The *Nomos* of the Earth

The *Nomos* of the Earth

in the International Law of the *Jus Publicum Europaeum*

Carl Schmitt

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Translator's Introduction

A "new world order" is on the horizon. But there is little common agreement as to precisely what this means. Is it primarily a political, economic, or social phenomenon? Often, it is confused with globalization, the Internet, universalism, and even American imperialism.[1] Rarely considered is the character and content of the "old world order,"[2] which was primarily a juridical phenomenon, albeit with political overtones, and how any "new world order" might relate to it, if at all.[3] This is the major significance of Carl Schmitt's *The* Nomos *of the Earth*, which addressed the question of the collapse of the old world order long before a new one became a topic of public debate. Since the German title is pregnant with meaning not immediately obvious in English, in order to better understand this English translation of *Der* Nomos *der Erde im Völkerrecht des Jus Publicum Europaeum*, it is necessary to explain basic concepts, such as *nomos*, *Völkerrecht*, and *jus publicum Europaeum*.

In ancient Greek, *nomos* had a wider meaning than "law," which is how it is usually translated. *Nomos* was the objectification of the *polis*,

1. See, among others, Mark Rupert, *Ideologies of Globalization: Contending Visions of a New World Order* (New York: Routledge, 2000); Edward McWhinney, *The United Nations and the New World Order for a New Millennium: Self-Determination, State Succession, and Humanitarian Intervention* (Boston: Kluwer Law International, 2000); Robert W. Tucker and David C. Hendrickson, *The Imperial Temptation: The New World Order and America's Purpose* (New York: Council on Foreign Relations, 1992); and John Stockwell, *The Praetorian Guard: The U.S. Role in the New World Order* (Boston: South End Press, 1990). For a discussion of whether this projected "new world order" is primarily economic or political, see Kenichi Omae, ed., *The Evolving Global Economy: Making Sense of the New World Order* (Boston: Harvard Business School, 1995); and Richard A. Falk, *On Humane Governance: Toward a New Global Politics. The World Order Models Project of the Global Civilization Initiative* (University Park, PA: Pennsylvania State University Press, 1995).

2. Cf. David M. Kirkham, ed., *The "New World Order" in Historical Perspective* (Worland, WY: High Plains, 1993).

3. Exceptions are Phillip Allott, *Eunomia: New Order for a New World* (New York: Oxford University Press, 1990); and Henry Brandon, ed., *In Search of a New World Order: The Future of U. S.-European Relations* (Washington, D. C.: Brookings Institution, 1992).

and its development was the most important stage in *paideia* (education).[4] For Plato, *paideia* was more important than written law, and it was precisely the fixed customs of Greek education that were called *nomos*. For Schmitt, the *nomos* of the earth is the community of political entities united by common rules. It is the spatial, political, and juridical system considered to be mutually binding in the conduct of international affairs — a system that has obtained over time and has become a matter of tradition and custom. Ultimately, the *nomos* of the earth is the order of the earth.

From the "Age of Discovery" until the end of the 19th century, the *nomos* of the earth was embodied in European "international law" (*jus gentium* in Latin, *Völkerrecht* in German). It was grounded in European public law (*jus publicum Europaeum*), as distinguished from domestic or constitutional law.[5] The term *Völkerrecht* first appeared in the 16th century, with the development of sovereign European states.[6] Although in medieval times *jus gentium* was related to natural law, *Völkerrecht* was positive law, and fit well with a *droit public de l'Europe* — a *jus publicum Europaeum*. Thus, the *nomos* of the earth here cannot be separated from *Völkerrecht*, and *Völkerrecht* cannot be separated from the *jus publicum Europaeum*.

Although the French Revolution challenged European international law, after the Congress of Vienna (1815) it was reconsolidated and lasted roughly until World War I. Specifically, it was based on the *spatial* distinction

4. Werner Jaeger writes: "It consisted in obedience to the laws of the state, just as Christian 'virtue' consisted in obedience to the commands of God." See Werner Jaeger, *Paideia: The Ideals of Greek Culture*, tr. by Gilbert Highet (New York: Oxford University Press, 1939), Vol. I, pp. 102 and 106-107. According to Gerhard Nebel, "*nomos* was a matter of life and death." He characterizes *nomos* as the "commonality of the *polis*" — the "content of the constitution, laws and customs." See Gerhard Nebel, *Griechischer Ursprung*, Vol. I, *Platon und die Polis* (Wuppertal: Marées-Verlag, 1948), pp. 22 and 39.

5. Hegel distinguished between *innere Staatsrecht* (internal state law) and *äußere Staatsrecht* (external state law). See Georg W. F. Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, in *Sämtliche Werke. Jubiläumsausgabe in zwanzig Bänden* (Stuttgart-Bad Cannstsatt: Friedrich Frommann Verlag [Günther Holzboog], 1964), pp. 337ff. and 440ff. The same distinction is rendered in English as "constitutional law" and "international law." See *Hegel's Philosophy of Right*, tr. with notes by T. M. Knox (New York: Oxford University Press, 1967), pp. 160ff. and 212ff.

6. It reintroduced *jus gentium*, the term Cicero and others had used to describe law regulating relations between Romans and foreigners, as distinguished from *jus civile*, i.e., domestic law. In the 14th century, *jus gentium* regulated the law of war, the right of reprisals, and the right of duels. Francisco de Vitoria redefined *jus gentium* as the law between different political entities, which Fernando Vasquez and Hugo Grotius subsequently redefined as natural law. The modern concept of *Völkerrecht* arose only in relation to a community of states. See Heinhard Steiger, "Völkerrecht," in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, ed. by Otto Brunner, Werner Conze, and Reinhart Koselleck (Stuttgart: Klett-Cotta, 1992), Vol. 7, pp. 97-140.

between European state territory and non-European space free for exploration and occupation. It consisted of customs and contracts based on consensus, recognizing not only the unity of the European spatial order, but the equality of all its members. The concepts of "humanity" and "civilization" that defined the system as a whole were exclusively Eurocentric: "civilization" meant *European* civilization. Non-European space was considered to be either uncivilized or half-civilized, leaderless, even empty. The belief in "European civilization" was essential to the whole structure of *Völkerrecht*, and was part and parcel of European consciousness.[7]

In Schmitt's view, the *jus publicum Europaeum*, as well as European consciousness, began to decline around 1890, and *Völkerrecht* dissolved into a "spaceless universalism," i.e., it lost its grounding in Europe, and did not find a new one.[8] This process toward an indiscriminate "international law" lacking any spatial reference was accelerated by the Hague Peace Conferences of 1899 and 1907. In the former, devoted to regulating land war, the preamble already spoke of the "dominant principles of *Völkerrecht*," not only in terms of the will of "civilized states," but also in terms of "laws of humanity" and "demands of public conscience."[9] Where once there was a

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7. This consciousness can be found in thinkers as widely separated in time and circumstance as Hegel and Husserl. Hegel wrote: "Europe constitutes the conscious, the rational part of the earth," and that "the principle and character of Europeans . . . are the concrete universal, which, in and of itself, determines thought." See Georg W. F. Hegel, *System der Philosophie Zweiter Teil. Die Naturphilosophie in Sämtliche Werke. Jubiläumsausgabe in Zwanzig Bänden*, ed. by Hermann Glockner (Stuttgart: Friedrich Frommanns Verlag [Günther Holzboog], 1929), Vol. 9, p. 468. More than a century later, Husserl also discussed the uniqueness of Europe: "The spiritual *telos* of European humanity, in which the particular *telos* of particular nations and of particular men is contained, lies in the infinite, in an infinite idea toward which, in concealment, the whole spiritual becoming aims, so to speak." See Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology: An Introduction to Phenomenological Philosophy*, tr. by David Carr (Evanston, IL: Northwestern University Press, 1970), p. 275. However, whereas Hegel, at the beginning of the 19th century, wrote in a Europe still convinced of its superiority and historical mission to civilize the world, in 1935 Husserl was addressing the "crisis of European existence." The choice was clear: "The downfall of Europe in its estrangement from its own rational sense of life, its fall into hostility toward the spirit and into barbarity; or the rebirth of Europe from the spirit of philosophy through a heroism of reason that overcomes naturalism once and for all." *Ibid.*, p. 299.

8. "This dissolution into a general universalism was at once the dissolution of the traditional European *Völkerrecht* — a concrete order based on certain presuppositions — into an empty normativism." See Carl Schmitt, "Die Auflösung der europäischen Ordnung im 'International Law' (1890-1939)," in *Deutsche Rechtswissenschaft: Vierteljahresschrift der Akademie für Deutsches Recht*, Vol. 5, No. 4 (January 1940), p. 269.

9. Although the distinction between *Völkerrecht* and "international law" is fundamental in Schmitt's understanding and should be kept in mind historically, to simplify matters I have translated *Völkerrecht* as "international law."

concrete order of European *Völkerrecht*, after World War I only its shadow remained in the "international law" of the League of Nations.

While *Völkerrecht* and *jus publicum Europeaum* appear to be synonymous, for Schmitt the latter was the embodiment of European consciousness *vis-à-vis* the rest of the world — the common understanding of relations among states concerning peace and war on the European continent. Public law concerned relations among states, and there was a sharp distinction between public and private. Crucial to this public law was the proposition that war was solely a public act. By the same token, a peace treaty had reference only to the state's public property,[10] i.e., private property and civil society remained untouched. All things considered, the *jus publicum Europaeum* was the internal *nomos* of Europe that was projected in the external *nomos* of the earth. The relation between these two *nomoi* was essential for almost three centuries. Once the *nomos* of Europe was lost, so, too, was the *nomos* of the earth embodied in *Völkerrecht*.

The Problem of International Law and World Order

During the Weimar Republic, Schmitt's primary focus was on constitutional law. Nevertheless, he could not ignore such events and institutions as the Versailles Treaty and the League of Nations, in response to which he began to develop his views on international law. In 1925, he wrote that Germany had become a "demilitarized zone controlled by various commissions," i.e., an "object" of international politics, and that the "forms and methods by which a country and a nation are made an object of international politics . . . are no longer the same as they were in the 19th century."[11] Formerly, there was "political annexation," but now, largely because of President Woodrow Wilson, there was "freedom and self-determination." The age of European world domination had been replaced by the "great sea powers" (England and America), whose domination took the form of "protectorates" and controls, such as "recognition" and the "right of intervention." The result was that "sovereignty," "freedom," "independence," and "self-determination" lost their meaning, since foreign powers could intervene when their political interests were involved, and could make decisions with respect

10. The enemy was solely the *public* enemy, because everything related to such a collectivity was automatically *public*. See Carl Schmitt, *The Concept of the Political*, tr. by George Schwab (Chicago: University of Chicago Press, 1996), p. 28.

11. Carl Schmitt, "Das Rheinland als Objekt internationaler Politik" (1925), in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923-1939* (1940), 2nd ed. (Berlin: Duncker & Humblot, 1988), p. 27.

to order and security, even on the basis of the protection of private interests.

In 1925, all political questions revolved around the *status quo*, in particular with respect to the demilitarization of the Rhineland, although, as Schmitt observed, the *status quo* meant something different for all the major parties concerned. For the English, it meant that peace in Europe would not be disturbed and, of course, that this peace had to be consistent with English economic and political interests. For the French, it meant the right of intervention whenever its interests were endangered, i.e., French military and political hegemony in Europe. For the Germans, it meant maintenance of stability, and protection against more sanctions, reprisals, and repressions.

In general, the *status quo* referred to the situation created by the victors in the Versailles Treaty. Schmitt contrasted this situation with that which had been created by the Holy Alliance in the 19th century, i.e., with "legitimacy," which meant a *guarantee* of the *status quo*, i.e., not of an expedient political situation, but of a condition considered to be "normal." The "European balance" had made possible a "normal" situation, as well as a method for implementing mutually acceptable changes. This "normal" situation required a more or less homogeneous internal political order, which, in turn, guaranteed the external political order. The presupposition of the "European balance" was a cultural, moral, and apparently homogeneous Christian Europe. Now, said Schmitt: "An abyss separates us from the time when international law textbooks still spoke of Christian international law, and of the right of Christian nations. The great step in the dethroning of Europe was the Versailles Treaty."[12] This is one of the essential presuppositions of *The* Nomos *of the Earth*.

Schmitt was not concerned primarily with a critique of the Versailles Treaty, but with the fact that it had created neither a solid peace nor a new international order. The Holy Alliance had been based on dynastic legitimacy. It was replaced by the principle of nationality. In the 20th century, democratic revolutions introduced a new type of legitimacy, which brought about the "Balkanization" of Europe.[13] With the help of the League of Nations and pacifist sentiments everywhere, the Versailles Treaty had attempted to create a radical type of legitimacy. But the call for the domination of law and the juridification of politics, however desirable as an ideal, had for Schmitt a dangerous political objective: to legitimate a problematic *status quo*. In his view, this *status quo* could not be

12. *Ibid.*, p. 32.

13. Carl Schmitt, *Die Kernfrage des Völkerbundes* (Berlin: Ferd. Dümmlers Verlagsbuchhandlung, 1926), p. 58.

the basis of peace; rather, peace had to be the basis of the *status quo.*[14]

The core question of the League of Nations was whether the *status quo* brought about by the Versailles Treaty was "legitimate," and that, in turn, depended on whether this association of numerous states could be considered to be a true federation.[15] Since the League of Nations lacked the two major characteristics of a true federation, i.e., a guarantee of the *status quo* and the homogeneity of its members, it was not "legitimate." It would be unreasonable, said Schmitt, to make a matter of principle out of every individual question, such as a guarantee of the *status quo.* However, when it came to creating legal principles regulating international relations, this question was crucial, since international law without a concept of legitimacy is nothing more than a composite of historical precedents, moral maxims, stereotypical reproductions of treaties, diplomatic relations, etc.[16]

Unlike an alliance, which is usually made against a common enemy and endures only as long as there is a need for it, a federation or league presupposes a certain homogeneity among its members. Schmitt stressed that a minimum of homogeneity is essential. However, he cautioned that this is largely formal, since it is impossible to determine homogeneity in the same way as guarantees. Just as true federations must guarantee

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14. Schmitt's concludes: "In an age of rapid changes and technological progress, it is remarkable that the *status quo* should be guaranteed. . . . In fact, the desire to find stability, peace, and justice is linked with the inability to find a legal principle, a principle of legitimacy. One cannot guarantee a factual situation, but only a legal situation, and this legal situation is possible only if it is considered to be normal. If this is so, and one cannot rationally dispute it, then the internal contradiction in the moral situation of Europe appears to be frightful. The existing situation is so unsatisfactory, so abnormal and, consequently, so unstable, that the longing for stability becomes stronger day by day. The demand for a guarantee of the *status quo* stems from this longing for peace and stability, i.e., a stabilization. But a stabilization of existing conditions would stabilize precisely this unsatisfactory situation lacking stability, and the result of such an artificial perpetuation and legalization will not be stability and peace, but the creation of new conflicts, sharper contradictions, and perpetuation of the absence of stability." See Carl Schmitt, "Der Status quo und der Friede" (1925), in Schmitt, *Positionen und Begriffe*, *op. cit.*, pp. 41-42.

15. Schmitt, *Die Kernfrage des Völkerbundes*, *op. cit.*

16. *Ibid.*, p. 54: "Of course, the Great Powers may proclaim their respect for law at every opportunity, but they will not allow anyone but themselves to decide what the law is in concrete cases. Also, they always leave open the possibility of constructing, alongside a general international law, a particular one that, in the theory of positivism, is considered to be as much international law as the other, and can lead to an American or even an Australian international law. They seek to bring about a situation in which maxims based on purely political interests, such as the Monroe Doctrine or even a 'Disraeli Doctrine,' are considered to be legal or 'semi-legal' parts of the public law of the earth, such as when Chamberlain, the English Foreign Minister, described the Versailles Treaty as part of the public law of Europe."

domestic order, which is the foundation of international order, so leagues must have principles determining what is legitimate. Once established, such principles may lead to valid interventions, which are directly related to the necessity of a federation or a league to maintain homogeneity.

The decisive question for Schmitt was "who decides?" with respect to questions such as: Which people are free? What is the content of true freedom? Which people are mature enough to govern themselves? Here, Schmitt cited a "remarkable dialectical contradiction" that had occurred in July 1923.[17] Samuel Gompers, president of the American Federation of Labor, had exchanged letters with Charles Evans Hughes, the American Secretary of State, regarding recognition of the Russian Soviet Republic. Gompers, relying on democratic principles, said the US should refuse recognition and should intervene. Hughes, relying on equally democratic principles, said there should be no intervention in the affairs of another state. Whereas Gompers had claimed that the Russian people were being suppressed by the Bolshevik government, Hughes had contended that the US had to respect the legitimacy of a government and the right to revolution.

Schmitt compared this dilemma with the fundamental principle of the Monroe Doctrine, whereby the US reserved the right to intervene in the domestic affairs of Central and South American states. The reasoning was that, under international law, any true federation had the right to intervene, and that the American continent had become a true community of states (in this sense, it was closer to a true federation than was the League of Nations). Under the Monroe Doctrine, the US had achieved both requirements needed to qualify as a federation — the guarantee of a normal situation and the homogeneity of participating states — meaning that the constitutions of American states had to be democratic. Thus, the US would not allow any Central or South American state to transform itself into a monarchy. Practically speaking, in the numerous revolutions in Central and South America that ensued, the US intervened simply by the fact of recognition or non-recognition.

For Schmitt, the fate of the Holy Alliance, the only total 19th century European system, was the best indicator of the political difficulty confronting a united Europe. Once this European system had been created (1815), it had been opposed by the US in the Monroe Doctrine (1823) and, not incidentally, with England's approval. In other words, what the American government objected to so passionately with respect to the Holy Alliance, i.e., the

17. *Ibid.*, pp. 71-72.

prospect of a political unification of Europe, it soon adopted as the Monroe Doctrine's fundamental principle, i.e., unification of the Western Hemisphere. World War I was only one of the results of Germany's political unification. By comparison, the political unification of Europe after World War I would have been a true miracle. If it were to be more than an administrative fiction, it would have constituted a new world power whose mere existence would have created new friend-enemy groupings. This is why the League of Nations would not allow itself to be used as a means to this end. In Schmitt's view, there would have been more opposition to the unification of Europe than to the unification of Germany. Thus, the League was neither a "European" nor a "universal" organization. It could not overcome fundamental distinctions such as victor and vanquished, armed and disarmed, controlled and not controlled, occupied and free states.

Schmitt considered both the "League of Nations" and "Europe" to be ambiguous formations. In some respects, Europe had become even more ambiguous than the League, since it already was difficult to recognize its geographical boundaries. Did England belong to Europe, or was it more a part of its empire of colonies? Were Spain's ties to Latin American countries closer than those to Germany or Scandinavia? Had Russia ever belonged to Europe? Given Germany's growing debt to the US, could it be considered to be a trustworthy European ally? Or could the problem of Europe be reduced to an understanding between France and Germany?

Uppermost in Schmitt's mind was the problematic relation between the League and Europe, which he perceived to be, first and foremost, a problem of the League's relation to the US. The original League had been prefigured in 1919 by Wilson, who thought the US would be a prominent member. When, in 1920, the US refused to join, the four other major allied powers proceeded alone. However, as critical as the US' decision was, other major problems followed suit. In 1926, Germany's admission to the League required constitutional changes. In 1933, Japan withdrew, followed shortly thereafter by Germany. The admission of the Soviet Union in 1934 challenged the League's legitimacy. As Schmitt argued, whereas a merely administrative organization, such as the World Postal Union, could admit a government such as Bolshevik Russia, a league of bourgeois, democratic states should have opposed the Bolshevik theory of proletarian world revolution. At issue, of course, was the League's pseudo-universality. Yet another transformation was precipitated by Italy's invasion of Ethiopia in 1935, which raised the equally significant question of the League's lack of

homogeneity.[18] Italy had rejected the idea that Negroes constituted any kind of civilized community, and had claimed that, although a member of the League, Ethiopia was a feudal power ruling over barbarian tribes, and, thus, could not belong to a community of nations. No true world community, said Schmitt, could condone this state of affairs. The comings and goings of nations appeared to him to be more like a "hotel" than any kind of political order.

By contrast with the League of Nations, the Western Hemisphere appeared to be a true political order. Moreover, Schmitt found American imperialism to be the most "modern," because it was primarily economic in nature. On the basis of the traditional 19th century antithesis between economics and politics, whereby economics was considered to be non-political, and politics to be non-economic, economic imperialism was not even considered to be imperialism. George Washington's 1796 Farewell Address was cited often: "as much trade as possible, as little politics as possible."[19] Furthermore, all the arguments that the US had used to justify its actions in the past century, both in foreign policy and in international law, were contained in embryo in the Monroe Doctrine. Not only had the US formulated such a doctrine, it had compelled the entire world to subscribe to it, even though its content was obscure, ambiguous, and often contradictory, and the US had reserved the right to interpret its meaning.[20] Unlike the European practice of distinguishing between "civilized, half-civilized, and uncivilized" nations, the US distinguished only between "creditors" and "debtors." The American view of international law assumed private property to be "sacrosanct," which Schmitt found to be consistent for a state that had become the creditor of the whole world, and whose capitalists had invested enormous sums in other states. "It is a typically American theory, a theory belonging to a state whose imperialist

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18. See Carl Schmitt, "Die siebente Wandlung des Genfer Völkerbundes," in Schmitt, *Positionen und Begriffe*, *op. cit.*, pp. 210-213.

19. Schmitt qualified this observation: "Every expansion of power, whether primarily economic or not, produces a certain *justification*. It requires a certain *principle of legitimation*, a whole inventory of legal concepts and formulas, of stock phrases and slogans that are not only 'ideological' simulations, and serve not only the purposes of propaganda, but are an indication of a simple truth: all human activity in some sense has an *intellectual* character, and politics, imperialistic as well as any other historically meaningful kind, is not essentially non-intellectual. . . there has never been an international law without such justifications." *Ibid.*, p. 163.

20. *Ibid.*, p. 169: "This remarkable elasticity and vagueness, this leaving open all possibilities, including also the alternative of law or politics, is in my opinion typical of every true and great imperialism."

expansion consists in the expansion of its capitalist enterprises and the possibilities of exploitation."[21]

Outside the Western Hemisphere, the US had developed a series of other methods to secure its influence. Although intervention in the affairs of other states is characteristic of every imperialism, only the US had developed the idea of a treaty that not only formulates the right of intervention juridically, but even the typical grounds and methods of such intervention.[22] In fact, said Schmitt, "to a large extent the US has become the arbiter of the world."[23] In 1917, the US had turned the European war into a "world war," and had determined its outcome. Then it had withdrawn from Europe. As Schmitt saw it, the US was driven to intervene, half against its will, and this was characteristic of a reluctant empire.

The League of Nations was a case in point. It was "crippled" on its American leg. "In matters concerning Europe, the US is officially absent, but can be effectively present."[24] While, on the American continent, the League had only such influence as the American government would tolerate, on the international scene no disarmament treaty could be ratified without the US's participation. Moreover, the 1921 Disarmament Agreement was decided not in Geneva, but in Washington, while the 1928 Kellogg Pact, although concluded in Paris, was named after the American Secretary of State.[25] This pact did not stipulate "no more war," but only condemned war as a tool of national policy. This was typical of various forms of imperialism. "Imperialism does not pursue national wars, which are forbidden, but, rather, wars that serve an international policy," which are by definition "just wars." As with the Monroe Doctrine, so with the Kellogg Pact, the US alone defined, interpreted, and applied the rules of the game; it alone decided what is war and what are "peaceful means" of international policy. Thus, in both the Monroe Doctrine and the Kellogg Pact, Schmitt recognized America's "superiority and astounding political creativity," and he left no doubt as to his meaning: "A historically meaningful imperialism is not only or essentially military and maritime panoply, not only economic and financial prosperity, but, also, this ability to

21. *Ibid.*, p. 173.

22. Schmitt's lecture, "Völkerrechtliche Formen des modernen Imperialismus," was published first in the *Königsberger "Auslandsstudien,"* Vol. 8 (1933), and republished in *Positionen und Begriffe*, *op. cit.*, pp. 162-180.

23. *Ibid.*, p. 174.

24. *Ibid.*, pp. 174f.

25. Frank Billings Kellogg. In the US, the Kellogg Pact was known as the Kellogg-Briand Pact, the latter being the last name of the French Premier.

determine in and of itself the content of political and legal concepts. . . . A nation is conquered first when it acquiesces to a foreign vocabulary, a foreign concept of law, especially international law."[26] Clearly, the US had changed the rules of the game, but this was indicative of the changed nature of political life following the decline of the *jus publicum Europaeum* and the rise of new economic, political, and technological forces.

Nomos *and* Großraum

In 1928, Schmitt alluded to two core concepts — *Großraum* and *Nomos* — to facilitate understanding the problem of international law and world order, which he subsequently elaborated on in articles and monographs, and in *The* Nomos *of the Earth*.[27] He observed that development of modern technology had made many borders "illusory," and had destroyed the traditional *status quo*. The world "had become smaller," while "states and state systems had to become larger." "In this enormous process of transformation, perhaps many weaker states will disappear. A few giant complexes will remain."[28] Territorially, Germany was "too small" to be a world power, and yet "not small and peripheral enough" to disappear from history. The implication was that Germany would find its political future in Europe's future. These larger political groupings, i.e., *Großräume*, also would arrange themselves as friends or enemies. Political realities were much closer to a "state of nature" than to any "domination of law." What there was of law in "international law" lay "in its specific order," and this concrete order (i.e., *nomos*) among larger political entities was more realistic than "the illusory fiction of world unity."

Schmitt first used the term *nomos* in 1934, when he wrote that every jurist, consciously or unconsciously, has a concept of law in mind, and conceives of it either as a rule, a decision, or a "concrete order." His main focus was on "concrete order thinking," which he opposed to the positivist "legal order" based on normative thinking. According to Schmitt, there always have been those who demanded that *law*, not *men* should rule. The drafters of the US Constitution wanted to insure that American public life would have a "government of law, not of men." But, in such a normative system, the highest law — the norm of norms — is still only a norm or a statute, whereas *nomos* means not only law but

Ibid., p. 179.

Carl Schmitt, "Völkerrechtliche Probleme im Rheingebiet," reprinted in *Positionen und Begriffe, op. cit.*, pp. 97-108.

Ibid., p. 107.

right, which, as Schmitt explains, "is norm, decision, and, above all, order. . . . Right as ruler, *nomos basileus*, cannot be any arbitrary or only positive norm, rule, or legal arrangement; the *nomos* that should be a true king must contain within itself the highest, unchangeable, and concrete qualities of order. . . . One can speak of a true *nomos* as a true king only if *nomos* means the total concept of right that comprises a concrete order and community."[29] He left no doubt as to his meaning: "There is no more a free-floating jurisprudence than there is a free-floating intelligentsia. Legal and jurisprudential thinking occurs only in connection with a total and concrete historical order. Also, there cannot be free-floating rules or free-floating decisions. The fictions and illusions of such 'freedom' and 'floating' are symptoms of a disintegrated order and are understandable only therein."[30]

In developing this concept, Schmitt relied on the French legal scholar Maurice Hauriou, who had developed a "theory of institutions"[31] in a systematic attempt to oppose legal positivism with "concrete order thinking."[32] Following Grotius, Hauriou spoke of a "social whole of personalities," and of the harmony between the personal and the institutional: individuals do not live in isolation, but in groups — in concrete orders and concrete communities. Schmitt first cited Hauriou's theory in

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29. On February 21, Schmitt spoke at the Kaiser-Wilhelm-Gesellschaft zur Forderung der Wissenschaften, and on March 10 at a conference of the Reichsgruppenrates der Referendare (Jungjuristen) im Bund Nationalsozialistischer Deutscher Juristen. See also Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg: Hanseatische Verlagsanstalt, 1934), pp. 15-16.

30. *Ibid.*, p. 40.

31. Cf. J. Declarueil, "Quelques remarques sur la 'Théorie de l'Institution' et le caractère institutionnel de la Monarchie capétienne," in *Mélanges Maurice Hauriou* (Paris: Librairie de Receuil Sirey, 1929), pp. 89-128; Gabriel Marty, "La théorie de l'Institution," in *La Pensée de doyen Maurice Hauriou et son influence* (Paris: A Pedone, 1969), pp. 29-45.

32. Carl Schmitt, "Freiheitsrechte und institutionelle Garantien der Reichsverfassung," reprinted in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre* (1958), 2nd ed. (Berlin: Duncker & Humblot, 1973), pp. 140-171. Hauriou's theory also is implicit in a previous article: "Grundrechte und Grund--pflichten," reprinted in *ibid.*, pp. 181-230. According to Schmitt: "Maurice Hauriou. . . . has expounded on a '*superlégalité constitutionnelle*,' which transcends simple laws, even written constitutional law, and precludes the destruction of the constitution through constitutional revisions. I agree with Hauriou, that every constitution knows such fundamental 'principles,' that they belong fundamentally to every unchangeable 'constitutional system,' . . . and that it is not the intent of constitutional arrangements with respect to constitutional revisions to introduce a procedure to destroy the system of order that should be constituted by the constitution. If a constitution foresees the possibility of revisions, these revisions do not provide a legal method to destroy the legality of the constitution, even less a legitimate means to destroy its legitimacy." See Carl Schmitt, *Legalität und Legitimität* (1932), 2nd ed. (Berlin: Duncker & Humblot, 1968), pp. 60f.

1931. Although Schmitt's understanding of "concrete order thinking" and of *nomos* originally was developed in relation to constitutional law, he always maintained that there is an essential link between domestic and international law. Thus, he proceeded to develop a concept of the "concrete order" or *nomos* of the international community, given the proposition that "[w]ithin one and the same order of international law there just as little can be two contradictory concepts of war as two contradictory concepts of neutrality."[33]

To demonstrate this proposition, Schmitt observed that the American President Wilson had introduced the problem of a discriminatory concept of war — a "just war" — into international law when he had declared war on Germany in 1917. Whereas "holy wars" were long gone, the war mobilization against Germany had become a crusade. Since the League of Nations was in a position to decide what constituted a "just war," it also became the arbiter of the "discriminatory concept of war." Since, by definition, a "just war" was a "total war," the League thus became the agency of supra-state and supra-national "just" wars. In order to illustrate this new stage of international law, Schmitt examined the works of two contemporary jurists: Georges Scelle, a proponent of a universal League of Nations, and Hersch Lauterpacht,[34] who sought simply to strengthen existing conditions. Scelle had constructed a new system of international law, which dethroned the state and transferred 19th century liberal constitutionalism into 20th century international law. He saw states in terms of social phenomena, and one world order as a "world federalism" of various societies. In his system, war simply was inconceivable: "either there is law, and then no war, or there is lawlessness, and then war is only a crime, in particular, the crime of aggressive war."[35]

Unlike Scelle, Lauterpacht did not attempt to create a new system of international law, but rather to turn the old system into a supra-state norm of the international legal community. He wanted to close all "gaps in the law," so that the international court, being non-partisan, could have the last word.[36] Concerned with the "limits of the judicial function in international law," Lauterpacht argued that there is law without a legislator, but no law without a judge. Thus, the central institution should not be the

33. Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Munich: Duncker & Humblot, 1938), p. 1.

34. See Georges Scelle, *Précis de droit des gens, principes et systématique* (Paris: Recueil Sirey, 1932-34); and Sir Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: The Clarendon Press, 1933).

35. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, *op. cit.*, p. 21.

36. *Ibid.*, p. 24.

French legislator, but rather an international "common law." Since all questions of international law could be solved by juridical decisions, this would guarantee peace. For Lauterpacht, juridical positivism in international law had become irrelevant, because it only registered the practice of states, and paralyzed attempts to develop a higher principle. He considered the League Charter to be the "higher law." Thus, despite their differences, both Scelle and Lauterpacht sought international law to replace the dethroned state.

As the state was being dethroned, war was being "denationalized"; state war should be "abolished," and war should be "internationalized," i.e., transformed into a civil war. Such was the conclusion of two English writers, John Fischer Williams and Arnold McNair. Schmitt agreed with their conclusion, but argued that such an outcome had far greater consequences than they thought, since it "pushed the totality of traditional international law off its axis, but created no new order. It only raised a new claim to world domination that can be realized only in a new world war."[37] Like Schmitt, Williams and McNair recognized that the League of Nations was neither universal nor economic in nature, but they insisted that it must become both. Nevertheless, also like Schmitt, they argued that the League had to find ways to become a truly federal structure. While there may have been a harmony between federalism and universalism, the moment it came to a concrete implementation of either, the incompatibility between them would become evident. The more effective the federalization of the League became, the sharper the distinction between members and non-members, and the more intense the distinction between friend and enemy. Here again, the touchstone for the League was the concept of war: within a federal structure, there can be no war as long as the federation lasts.[38] In the final analysis, said Schmitt, the League's two main tendencies — federalism and universalism — were at odds.[39] Moreover, it was obvious that within such a structure the traditional European concept of war could not remain unchanged, and that new international orders and communities were necessary.

Addressing this situation, in 1939 Schmitt elaborated on his theory of

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37. In *The British Yearbook of International Law 1936* (London: H. Frowde; Hodder and Stoughton, 1936). See *ibid.* p. 47.

38. *Ibid.*, pp. 48-49: "In traditional international law, war has its right, its honor, and its worth, in that the enemy is no pirate, no gangster, but a 'state' and a 'subject of international law.' That remains valid, as long as there are political organizations with a *jus belli* (in the sense of *jus ad bellum* [right to war]). By comparison, the concept of federation contains a renunciation of the *jus belli* within the federation."

39. *Ibid.*, p. 51.

Großraum.[40] The term had gained currency after World War I, in connection with the development of a "technical-industrial-economic" order, in which the small-space (*Kleinraum*) isolation and segregation of specific forms of energy, such as electricity and gas, were overcome "organizationally" in a "great-space economy" (*Großraumwirtschaft*). It was no accident that *Großraum* thinking had appeared first in economics, and that the underlying principle might be applicable to a new order of international law, since the economy had become political. Yet, for Schmitt, the first and most successful application of a *Großraum* principle in international law had been the Monroe Doctrine, which had joined a politically-awakened people, a political idea, and the exclusion of foreign intervention in an area broader than that controlled directly by the US. The Monroe Doctrine was deployed in opposition to the monarchical-dynastic principle of legitimacy, which the European order had made the standard of international law. Not only had the Monroe Doctrine been the first major revolt against the European political system, but it was "conceived to be spatially global in a modern sense."[41]

Six months before World War II began, Schmitt's main objective was to prefigure a new international law and world order. He was not advocating the Monroe Doctrine as such, but rather the *Großraum* principle it embodied, which could be applied elsewhere, in other historical situations, and in different friend-enemy groupings. Although his views of *Großraum* and of a new world order were not systematic, he envisioned "a concrete territorial spatial order," i.e., a *nomos* of the earth. It had been obvious for some time that the state was no longer the only spatial unit in international law, and that empires, rather than states, were fast becoming the main international agents.[42] An empire was not a *Großraum* or simply a larger *Kleinraum*, and the legal status of empires at the center of *Großräume* was not conceived of in terms of sovereignty.[43] "The *Großraum* remains a sphere of national independence. Only as such is it superior to universalist forms of

40. Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* [1939] (Berlin: Duncker & Humblot, 1991). Cf. also Mathias Schmoeckel, *Die Großraumtheorie: Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (Berlin: Duncker & Humblot, 1994).

41. *Ibid*., p. 28.

42. Schmitt, "Völkerrechtliche Probleme im Rheingebiet," in *Positionen und Begriffe*, *op. cit.*, p. 107.

43. "Raum und Großraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. XXIV (1941), reprinted in Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969*, ed. by Günther Mashke (Berlin: Duncker & Humblot, 1995), p. 260.

domination, and consistent with peace." Obviously, relations among nations or empires within a *Großraum* would be different from relations among *Großräume*. In this respect, Schmitt warned against any mechanistic transference of traditional decisionistic, state-to-state relations to empires and *Großräume*, and wondered whether relations between empires and *Großräume* should be called "international law" or something else.

For Schmitt, the development of a "new world order" was confronted with the alternative between *Großraum* and universalism,[44] which the US had posed in abandoning the purely defensive principle of the Monroe Doctrine, and in embarking on imperialist expansion at the turn of the 20th century. Schmitt mentioned specifically the policies of Theodore Roosevelt and "dollar diplomacy," which indicated that the US had joined the universalism of the British Empire.[45] The globalism of the British Empire had been the agency of a universalism that had hoped to incorporate the whole world, including traditional European colonial policy and international law, into a universalist international law. In Schmitt's view, the American struggle for the "open door" in East Asia was likewise a struggle for universalist world domination, using liberal economic policy methods. The League of Nations was foundering on this same false universalism. This is why Schmitt sought to distinguish concrete *Großräume* from a universalist-humanitarian world law.

In the early 1940s, Schmitt also prefigured other themes eventually elaborated on in *The* Nomos *of the Earth*, such as "amity lines" and the essential link between order and orientation.[46] He was "thinking globally," but he also was thinking about Europe's place in any new world order, and about the significance of the European legacy. Thus, while

44. Cf. Carl Schmitt, "Großraum gegen Universalismus: Der völkerrechtliche Kampf um die Monroedoktrin," in *Zeitschrift der Akademie für Deutsches Recht*, Vol. VI, No. 7 (May 1939), reprinted in *Positionen und Begriffe*, *op. cit.*, pp. 295-302.

45. Cf. G. L. Ulmen, "American Imperialism and International Law: Carl Schmitt on the US in World Affairs," in *Telos* 72 (Summer 1987), pp. 43-71.

46. See Carl Schmitt, "Reich und Raum — Elemente eines neuen Völkerrechts," in *Zeitschrift der Akademie für Deutsches Recht*, Vol. 7, No. 13 (1940), pp. 201-203; "Die Auflösung der europäischen Ordnung im 'International Law'," *op. cit*, pp. 267-278; "Die Raumrevolution: Durch den totalen Krieg zu einem totalen Friede," in *Das Reich* (September 29, 1940), reprinted in *Staat, Großraum, Nomos*, *op. cit.*, pp. 388-391; "Raum und Großraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. 24 (1940), pp. 145-179; "Staatliche Souveränität und freies Meer — Über den Gegensatz von Land und See im Völkerrecht der Neuzeit," in *Das Reich und Europa* (1941), republished in *ibid.*, pp. 401-422; "Beschleuniger wider Willen oder: Die Problematik der westlichen Hemisphäre," in *Das Reich* (1942), republished in *ibid.*, pp. 431-436; and "Die letzte globale Linie," in *Völker und Meere* (1943), republished in *ibid.*, pp. 441-448.

working on the manuscript of *The* Nomos *of the Earth*, early in 1943 he drafted a lecture that he delivered in several European cities in 1943 and 1944, which he regarded as his "testament."[47] While the focus of Schmitt's lecture was broader, the link with *The* Nomos *of the Earth* is clear in his concern with the European heritage.[48] He contended that European jurisprudence — the legacy of Roman law, and the customs established over the centuries — was a *katechon*, i.e., a restrainer of the "total functionalization" of law. European jurisprudence was the guardian of a European identity embodied not in frozen traditions, but in an ongoing cultural project, meaning that any new *nomos* of the earth would not result from "the unearthing of atemporal institutions."

While the *respublica Christiana* of the Middle Ages had been a strictly European order, its successor, the *jus publicum Europaeum*, was the first global order, even if based exclusively on European sovereign states. Since this new order was international, jurists had assumed a pivotal position in its creation and maintenance, until the state began to decline with the French Revolution and its aftermath, i.e., when state bureaucracies increasingly began to instrumentalize the legal establishment. Schmitt was seeking to reconstitute European jurisprudence in opposition to bureaucrats and technocrats, who systematically reduce it to regulations and procedures.[49] In both domestic and international law, Schmitt opposed concrete orders to normative rules.

International Law and the Rise of the US

Just as the discovery of the New World played a pivotal, although *passive* role in the formation of the *jus publicum Europaeum*, so the US played a pivotal and *active* role in challenging and ending the age of European domination. Moreover, the American choice between *Großraum* or universalism is crucial to any new order of international law. The logic of Schmitt's argument particularly is evident in the concluding section of

47. Carl Schmitt, "The Plight of European Jurisprudence," in *Telos* 83 (Spring 1990), pp. 35-70. See Paul Piccone and G. L. Ulmen, "Schmitt's 'Testament' and the Future of Europe," in *ibid.*, pp. 3-34.

48. Schmitt, "The Plight of European Jurisprudence," *ibid.*, p. 37.

49. *Ibid.*, p. 36: "Until the end of the 19th century, what one called 'international law' was synonymous with European international law and even a *jus publicum Europaeum*. But, from a positivist standpoint, international law and state law had been divided into two absolutely distinct and isolated spheres; state legislation, on the one side; international accord, on the other. The positivism of domestic law is consistent with the positivism of international treaties. The separation of internal and external, of domestic law and international law, is so absolute that, formally, there can be no conflict between them."

The Nomos *of the Earth*, which begins by discussing the Congo Conference of 1885. He characterizes this conference as the "last common land-appropriation of non-European soil by European powers, the last great act of a common European international law." Yet, "the conference no longer was purely European," because it was attended by other, non-European countries, such as the US. American influence was strong, especially concerning neutralization of the Congo Basin. But the US did not ratify the resulting Congo Act, and later, in 1914, when neutralization of the Congo Basin became a practical issue, the US refused to participate. In so doing, the US demonstrated that mixture of absence in principle and presence in practice that Schmitt considered to be typical of American foreign policy in general and American imperialism in particular.

At the Congo Conference, imperialism already was becoming a significant factor for Europe and Africa. Usually, 1870 is regarded as the beginning of a conscious policy of imperialism, although the movement did not attain its full impetus until the mid-1880s.[50] At any rate, the distinction between colonialism and imperialism is significant, since it coincided with the European "scramble for Africa."[51] During the age of high imperialism, European states acted not in unison, but as competitors in their dealings with Africa,[52] and their behavior in Africa attested even more to the collapse of the *jus publicum Europaeum*.[53] The crucial distinction between European and non-European or colonial soil was lost in Africa, and with it the meaning of the legal distinction of "beyond the

50. See John A. Hobson, *Imperialism: A Study* (1902), 3rd ed. (London: Allen & Unwin, 1948).

51. As Hannah Arendt writes: "The three decades from 1884 to 1914 separate the 19th century, which ended with the scramble for Africa and the birth of the pan-movements, from the 20th, which began with the First World War. This is the period of imperialism, with its stagnant quiet in Europe and breathtaking developments in Asia and Africa. Some of the fundamental aspects of this time appear so close to totalitarian phenomena of the 20th century that it may be justifiable to consider the whole period a preparatory stage for the coming catastrophe." See Hannah Arendt, *The Origins of Totalitarianism* (1951), 2nd ed. (New York: The World Publishing Company, Meridian Books, 1962), p. 123.

52. During the colonial era, "the key question was space, not race." See Russell A. Berman, *Enlightenment or Empire: Colonial Discourse in German Culture* (Lincoln, NE: University of Nebraska Press, 1998), p. 3. Cf. also, G. L. Ulmen, "The Dialectic of Enlightenment and the 'Dark Continent'," in *Telos* 115 (Spring 1999), pp. 151-160.

53. On the European heritage in Africa, see Adam Hochschild, *King Leopold's Ghost, a Story of Greed, Terror, and Heroism in Colonial Africa* (New York: Houghton Mifflin Co., 1998). See also Howard W. French, "The African Question: Who is To Blame? The Finger Points to the West, and Congo is a Harsh Example," in *The New York Times* (January 16, 1999); and Michela Wrong, *In the Footsteps of Mr. Kurtz: Living on the Brink of Disaster in the Congo* (London: Fourth Estate, 2000).

line," which separated the reach of European public law from the sphere of lawlessness. Since European governments knew that their countries were disintegrating, the European community of nations allowed imperialism to spread until it destroyed everything. For Schmitt, what was most significant at the Congo Conference was that the US had assumed a decisive position when, on April 22, 1884, it had recognized the flag of the International Congo Society, which was not a state, thereby disorienting the core concept of European international law.

From the outset, however, the American impulse had been to represent European civilization and European international law.[54] The Latin American states that arose at that time also assumed that they belonged to the "family of European nations." In the 19th century, American international law textbooks took this for granted, even when speaking of a specifically American, as compared to European international law.[55] Interesting in this regard is Schmitt's understanding of the transition from "European civilization" to "Western civilization," which incorporates both Europe and the US. Strangely enough, the "Western Hemisphere" was not opposed to Asia or to Africa, but to Europe — the old West. As Schmitt writes: "The new West claimed to be the true West, the true Occident, the true Europe. The new West, America, would supersede the old West, would reorient the old world historical order, would become the center of the earth. The West, and all that belonged to it in the moral, civilizing, and political sense of the word 'Occident,' would neither be eliminated nor destroyed, nor even dethroned, but only displaced. International law ceased to have its center of gravity in old Europe. The center of civilization shifted further west, to America."[56] After 1848, millions of disillusioned Europeans left Europe for America, which appeared to be on the threshold of a new *jus gentium*. Then, around 1890, the freedom of internal land-appropriation in America ended, as did the settlement of free soil, the frontier: "The Spanish-American War (1898) was a

54. In the case of "United States vs. the Schooner La Jeune Eugénie" (May Term 1822), Justice Story wrote that "no principle belongs to the law of nations, which is not universally recognized as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe." See William F. Mason, *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (Boston: Wells and Lilly, 1824), Vol. II, p. 448.

55. See James Kent, *Commentaries on American Law*, 14th ed., ed. by John M. Gould (Boston: Little, Brown and Company, 1896); and Henry Wheaton, *History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks & Co., 1845).

56. See Schmitt, *The* Nomos *of the Earth*, p. 290.

sign to the rest of the world that US foreign policy was turning to open imperialism. The war did not abide by the old continental concepts of the Western Hemisphere, but reached deep into the Pacific Ocean and into the old East. The antiquated Monroe Doctrine was replaced by a demand for the 'open door' to the wide open spaces of Asia."[57] By extending the usual three-mile limit of coastal waters to three hundred miles, the US in effect "extended *Großraum* thinking over the free sea."[58]

In his discussion of the meaning of "recognition" in international law, Schmitt had occasion to discuss American isolationism and corresponding interventionism. In his view, at the start of the 20th century, the US was faced with an alternative between a plurality of *Großräumen* and a global claim to world power. If it chose the latter,[59] it also would be choosing to "transform the concept of war contained in traditional international law into a global civil war." According to European international law, recognition of another state presupposed that the enemy was considered to be "just," i.e., that the enemy was treated as an equal. But when war turns into "just war," the enemy is considered to be unjust and becomes a foe. This problem loomed so large in Schmitt's mind with respect to the question of a new *nomos* of the earth that it is the focus of the final two sections of his book.

57. *Ibid.*, p. 292.

58. *Ibid.*, p. 283.

59. In the summer of 1945, Schmitt wrote a comprehensive legal brief concerning the criminality of aggressive war and the possibility of indicting industrialists as well as military and political leaders. Schmitt distinguishes three types of war crimes: violations of the rules and uses of war by military personnel; the criminalization of aggressive war; and crimes against humanity. His inclusion of the third type may be considered to be his *mea culpa* for having collaborated with the Nazis. At the conclusion, Schmitt added a note in English, reiterating his condemnation of the Nazi regime. He was careful to distinguish these crimes from the criminalization of aggressive war that he discusses at length in *The* Nomos *of the Earth*. Within the *jus publicum Europeaum*, an international war was fought among sovereign states in a Eurocentric world order, whereas a civil war could take place within a given state. But, in the epoch of total war, of war fought by partisans, everything that could be considered to be humanitarian progress, i.e., the distinction between an enemy and a criminal, had been lost. See Carl Schmitt, *Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege,"* ed. by Helmut Quaritsch (Berlin: Duncker & Humblot, 1994). As Quaritsch notes, it is unclear whether Schmitt took parts II and III of his legal brief out of his manuscript on *The* Nomos *of the Earth* or whether he inserted parts of it into his manuscript, but there are many parallels, including references to Francisco de Vitoria. Schmitt had been asked to write this legal brief by Friedrich Flick, a prominent German industrialist, who was arrested by the Americans on June 13, 1945. Since the Nuremberg trials ruled against the principle of "*nullum crimen, nulla poena sine lege*" ("no crime, no penalty in law"), his legal brief was not used in the trial of Flick and his colleagues (April 19-December 22, 1947).

Lenin and Mao had claimed that the only just war is a revolutionary war, i.e., a war whose goal is to destroy the social order in an opponent's country, to annihilate its ruling stratum, and to create a new division of power and property — thereby eliminating the distinction between aggressive and defensive war. In Schmitt's view, Western jurists also were relativizing the classical concepts of international law. In particular, they dissolved the concept of war into various "rules" according to their application. Thus, there was war in the sense of the Hague Conventions, war in the sense of trade law, or war in the sense of certain norms regarding the right to security. Although this positivist solution had its advantages in a Cold War, the danger lay in that the relativization and neutralization had the same result as the revolutionary methods of the Eastern world. On his part, and *vis-à-vis* the US, Stalin had pursued a struggle that fell between war and peace, which was part of his strategy of revolutionary war. This began the first phase of the modern Cold War, which Schmitt characterized as "monistic," because it was still predicated on the political unity of the world. The alliance between the US and the Soviet Union that had developed after 1942 was based on a system of global political constructions. It was meant to defeat Hitler's Germany and to bring about both universal peace and a new world order. This first phase, which resulted in the United Nations, was only a prelude, because, in 1947, the second phase began, when an illusory monistic unity turned into a bipolar structure. All that remained of the ideas of "one world" and of universal peace collapsed.

Early in the 1960s, Schmitt thought that the bipolar structure of the world would turn into a multipolar one. Not only had numerous new African and Asian states joined the United Nations, but the US no longer could control the Third World. He considered it a mistake simply to view this situation as an enlargement of the bipolar structure, and to ignore the fundamental spatial transformation. Few states could avoid a choice between the two world blocs, and none could ignore the tendential development of *Großräume*, unless they were resigned to becoming politically meaningless. According to Schmitt, the US was the best example of the new state of affairs. On the one hand, it was spatially limited — it had distinct territorial borders, although it also had made claims to the sea. But the actual American political dimensions were not confined to its territory. The most important factor in the Atlantic Alliance was that it was comprised of some 15 states, American and non-American, and that NATO's defense perimeter did not constitute a region as specified in Art. 52 of the United Nations Charter. But all these spatial spheres — the

Western Hemisphere, NATO's defense perimeter, and the United Nations' global reach — were secondary compared to their reality as "magnetic power fields of human energy and work."

Schmitt sought to take these changes into account, especially with respect to the US.[60] What concerned him most was industrial development and division of the world into industrially developed and underdeveloped regions. He considered the original document in this prospective new *nomos* of the earth to be Art. 4 of the Truman Doctrine (January 20, 1949), which expressly confirmed the distinction between developed and underdeveloped countries, and proclaimed that the industrial development of the earth was the American goal. The term "underdeveloped" soon was changed into the softer notion of "uncommitted" nations, which reflected the ideological struggle with the Soviet Union.

Toward a New World Order

The end of the *jus publicum Europaeum* signaled the end of modernity, which had its center of gravity in the sovereign state. Whereas, in *The Concept of the Political,* Schmitt confronted the dissolution of the sovereign state, in *The* Nomos *of the Earth* he tackles the problem of the dissolution of world order. Since modernity was not only a political and juridical, but also a social, cultural, economic, and, above all, a mental complex defining an entire epoch, its end transformed all facets of life. Since the implications of the end of modernity are unclear, Schmitt's focus is on its political, juridical, and spatial ramifications: anti-European ideology, globalization, and universalism.

Clearly, the ideological assault on the European past in general and on "Western culture" in particular is more than an academic fad; it is a cultural phenomenon with far-reaching implications.[61] It has its roots in

60. "Among others, there is the space of authentic American influence, which is not identical with that of the Monroe Doctrine. Then, there is the space of economic wealth, of the internal and external markets of North America. Then, there is the space of the influence of the American dollar, and also the spaces of cultural expansion, of language, and of moral prestige." See Carl Schmitt, "Die Ordnung der Welt nach dem zweiten Weltkrieg. Vortrag von 1962," tr. by Günter Maschke, in *Schmittiana - II*, ed. by Piet Tommissen (Brussels: Economische Hogeschool Sint-Aloysius, 1990), p. 25.

61. According to Schmitt: "The odium of colonialism today concerns the European nations. At its core, it is nothing other than the odium of appropriation. . . . [and] the odium is universal; it is dominant in America, Asia, Africa, and even in Europe. It is based on a profound change in social and economic-ethical concepts. However, it began with the centuries of propaganda against the Spanish *conquista.*" See Carl Schmitt, "*Nomos — Nahme* — Name," in this volume, pp. 346 and 349f.

the collapse of the *jus publicum Europaeum*. Concretely, said Schmitt, the critique of colonialism is a critique of the whole Age of Discovery. It began with propaganda against the Spanish conquest in the 15th and 16th centuries, and took a firm hold during the Enlightenment in the 18th century. In the 19th century, it became generalized, until all of Europe was classified as the aggressor: "Everything European is on the defensive. . . . What still remains of the classical ideas of international law has its origins in a purely Eurocentric spatial order."[62] Schmitt's point is that anti-colonialism lacks the capacity to create a new spatial order.

Today, this anti-European propaganda presents itself as "multiculturalism." With respect to *The* Nomos *of the Earth*, an especially relevant aspect of this current form of anti-European propaganda is the sea change that has occurred in cartography during the past 25 years. Whereas Schmitt takes note of the importance of geographers, and of the significance of maps in European explorations of the world, several recent books on cartography are at pains to reject the European heritage.[63] Typical of these is Jeremy Black's study of the ideological presuppositions of maps.[64] He argues that maps and politics are inseparable, and that "there is no unchallenged or obvious basis" for a map's objectivity. Schmitt certainly would have concurred with the first claim, but disputed the second.[65] By focusing

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62. Schmitt, "Die Ordnung der Welt nach dem zweiten Weltkrieg," *op. cit*, p. 15: "Anti-colonialism is a phenomenon that attends the destruction of this spatial order. It is oriented solely backwards, to the past, and has as its goal the liquidation of a state of affairs that has remained valid until now. But, aside from the moral postulates and the criminalization of European nations, it has not created any idea of a new order. Determined fundamentally by a spatial idea, if only negatively, anti-colonialism does not have the capacity to forge the beginning of a new spatial order in a positive way."

63. Thus, Arno Peters argues that the familiar Mercator map of the globe, in which a country's size increases the further it is from the equator, gives undue geographical emphasis to Europe, and thus diminishes the size of Third World countries. Its proposed replacement is an "equal-area" map, in which shapes are distorted, but size is preserved. However, the Mercator map never was intended to associate size with importance — Greenland was never a world power — and its advantage was that it preserved bearings for sea navigation. As the title of Peters' book indicates, he was less concerned with the problems of his argument than with "overcoming" the "Eurocentric character of our geographical world-view." See Arno Peters, *Der Europa-zentrische Charakter unseres geographischen Weltbildes und sein Überwindung* (Dortmund: W. Größchen-Verlag, 1976).

64. Jeremy Black, *Maps and Politics* (Chicago: Chicago University Press, 1997).

65. In his discussion of the first attempts to divide the earth immediately after 1492, Schmitt points out that: "The question was political from the start; it could not be dismissed as 'purely geographical.' As scientific, mathematical, or technical disciplines, geography and cartography certainly are neutral. However, as every geographer knows, they can be instrumentalized in ways both immediately relevant and highly political. . . ." See Schmitt, *The* Nomos *of the Earth*, p. 88.

on the instrumentalization of geography and cartography, while rejecting their objective character, multicultural scholars instrumentalize both.[66]

Also typical of this multicultural project, and indicative of the lengths to which it will go, is the claim that the standard notion of a map as an attempt to render geographic space accurately is Eurocentric, thus distorting other cultures' "map-making achievements." Schmitt observes that the European discovery of the New World did not occur by chance, that it was not simply one of many successful campaigns of conquest, but rather an achievement of Occidental rationalism. As Edward Rothstein notes, various non-European cultures had no word for "map" before their contact with the West.[67] However, in the new view of maps as "cognitive systems," as ways of making sense of the world according to a culture's customs, "iconography merges into cartography." By suggesting that all understanding may be a form of mapping, this cultural anthropology turns maps into archetypical instances of knowledge. Rothstein's conclusions put this dubious project in perspective: "What, after all, made Western mapping so different from that of other cultures? How important is the notion of the Western map as a metaphor for science? What made certain forms of mapping more important and more powerful than others? The answers go to the heart of many contemporary controversies. But in its ambitious attempts to map world cultures, the project is already more Western than it might seem. It ends up affirming the principles of observation, imagination, and abstraction that gave birth to Western cartography in the first place." Thus, this multicultural project turns out to be parasitic on the Eurocentric framework it seeks to destroy, and no progress toward a new *nomos* of the earth can be made without an

66. The most ambitious multicultural project is J. B. Harley and David Woodward, eds., *The History of Cartography* (Chicago: Chicago University Press, 1987-). In the first volume, Harley claims that the objective was to move beyond "a deeply entrenched Eurocentricity," and to undertake "a technical, a cultural, and a social history of mapping." In an interview with Edward Rothstein, Woodward pointed out that the original plan was for a four-volume history. The first was to include all non-Western and pre-medieval materials, while the last three volumes would be devoted to "the European renaissance, the European enlightenment, and the modern period." As the search for non-Western materials increased, so did the interpretation of what a "map" is, and so did the number of volumes. The third volume presumably provides "the first serious global attempt" to explain the principles of cartography in traditional African, American, Arctic, Australian, and Pacific societies. Allegedly, these volumes are not just accumulations of neglected materials, but include essays written from a new perspective, i.e., that "maps must be treated less as representational devices than as rhetorical devices." Obviously, the definition of "cartography" had to be changed.

67. Edward Rothstein, "Map-Makers Explore the Contours of Power: New Study Tries to Break the Euro-Centric Mold," in *The New York Times* (May 19, 1999), pp. B9 and B11.

appreciation of the legacy of the *jus publicum Europaeum.*

In *The* Nomos *of the Earth*, Schmitt does not suggest any return to the European solution to the problem of world order. Yet, any "new world order" must not abandon the political aspects of the normative order of terrestrial existence that the Europeans discovered, such as the division of space and the bracketing of war. The specter haunting Europe today is the ghost of its own past, which has become the bugaboo of all attempts to reorient global order. Part and parcel of this European malady is the disintegration of the Western rationalism that made possible the traditional *nomos* of the earth. Not only has Europe ceased to be the center of the earth, but Western rationalism has lost its grounding. This is not only a European predicament, but a global one. The present is not a measure, but a mirror of the past, and all attempts to "overcome" the past are obstacles not only to understanding it, but to utilizing it in reordering the future. Europe's identity is not a historical crime, but a common cultural heritage that not only defined modernity, but prefigured the shape of things to come.[68]

As Schmitt notes in *The* Nomos *of the Earth*, globalization began in the 19th century, and the undermining of the old European order and even the continuing dilemma of world order cannot be answered exclusively by pointing out the rise of the US as a world power. It had as much to do with globalization of the economy, which the English Empire promoted and the American Empire brought to fruition. Since all states of the *jus publicum Europaeum* belonged to the same economic system, the rule was whoever controls the territory controls the economy. When the old world order was confronted with universalism and commercialism, the rule became whoever controls the economy controls the territory. As Schmitt puts it: "Over, under, and beside the state-political borders of what appeared to be a purely political international law between states spread a free, i.e., non-state sphere of economy permeating everything: a *global* economy."[69]

The future of politics for Schmitt lay beyond the sovereign state and modernity, but not in any "universalism" of the kind being touted as a "world republic" or a "world state," which would spell not the future, but

68. See, for example, Tony Judt, "Europe: The Grand Illusion," in *The New York Review of Books* (July 11, 1996), pp. 6-10; Roger Cohen, "A European Identity; Nation-States Losing Ground," in *The New York Times* (January 14, 2000); Michael Z. Wise, "Idea of a Cultural Heritage Divides Europe," in *The New York Times* (January 24, 2000); Heiner Timmermann and Hans Dieter Metz, eds., *Europa — Ziel und Aufgabe: Festschrift für Arno Krause zu 70. Geburtstag* (Berlin: Duncker & Humblot, 2000).

69. See Schmitt, *The* Nomos *of the Earth*, p. 235.

the end of politics.[70] Globalization and new, larger political entities require a new political realism and a new political theory dealing with a new type of law regulating "international" relations. This global order will fail if it does not take into account the accomplishments of the only truly global order of the earth developed so far: the *jus publicum Europaeum.*

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70. For a confusion of globalization and universalism, see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (Munich: Beck Verlag, 1999). The author calls for a "new political vision" beyond the nation-state, and predicts a globalization bringing about a positivistic legal order, a world democracy, and, ultimately, a "world republic." This world republic is a "realistic vision" of something already in progress. He foresees "political unities of continental scope," and considers the basic units of such a global order to be "great-regional intermediary entities," resembling what Schmitt called *Großräume.* Höffe's world republic, however, would be a "world federal state: a *federal world republic*," making all of the world's inhabitants "world citizens."

Translator's Note and Acknowledgments

Carl Schmitt once had occasion to tell me about his difficulties in writing *Der* Nomos *der Erde*. Most of the manuscript was written in Berlin between 1942 and 1945, when, because of the war, access to libraries and sources was difficult at best and, at times, impossible. The situation was even more problematic immediately after the war, given the destruction and the occupation, which is why Schmitt writes in the forward to this book: "At present, there are all sorts of restraints and restrictions. A critic unencumbered by them will have no trouble finding bibliographic and other imperfections." In fact, there are numerous errors in the German edition, not only in titles and in authors, but in spelling, dates, and page numbers. Casually, I told Schmitt that if I ever had the occasion to translate *Der* Nomos *der Erde*, I would correct the mistakes. He said that would please him very much. At the time, I had no plans to translate this book.

Funds for this translation were provided by the Earhart Foundation in Ann Arbor, Michigan. Originally, Kizer Walker — at the time a graduate student at Cornell University — was hired to do the job. He completed a first draft of parts I and II, but circumstances made it impossible for him to continue, which is why I assumed the task of completing the job. In so doing, I have endeavored to do what I told Schmitt I would, although it proved to be a much bigger task than initially foreseen. However, aside from one or two instances, where it was impossible to track down a source, I have checked and, where necessary, corrected all the bibliographic references. Where they were incomplete, I have filled them out, and, when an English translation of a source was available, I have used it. In one or two instances, when the text discusses a matter of purely German linguistic interest, I have put the lines in a footnote to facilitate the flow of the argument. I also have translated all foreign words the first time they appear in the text, and have provided a glossary for easy reference. These translations appear in brackets, as do footnotes that I have added for identification and/or clarification.

Like the German edition, the English one has both a name index and a subject index, though they are more complete in this volume. However, these indices pertain only to Schmitt's text, not to my introduction. Unlike the German edition, this edition includes three of the corollaries of *Nomos* that Schmitt wrote after his book was published. In my view, these "concluding corollaries" serve to round out Schmitt's argument and to focus on the future, rather than on the past, which was Schmitt's intention when he wrote the book.

Any endeavor of this kind requires assistance, and I am pleased to acknowledge the help of many colleagues and friends. George Schwab checked the German translation, and I was able to discuss with Guenther Roth how best to translate certain difficult German terms and concepts. Nino Langiulli checked the Latin translations, and Andreas Kalyvas checked the Greek transliterations. Julia Kostova formatted and checked the manuscript numerous times, and Naomi Novak proof-read it several times. Brendan Bathrick designed the cover. Finally, Paul Piccone was always at hand with invaluable suggestions.

G. L. Ulmen

Author's Foreword

This book, the defenseless product of hard experiences, I lay on the altar of jurisprudence, a discipline I have served for more than forty years. I cannot foresee who will take my offering in hand, be it a thoughtful or a practical person, be it a destroyer and annihilator who ignores the asylum I offer. The fate of a book does not lie in the author's hands, any more than does his personal fate upon which it hinges.

Given this fact, the motto for this book might be two verses Goethe wrote in 1812:

> All petty things have trickled away,
> Only sea and land count here.

For I speak here of firm land and free sea, of land-appropriations and sea-appropriations, of order and orientation. However splendid that motto might be, it would be misleading. Both extraordinary verses steer attention too much away from international law, and to either a geographical-scientific or an elemental-mythological approach. That would not do justice to the essentially jurisprudential foundations of this book, which I have taken much pains to construct.

I am much indebted to geographers, most of all to Mackinder.[1] Nevertheless, a juridical way of thinking is far different from geography. Jurists have not learned their science of matter and soil, reality and territoriality from geographers. The concept of sea-appropriation has the stamp of a

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1. [Tr. Sir Halford John Mackinder (1861-1947) was both a geographer and a politician. In January 1887, the fame of his Oxford extension lectures resulted in an invitation to speak at the Royal Geographical Society in London. During the discussion after the lecture, he defined geography as "the science of distribution, the science, that is, which traces the arrangement of things in general on the earth's surface." In 1899, he was instrumental in establishing the first British school of geography, at Oxford. He is best known for his theory of the "heartland," which influenced the geopolitical thinking of Karl Haushofer. Mackinder's writings on land power are comparable to the ideas of Alfred Thayer Mahan (1840-1914) on sea power, which also influenced Schmitt's thinking.]

jurist, not of a geopolitician. As a jurist, I agree with Camilio Barcia Trelles,[2] an important scholar of contemporary international law, who also has dealt with the theme of land and sea.

The ties to mythological sources of jurisprudential thinking are much deeper than those to geography. These were revealed to me by Bachofen,[3] but the many profound insights of Jules Michelet should not be forgotten. Bachofen is the legitimate heir of Savigny.[4] What the founder of the Historical School of Law understood to be historical authenticity, Bachofen extended and made much more fruitful. This historical authenticity is not just archeology and a museum artifact. It concerns the existential question of jurisprudence, which today would be sundered between theology and technology if the ground of its being here and now were not understood properly and developed fruitfully in terms of its historical relevance.

For this reason, the question of presentation is especially difficult. At present, there are all sorts of restraints and restrictions. A critic unencumbered by them will have no trouble finding bibliographic and other imperfections. What is more, I avoid mention of contemporary affairs and break off at many points, so as not to give a false impression. All experts lament the Babylonian linguistic confusion of our time: the crudeness of the ideological struggle, the disintegration and contamination of the most common and familiar concepts of contemporary public life. Since both the given subject and the present situation are overwhelming, all we can do is

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2. [Tr. Given the significance Francisco de Vitoria plays in this book, it is noteworthy that Schmitt says "Barcia Trelles' lectures constituted the strongest breakthrough for the world at large" in the Vitoria renaissance after World War I. See *The* Nomos *of the Earth*, p. 118n. Elsewhere, Schmitt speaks of this Spanish teacher of international law as one who discussed "the confrontation between the contemporary fronts of the Free World and the Communist Bloc." See "Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West: Bemerkungen zu Ernst Jüngers Schrift: *Der Gordische Knoten*" (1955), reprinted in Carl Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969*, ed. by Günter Maschke (Berlin: Duncker & Humblot, 1995), p. 529. Schmitt here mentions Camilio Barcia Trelles, *El Pacto del Atlántico, la tierra y el mar frente a frente* (Madrid: Instituto de Estudios Politicos, 1950).]

3. [Tr. Johann Jacob Bachofen (1815-1887) was appointed to the chair of Roman law in Basel, but resigned in 1844 to devote himself to the history of art. His major interests, however, were ancient Roman law and Greek antiquity, and it was in his investigation of these subjects that he became fascinated by myths.]

4. [Tr. Friedrich Carl von Savigny (1779-1861). In Schmitt's "Testament," written in 1943-44 while he was working on *Der* Nomos *der Erde*, he called Savigny's 1814 treatise, *Of the Vocation of Our Age for Legislation and Jurisprudence*, an "alternative paradigm" to legal positivism and to the crisis of jurisprudence. See my translation of Schmitt's "Testament": "The Plight of European Jurisprudence," in *Telos* 83 (Spring 1990), pp. 35-70.]

sift through the wealth of material, present new ideas objectively, avoid unnecessary controversy, and not fail to grasp the magnitude of our theme. Both the theme and the situation are overwhelming.

The traditional Eurocentric order of international law is foundering today, as is the old *nomos* of the earth. This order arose from a legendary and unforeseen discovery of a new world, from an unrepeatable historical event. Only in fantastic parallels can one imagine a modern recurrence, such as men on their way to the moon discovering a new and hitherto unknown planet that could be exploited freely and utilized effectively to relieve their struggles on earth. The question of a new *nomos* of the earth will not be answered with such fantasies, any more than it will be with further scientific discoveries. Human thinking again must be directed to the elemental orders of its terrestrial being here and now. We seek to understand the normative order of the earth. That is the hazardous undertaking of this book and the fervent hope of our work.

The earth has been promised to the peacemakers. The idea of a new *nomos* of the earth belongs only to them.

Carl Schmitt
Summer 1950

Part I

Five Introductory Corollaries

Chapter 1

Law as a Unity of Order and Orientation

In mythical language, the *earth* became known as the mother of law. This signifies a threefold root of law and justice.

First, the fertile earth contains within herself, within the womb of her fecundity, an inner measure, because human toil and trouble, human planting and cultivation of the fruitful earth is rewarded justly by her with growth and harvest. Every farmer knows the inner measure of this justice.

Second, soil that is cleared and worked by human hands manifests firm lines, whereby definite divisions become apparent. Through the demarcation of fields, pastures, and forests, these lines are engraved and embedded. Through crop rotation and fallowing, they are even planted and nurtured. In these lines, the standards and rules of human cultivation of the earth become discernible.

Third and last, the solid ground of the earth is delineated by fences, enclosures, boundaries, walls, houses, and other constructs. Then, the orders and orientations of human social life become apparent. Then, obviously, families, clans, tribes, estates, forms of ownership and human proximity, also forms of power and domination, become visible.

In this way, the earth is bound to law in three ways. She contains law within herself, as a reward of labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order. Law is bound to the earth and related to the earth. This is what the poet means when he speaks of the infinitely just earth: *justissima tellus*.

The *sea* knows no such apparent unity of space and law, of order and orientation. Certainly, the riches of the sea — fishes, pearls, and other things — likewise are won by the hard work of human labor, but not, like the fruits of the soil, according to an inner measure of sowing and reaping. On the sea, fields cannot be planted and firm lines cannot be engraved. Ships that sail across the sea leave no trace. "On the waves,

there is nothing but waves." The sea has no *character*, in the original sense of the word, which comes from the Greek *charassein*, meaning to engrave, to scratch, to imprint. The sea is free. According to recent international law, the sea is not considered to be state territory, and should be open equally to all for three very different spheres of human activity: fishing, peaceful navigation, and the conduct of war. At least, that is what is written in international law textbooks. One easily can imagine what becomes of this equal right to, and free use of the sea in practice, when a conflict arises over the use of space, when, for instance, the right to free fishing or the right of a neutral party to peaceful navigation clashes with the right of a mighty sea power to unlimited warfare. One and the same surface — the sea, which is open to all three endeavors — is supposed to serve both as the theater of peaceful labor and as the arena of actions consistent with a modern sea war. Thus, the peaceful fisherman has the right to fish peacefully precisely where the belligerent sea power is allowed to lay its mines, and the neutral party is allowed to sail freely in the area where the warring parties have the right to annihilate each other with mines, submarines, and aircraft.

Yet, this scenario touches on questions of a complex modern situation. Originally, before the birth of great sea powers, the axiom "freedom of the sea" meant something very simple, that the sea was a zone free for booty. Here, the pirate could ply his wicked trade with a clear conscience. If he was lucky, he found in some rich booty a reward for the hazardous wager of having sailed the open sea. The word *pirate* comes from the Greek *peiran*, meaning to test, to try, to risk. None of Homer's heroes would have been ashamed to have been the son of such a daring adventurer, who tries his luck as a pirate. On the open sea, there were no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property. Many peoples kept to the mountains, far from the coasts, and never lost the old, pious fear of the sea. In his fourth eclogue, Virgil prophesied that in the felicitous age to come there would be no more seafaring. Indeed, in one of the sacred books of our Christian faith, in the Apocalypse of Saint John, we read that the new earth, purged of its sins, will have no more oceans: *ἡ θάλασσα οὐχ ἔστιν ἔτι.*[1] Many jurists of terrestrial peoples also knew

1. [Tr. "And I saw a new heaven and a new earth: for the first heaven and the first earth were passed away; and there was no more sea." See Revelation 21:1 in *The Holy Bible*, Containing the Old and New Testaments, Authorized King James Version, ed. by C. I. Scofield (New York: Oxford University Press, 1909-1945), p. 1351.]

this fear of the sea. One still can detect this in some 16th century Spanish and Portuguese authors. Alciatus, a renowned Italian jurist and humanist of this period, said that piracy was a crime with extenuating circumstances: *Pirata minus delinquit, quia in mari delinquit* [Piracy is a lesser crime, although it was a crime on the sea]. On the sea, there was no law.

Only when the great sea empires, maritime nations, or, to use a Greek expression, *thalassocracies*, arose was security and order established on the sea. The disturbers of the order created thereby sank to the level of common criminals. The pirate was declared to be an enemy of the human race (*hostis generes humani*). This meant that he was ostracized and expelled, stripped of his rights, and made an outlaw by the rulers of the sea empires. Such extensions of law to the space of the free sea were world-historical events of revolutionary significance. We will call them "sea-appropriations." The Assyrians, the Cretans, the Greeks, the Carthaginians, the Romans in the Mediterranean, the Hanseatics in the Baltic, and the British in the oceans of the world all "appropriated the sea" in this manner. As one English author said: "The sea must be kept,"[2] the sea must be taken. However, sea-appropriations became possible only at a later stage in the development of human means of power and human consciousness of space.

By contrast, the great primeval acts of law remained terrestrial orientations: appropriating land, founding cities, and establishing colonies. In Isidore of Seville's medieval definition in *Etymologia*, included in the first part of the famous *Decretum Gratiani* (around 1150), the essence of international law is stated concretely: "*Jus gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, induciae, legatorum non violandorum religio, connubia inter alienigenas prohibita.*" Literally, that means: "International law is land-appropriation, building cities and fortifications, wars, captivity, bondage, return from captivity, alliances and peace treaties, armistice, inviolability of envoys, and prohibition of marriage with foreigners." Land-appropriation takes first place. The sea is not mentioned. In the *Corpus Juris Justiniani* (e.g., "*Dig. de verborum significatione* 118"), one finds similar definitions in which war, the diversity of peoples, empires, boundaries, and, above all, trade and commerce (*commercium*) are discussed in terms of the essence of

2. Thomas Wemyss Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of the Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute* (London: Blackwood, 1911); (Millwood, N.Y.: Kraus Reprint Co., 1976).

international law. It would be worthwhile to compare and to consider historically the individual components of such definitions. At any rate, this would be more meaningful than the abstract definition of terms found in modern textbooks, which are geared to so-called norms. For the most concrete determination of what one calls international law, any medieval enumeration and listing of contents is illuminating even today, because appropriating land and founding cities always is associated with an initial measurement and distribution of usable soil, which produces a primary criterion embodying all subsequent criteria. It remains discernible as long as the structure remains recognizably the same. All subsequent legal relations to the soil, originally divided among the appropriating tribe or people, and all institutions of the walled city or of a new colony are determined by this primary criterion. Every ontonomous and ontological judgment[3] derives from the land. For this reason, we will begin with land-appropriation as the primeval act in founding law.

A land-appropriation grounds law in two directions: internally and externally. Internally, i.e., within the land-appropriating group, the first order of all ownership and property relations is created by the initial division and distribution of the land. Whether public or private, collective or individual, or both, ownership derives from this initial land-division; whether or not cadastral surveys are undertaken and land registers are established are later questions, and they concern distinctions presupposed by and derived from the common act of land-appropriation. In historical reality, every imaginable possibility and combination of legal and property titles abound. But even when the initial land-division establishes purely individualistic private ownership or common clan ownership, this form of property remains dependent on the common land-appropriation and derives legally from the common primeval act. To this extent, every land-appropriation internally creates a kind of *supreme ownership* of the community as a whole, even if the subsequent distribution of property does not remain purely communal, and recognizes completely "free" private ownership of the individual.

Externally, the land-appropriating group is confronted with other land-appropriating or land-owning groups and powers. In this case, land-appropriation represents a legal title in international law in two different ways. Either a parcel of land is extracted from a space that until

3. [Tr. Schmitt first uses the Greek word *ontonome*, meaning in accord with the *nomos* of being; he then uses the German word *seinsgerechte*, meaning in accord with the *nature* of being.]

then had been considered to be *free*, i.e., having no owner or master recognized by the foreign law of the land-appropriating group, or a parcel of land is extracted from a formerly recognized owner and master, and thereby becomes the property of the new owner and master. It is not difficult to comprehend that acquisition of formerly free territory, lacking any owner or master, presents a different and simpler legal problem than does acquisition of territory with recognized ownership.

In every case, land-appropriation, both internally and externally, is the primary legal title that underlies all subsequent law. Territorial law and territorial succession, militia and the national guard presuppose land-appropriation. Land-appropriation also precedes the distinction between private and public law; in general, it creates the conditions for this distinction. To this extent, from a legal perspective, one might say that land-appropriation has a categorical character. Kant expounds on this notion with great clarity in his *Philosophy of Law*. He speaks of *territorial sovereignty* or, more preferably, of *supreme proprietorship of the soil*, which he considers to be the "main condition for the possibility of ownership and all further law, public as well as private."[4] Of course, he construes this completely ahistorically, as a purely logical "idea of the civil constitution." Also, it seems to me that neither of his terms — *supreme proprietorship* and *territorial sovereignty* — is entirely useful for our discussion, since they are determined too much by the distinction (which took effect only later) between public and private law. Today, most jurists understand "supreme proprietorship" only as property (*dominium*), and then only in the sense of private law, whereas "territorial sovereignty" is understood as public power and domination (*imperium*), and only in the sense of public law. But there are two aspects to this distinction. First, we must not think of land-appropriation as a purely intellectual construct, but must consider it to be a legal fact, to be a great historical event, even if, historically, land-appropriation proceeded rather tumultuously, and, at times, the right to land arose from overflowing migrations of peoples and campaigns of conquest and, at other times, from successful defense of a country against foreigners. Second, we must remember that, both externally and internally, this fundamental process of land-appropriation preceded the distinction between public and private

4. [Tr. Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, tr. by W. Hattie (Edinburgh: T. T. Clark, 1887)/Reprint (Clifton: Augustus M. Kelley, 1974), Part Second: Public Right, Note B: Land Rights, p. 182 (translation altered).]

law, public authority and private property, *imperium* and *dominium*. Land-appropriation thus is the archetype of a constitutive legal process externally (*vis-à-vis* other peoples) and internally (for the ordering of land and property within a country). It creates the most radical legal title, in the full and comprehensive sense of the term *radical title*.

This terrestrial fundament, in which all law is rooted, in which space and law, order and orientation meet, was recognized by the great legal philosophers. The first law, said Giambattista Vico, was received by men from heroes in the form of the first agrarian laws. For Vico, the division and demarcation of soil (*la divisione dei campi*) is, along with religion, marriage, and asylum, one of the four primeval elements of all human law and all human history. To avoid giving the impression that we are dealing merely with mythological legal antiquities, I will cite two more recent, modern (17th and 18th century) legal philosophers: John Locke and Immanuel Kant. According to Locke, the essence of political power, first and foremost, is jurisdiction over the land. He understands "jurisdiction" in medieval terms, as sovereignty and dominion in general. For him, the occupation of a country is subjugation by whoever has jurisdiction over the soil. Domination is, first of all, rule only over the land and, only as a consequence of this, rule over the people who live on it.[5] Even in this purely theoretical, legal-philosophical formulation the aftermath of the Norman conquest of England by William the Conqueror (1066) still is recognizable. The Englishman Locke, often described as a modern rationalist, in reality still is rooted deeply in the tradition of the medieval, feudal land law that resulted from the fundamental legal process of the Norman land-appropriation.[6] However, as is evident in Kant's doctrine of the "supreme proprietorship of the land," in philosophical fundamentals his legal theory also begins with the premise

5. "[G]ovemment has a direct jurisdiction only over the land." [Tr. See *The Works of John Locke*, A New Edition, Corrected in 10 Vols. (London: Thomas Tegg, *et al.*, 1823), reprinted by Scientia Verlag Aalen (Darmstadt, 1963), "Two Treatises on Government," the latter being "An Essay Concerning the True Original, Extent, and End of Civil Government," Vol. 5, §121, p. 410.]

6. Emil Roos' dissertation clearly establishes that Locke's reputedly "rationalistic" philosophy, in typical English pragmatism, is conditioned by feudal tradition. See *Naturzustand und Vertrag in der Staatsphilosophie Lockes* (Berlin: 1943). Walter Hamel's book, *Das Wesen des Staatsgebietes* (Berlin: O. Liebmann, 1933), is useful, because it is more comprehensive and contains a larger amount of historical material. But some of its concepts are intellectually overwrought and, instead of "spatial" concepts, the work suffers from the fact that it speaks only in terms of "material" or "substantive" concepts. The work ignores the history of the principle of territoriality in international private and criminal law, and does not consider Locke's territorial theory.

that all property and every legal order has land as its precondition, and is derived from the original acquisition of the earth's soil. Kant says: "First acquisition of a thing can be only acquisition of land."[7] This "law of mine and thine that distributes the land to each man," as he puts it, is not positive law in the sense of later state codifications, or of the system of legality in subsequent state constitutions; it is, and remains, the real core of a wholly concrete, historical and political event: a land-appropriation.

Thus, in some form, the constitutive process of a land-appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire. This is true as well for the beginning of every historical epoch. Not only logically, but also historically, land-appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law. It is the reproductive root in the normative order of history. All further property relations — communal or individual, public or private property, and all forms of possession and use in society and in international law — are derived from this radical title. All subsequent law and everything promulgated and enacted thereafter as decrees and commands are *nourished*, to use Heraclitus' word, by this source.

The traditional history of international law also is a history of land-appropriations. At certain times, *sea-appropriations* also became part of this history, and then the *nomos* of the earth rests on a particular *relation* between firm land and free sea. Today, as a result of a new spatial phenomenon — the possibility of a domination of air space — firm land and free sea alike are being altered drastically, both in and of themselves and in relation to each other. Not only are the dimensions of territorial sovereignty changing, not only is the efficacy and velocity of the means of human power, transport, and information changing, but so, too, is the content of this *effectivity*. This always has a spatial dimension and always remains an important concept of international law for land-appropriations and land-occupations, as well as for embargoes and blockades. Consequently, as a result of these developments, the relation between protection and obedience, and with it the structure of political and social power and their relation to other powers, is changing. We are on the threshold of a new stage of human spatial consciousness and global order.

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7. Immanuel Kant, "Metaphysical First Principles of the Doctrine of Right," in *The Metaphysics of Morals*, tr. by Mary Gregor (Cambridge: Cambridge University Press, 1996), §12, p. 50 and §16: "Exposition of the Concept of the Original Acquisition of Land," p. 54.

All pre-global orders were essentially *terrestrial*, even if they encompassed sea powers and *thalassocracies*. The originally terrestrial world was altered in the Age of Discovery, when the earth first was encompassed and measured by the global consciousness of European peoples. This resulted in the first *nomos* of the earth. It was based on a particular relation between the spatial order of firm land and the spatial order of free sea, and for 400 years it supported a Eurocentric international law: the *jus publicum Europaeum.* In the 16th century, it was England that dared to take the step from a terrestrial to a maritime existence. A further step was taken with the industrial revolution, in the course of which the earth was newly conceived and newly measured. It was essential that the industrial revolution occurred in the country that first had taken the step to a maritime existence. This is the point at which we can approach the mystery of the new *nomos* of the earth. Until now, only one author, Hegel, has come close to this *arcanum* [secret]. His words will serve to conclude this corollary: "The principle of family life is dependence on the soil, on firm land, on *terra firma.* Similarly, the natural element for industry, animating its outward movement, is the sea."[8]

This quotation is pregnant with meaning for further prognoses. For the moment, however, we must consider an elementary distinction, because it is not inconsequential whether the industrialized and mechanized world that men have created with the help of technology has a terrestrial or a maritime foundation. But today, it is conceivable that the air will envelop the sea and perhaps even the earth, and that men will transform their planet into a combination of produce warehouse and aircraft carrier. Then, new amity lines will be drawn, beyond which atomic and hydrogen bombs will fall. Nevertheless, we cling to the hope that we will find the normative order of the earth, and that the peacemakers will inherit the earth.

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8. [Tr. *Hegel's Philosophy of Right*, tr. with Notes by T. M. Knox (New York: Oxford University Press, 1967), p. 151.]

Chapter 2

Pre-Global International Law

For centuries, humanity had a mythical image of the earth, but no scientific understanding of it as a whole. There was no concept of a planet, of human compass and orientation common to all peoples. In this sense, there was no global consciousness and thus no political goal oriented to a common hope. Thus, a *jus gentium* [international law] capable of encompassing the whole earth and all humanity was impossible. If one speaks of a *jus gentium* in this age, it is only in terms of differing spatial structures, but not in terms of what later, after the emergence of planetary and global concepts, was called the law of nations, *jus gentium*, or international law. In this context, we can disregard the philosophical generalizations of the Hellenistic period, which made a *cosmopolis* [world-state] out of a *polis* [city-state], because they lacked a *topos* [orientation], and thus had no concrete order.[1]

If we consider the earth retrospectively, from the horizon of today, naturally it always was divided in some way, even if men were not aware of the division. But this was no spatial ordering of the earth as a whole, no

1. In the chapter on "Freedom of the Sea" (see Part III, Ch. 3, pp. 143ff.), we will return to the question of *topos* and its relation to modern utopia. The Greek word *topos*, in the course of time, has acquired the significance of *locus communis* or "commonplace." Today, it serves to designate general and abstract banalities. But even such commonplaces become concrete and extraordinarily vivid if one considers their spatial meaning. The theory of *topoi* was developed by Aristotle as a part of rhetoric. The latter, in turn, is a counterpart, an antistrophe of dialectics, as Eugène Thionville demonstrates in his splendid thesis, *De la théorie des lieux communs dans les Topiques d'Aristote et des principales modifications qu'elle a subies jusqu'à nos jours* [1885] (Paris: J. Vrin, 1983). Rhetoric is the dialectics of the public square, the *agora*, in contrast to the dialectics of the lyceum and the academy. What one person says to another is debatable, plausible, or convincing only in a given context and at a given place. So, even today, we have the still indispensable *topoi* of the chancellery and the lectern, of the judge's bench and the town meeting, of conferences and congresses, of cinema and radio. Any sociological analysis of these various sites must begin with an account of their *topoi*.

nomos of the earth in the true sense. A variety of great power complexes — the Egyptian, the Asiatic, the Hellenistic empires, the Roman Empire, perhaps even Negro empires in Africa and Incan empires in America — in no sense were disconnected and totally isolated from one another. But their interconnections lacked a global character. Each considered itself to be the *world*, at least the world inhabited by human beings, or to be the *center* of the world, the *cosmos*, the *house*, and each regarded the part of the earth outside this world, as long as it did not appear to be threatening, to be either uninteresting or an odd curiosity. To the extent that this outside was threatening, it was thought to be a malevolent chaos, in any case, to be an open and "unoccupied" space "free" for conquest, territorial acquisition, and colonization. However, this situation was not at all as it appears in 19th century textbooks, or as the Romans saw it, according to the renowned scholar of Roman history, Theodor Mommsen, i.e., that the peoples of antiquity coexisted in a situation of "natural" enmity, that every foreigner was an enemy and every war a war of annihilation, that all foreign territory was enemy territory unless an explicit treaty of friendship had been concluded, and all this because there was as yet no international law in the modern, humane, and civilized sense. Such claims are indicative of the self-confidence of the 19th century and its civilizing illusions. In the meantime, they have found verification in the world wars of the 20th century.

Contrary to these incorrect claims, the historically correct realization has gained acceptance, i.e., that precisely Roman law, in its practice of international law, recognized a variety of wars, leagues, federations (*foedus aequum* [equitable federation] and *foedus iniquum* [inequitable federation]), and foreign territories.[2] Above all, Roman law was able to distinguish the enemy, the *hostis*, from the thief and the criminal, as is evident in Pomponius' often-cited axiom: *Hostes hi sunt, qui nobis aut quibus nos publice bellum decrevimus: ceteri latrones aut praedones sunt* [There are enemies, who declare war against us, or against whom we publicly declare war; others are robbers or brigands].[3] The ability to recognize a

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2. The thesis of natural enmity and the necessity of a friendship treaty is refuted by Alfred Heuss in "Die völkerrechtliche Grundlagen der römischen Außenpolitik in republikanischer Zeit," in *Klio: Beiträge zur alten Geschichte*, N.F., Supplement XXXI (1933), p. 18.

3. *Digest. de verborum significatione*, p. 118. [Tr. See Justinian/Scott, *The Civil Law*, Including The Twelve Tables, The Institutes of Gaius, The Rules of Ulpian, The Opinions of Paulus, The Enactments of Justinian, and The Constitutions of Leo, by S. P. Scott (Cincinnati: The Central Trust Company, 1932)/Reprint (New York: AMS Press, 1973), 17 vols, Vol. XI, The Digest or Pandects, Book L, Title XVI (Concerning the Signification of Terms), p. 118 (Pomponius, On Quintus Mucius), p. 275.]

justus hostis [just enemy] is the beginning of all international law. Thus, there was an international law corresponding to the pre-global image of the world. But its concepts of the world and of its peoples remained in the mythical sphere. These concepts could not withstand the geographical enlightenment and scientific measurement that prevailed in the global image of the world after the 16th century. The *earth* or the *world* appeared to be a circle, an *orbis*, although the ambiguous word "orb" can signify a disk, a circular surface, as well as a spherical body.[4] Its boundaries were determined by mythical concepts, such as the ocean, the Midgard Serpent, or the Pillars of Hercules. Its political security rested on exclusionary defensive structures, such as border fortifications, a *great wall*, a limes, or (according to Islamic law) the concept of the "house of peace"[5]; outside these defenses was war. The purpose of such boundaries was to separate a pacified order from a quarrelsome disorder, a cosmos from a chaos, a house from a non-house, an enclosure from the wilderness. Boundaries constituted a division in terms of international law, whereas, in the 18th and 19th centuries, for example, the border between two territorial states of modern European international law did not constitute an exclusion, but rather mutual recognition, above all of the fact that neighboring soil beyond the border was sovereign territory.

In all ages, there have been relations between empires — various negotiations and engagements both friendly and hostile, legations, trade agreements, safe-conduct agreements, alliances, wars, armistices, peace treaties, family relations, rights of asylum, extraditions, and hostages. There was *commercium* [commerce] and often even *connubium* [marriage], at least among the ruling families and groups. The first treaty of peace, friendship, and alliance, handed down to us in the original documents of both parties, dates from 1279 BC; it is the much discussed treaty of the Egyptian King Ramses II with Hattushilish III, King of the Hittites. The treaty contains provisions covering mutual aid against domestic and foreign enemies, extradition of refugees and emigrants, and amnesties. It has become famous as a model treaty of international law, and is also an example of the founding of a "dual hegemony" of two empires. Until

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4. Joseph Vogt, *Orbis Romanus: Zur Terminologie des römischen Imperialismus* (Tübingen: Mohr, 1929), pp. 14f.

5. *Dar-el-Islam*, as opposed to *dar-el-harb*, the house or area of war. See Najib Armanazi, *Les principes Islamiques et les rapports internationaux en temps de paix et de guerre* (Paris: 1929). [Tr. I was unable to find this title in any catalogue. Perhaps Schmitt meant *L'Islam et le droit international* (Paris: Picart, 1929).]

recently, it was commonly thought in Europe that fully developed diplomatic exchange and the art of a well-conceived foreign policy balancing several powers first arose in Italy during the 15th and 16th centuries AD, as a highly modern product of the Renaissance. Today, this view is described by experts on Egyptian history as an "illusion"; the negotiations, alliances, trade agreements, political marriages, correspondence, and archival systems of the pharaohs, the kings of Babylon and Assyria, of the Mitanni and the Klatti in the 14th and 15th centuries BC are seen now by some historians as prototypical relations of international law.[6] The political and economic relations of Greek, Hellenistic, Jewish, Indian, Arabic, Mongolian, Byzantine, and other power formations are often the subject of interesting studies. Nevertheless, all that was only *jus gentium* or international law in an incomplete and indeterminate sense. Not only did everything, war in particular, remain organizationally at the technological, economic, and communicational level of that time, but, above all and most decisive, everything remained within the framework and the horizon of a spatial concept of the earth that was neither global nor all-encompassing, of an earth that had not been measured scientifically.

All the great political power complexes that emerged in the high cultural areas of antiquity and the Middle Ages, in both the Orient and the Occident, were either purely continental cultures, river (*potamic*) cultures, or at most inland sea (*thalassic*) cultures. Consequently, the *nomos* of their spatial order was not determined either by the antithesis of land and sea as two orders, as in traditional European international law, or (still less) by an overcoming of this antithesis. That was true for the East Asian and Indian empires, as well as for Oriental empires until their reshaping under Islam; it also was true of the empire of Alexander the Great, of the Roman and Byzantine empires, of the Frankish empire of Charlemagne, and of the Roman Empire of the German kings of the Middle Ages, as well as of all their mutual

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6. The treaty of 1279 BC is published (in the translation of Gardiner and Langdon) in *Journal of Egyptian Archaeology*, Vol. 6, pp. 132ff.; cf. Victor Korosec, "Hethitische Staatsverträge: Ein Beitrag zu ihrer juristischen Wertung," in *Leipziger rechtswissenschaftliche Studien*, Vol. 60 (Leipzig: Weicher, 1931), pp. 64f.; Günther Roeder, *Ägypter und Hethiter* (Leipzig: J. C. Hinrichs, 1919), p. 36; Alexandre Moret and Georges Davy, *Des clans aux empires: l'organisation sociale chez les primitifs et dans l'Orient ancien* (Paris: Renaissance du livre, 1929), pp. 374f. Cf. also, Wolfgang Mettgenberg, "Vor mehr als 3000 Jahren: Ein Beitrag zur Geschichte des Auslieferungsrechts," in *Zeitschrift für Völkerrecht*, Vol. XXIII (1939), pp. 23-32, and "Vor 3500 Jahren: Ein Nachtrag zu den Aufsatz: Vor mehr als 3000 Jahren," in *ibid.*, Vol. XXVI (1944), pp. 377-380.

relationships.[7] As for the feudal law of the European Middle Ages in particular, it was land law in the sense of an exclusively terrestrial order not acquainted with the sea. Papal awards of new missionary regions divided the spaces of land and sea equally, without distinguishing between them. The papacy raised claims to all islands (Sicily, Sardinia, Corsica, England), but these claims had reference to the alleged donation of Constantine, rather than to a division of the earth based on land and sea. The antithesis of land and sea as an antithesis of diverse spatial orders is a modern phenomenon. It governed the structure of European international law only after the 17th and 18th centuries, i.e., only after the oceans had opened up and the first global image of the earth had emerged.

The common law that arose from such a pre-global division of the earth could not be a comprehensive and coherent system, because it could not be an encompassing spatial order. To begin with, there were primitive relations among clans, extended families, tribes, cities, vassalages, leagues, and counter-leagues of all kinds. These functioned either at the stage *prior to* empire formation, or they were (as was the case on Italian soil until the formation of the Roman Empire and on Germanic-Roman soil until the formation of the Frankish Empire) part of the struggle in empire-building. As soon as empires appeared on the scene, three types of relations arose: relations among empires; relations between peoples within an empire; and relations between an empire and mere tribes and peoples, such as those between the Roman Empire and the wandering tribes with whom alliances were forged and to whom imperial territory was entrusted.

International law among empires in the pre-global period contained some significant legal structures for war and peace. But, despite such

7. "In terms of locality, the high cultural zones of the eastern and western hemispheres were basically continental, at most *thalassic*. In the ancient world, with the exception of the far north and the perennially damp tropics, they were distributed over all climatic zones of the North African-European continental landmass. The two great southern columns of the landmass of the ancient world — Black Africa and Australia, including the Austral-Asiatic archipelago — contained no independent high cultures. For the most part, they also were outside the areas of expansion of the ancient, spontaneous *Großraum* formations. In terms of plant geography and climate, the core regions of most high cultures do have one thing in common: they extend from damp regions suitable for the expansive spread of agriculture, from originally forested lands of the temperate zone, the subtropics, and the tropical and non-tropical monsoon regions up to the edge of the great steppe and desert zones. The Oriental cultural world, however, was at home west of the dry regions of the ancient world. It only overstepped it in its colonial expansions. In their earliest forms, the ancient American high cultures, with the exception of the Mayan, similarly appear to have been bound to dry regions; but, unlike the Orient, they also were bound to the area of the cooler highlands." (Heinrich Schmitthenner).

initial advances, this international law could not overcome the lack of a global concept of the earth. It remained necessarily rudimentary (even though it established firm forms and accepted customs in diplomatic law, in alliances and peace treaties, in law pertaining to aliens, and in asylum law), because international law regulating relations between empires could not be converted easily into a firm bracketing of war, i.e., into recognition of the other empire as a *justus hostis*. Consequently, wars between such empires were waged as wars of annihilation until another standard developed. Law among peoples within an empire, however, was determined by the fact that they belonged to the *orbis* [world] of the same empire. The territory of independent, autonomous confederates (*foederati*) also belonged to this *orbis*. Conversely, even totally enslaved peoples, those robbed of all their land, still could retain their identity in terms of international law. This is demonstrated (all the more clearly in a negative sense) by the ephors' annual declaration of war against the helots in Sparta, i.e., against the vanquished and subjugated people who had lost their communal fields. The idea of a coexistence of true empires, of independent *Großräume* [literally, large spaces; figuratively, large spatial spheres] in a common space, lacked any ordering power, because it lacked the idea of a common spatial order encompassing the whole earth.

Chapter 3

References to International Law in the Christian Middle Ages

The empire of the Christian-European Middle Ages requires a separate, but brief assessment. It was a pre-global spatial order, but it produced the only legal title for the transition to the first global order of international law. So-called "modern" international law — interstate European international law from the 16th to the 20th century — arose from the disintegration of the medieval spatial order supported by empire and papacy. Without knowledge of the continuing effects of this medieval Christian spatial order, it is impossible to gain a legal-historical understanding of the international law that emerged from it: an international law among states.

In scholarly discussions of international law today, especially concerning the question of just war, the international law of the Christian-European Middle Ages is invoked and utilized in a peculiar and contradictory manner. This is true not only of those scholars continuing to work with the system and methods of Thomist philosophy, to whom reference to scholastic definitions readily suggests itself. It also is true of numerous arguments and constructions in which, for example, League of Nations theorists in Geneva and American jurists and politicians have endeavored to utilize medieval theories, above all those concerning just war, for their own ends.[1] In any case, medieval conditions and institutions appear today in an odd mixture: here as a specter of feudal anarchy, there as a precursor of modern order. It might be useful to examine such contradictions for their deeper causes and motives. Though such an in-depth study cannot be undertaken here, the issue cannot be ignored. In view of the peculiar confusion predominant in this discussion, it is imperative to distinguish

1. Later in our investigation, we will have occasion to discuss this application of the doctrine of just war, in particular Vitoria's doctrine (Part II, Ch. 2, pp. 119ff.).

clearly between the *anarchy* of the Middle Ages and the *nihilism* of the 20th century. As already mentioned, the European medieval order certainly was very anarchistic in terms of a smoothly functioning modern factory, but it was not nihilistic, despite all the wars and feuds, as long as it retained the fundamental unity of order and orientation.

A. The Respublica Christiana *as a Spatial Order*

The medieval order arose from the land-appropriations of the migration of peoples (*Völkerwanderung*). Many of these land-appropriations, e.g., by the Vandals in Spain and North Africa or the Lombards in Italy (568 AD), proceeded as conquests, simply by seizing landed property from the previous owners, but without respect to the legal situation of the Roman world. Thus, they exceeded the limits of the existing order of the empire. By contrast, Germanic land-appropriations, such as those of the Odoacer, the Ostrogoths, and the Burgundians on Italian and Gallic soil, occurred within the spatial order of the Roman Empire, in that the wandering tribes had obtained Roman imperial territory from the Roman emperor. To this extent, most land-appropriations by the Germanic tribes are examples of territorial changes among peoples within the framework of an existing order and of international law within an empire. They were not fulfilled as annexations, but rather in the form of a recognized legal institution: military quartering, so-called *hospitalitas*. As early as Arcadius and Honorius, it was axiomatic that the owner of a house would relinquish one-third of it to military *hospes* quartered there. In such cases, land-appropriation took the legal form of a *quartering* of soldiers with a Roman landowner, who had to share his house, garden, fields, forest, and other property according to the quotas of the quartered Germanic occupiers. Accordingly, Odoacer took a third for his people. Later, the Ostrogoths encroached on the third occupied by Odoacer. A well-known example of this type of land-appropriation is the origin of the Burgundian empire.[2] With the land divided between the Germanic appropriator and the Roman landowner, new nations and new political units arose from different tribes and peoples living together. With them arose a new, European international law.

2. Karl Binding, *Das burgundisch-romanische Königreich: Eine reichs- und rechtsgeschichtliche Untersuchung* (Leipzig: Engelmann, 1868); for further examples, see the significant and, until today, the only monograph on the Germanic land-appropriations of the *Völkerwanderung*: Ernst Theodor Gaupp, *Die germanischen Ansiedlungen und Landtheilungen in den Provinzen des römischen Weltreiches in ihrer völkerrechtlichen Eigentümlichkeit und mit Rücksicht auf verwandte Erscheinungen der Alten Welt und des späteren Mittelalters* (Breslau: J. Max & Co., 1844); cf. Part I, Ch. 5, pp. 80ff.

The encompassing unity of the international law of medieval Europe was called *respublica Christiana* [Christian republic] and *populus Christianus* [Christian people]. It had definite orders and orientations. Its *nomos* was determined by the following divisions. The soil of non-Christian, heathen peoples was Christian missionary territory; it could be allocated by papal order to a Christian prince for a Christian mission. The continuity between the Roman and Byzantine empires was in theory a problem of international law, but in practice it affected only the Balkans and the East. The soil of Islamic empires was considered to be enemy territory[3] that could be conquered and annexed in crusades. Such wars *eo ipso* [in and of themselves] not only had *justa causa* [just cause], but, when declared by the pope, were even holy wars.[4] The soil of European Christian princes and peoples was distributed, according to the land law of the time, among princely houses and crowns, churches, cloisters and sponsors, lords of the land, castles, marches, cities, communities, and universities of various types. The essential point is that, within the Christian sphere, wars among Christian princes were bracketed wars. They were distinguished from wars against non-Christian princes and peoples. These internal, bracketed wars did not negate the unity of the *respublica Christiana*. They were feuds in the sense of assertions of right, realizations of right, or confirmations of a right of resistance, and they occurred within the framework of

3. [Tr. Since Muslims were considered to be children of the devil, the word "enemy" here should be understood in the sense of "foe," i.e., a mortal enemy that should be annihilated. See George Schwab, "Enemy or Foe: A Conflict of Modern Politics," in *Telos* 72 (Summer 1987), pp. 194-201. See also, in the same issue, G. L. Ulmen, "Return of the Foe," pp. 187-193. Hereafter, "foe" will be substituted for "enemy" when the context requires, since the German word *Feind* does not make this distinction, as Schmitt well understood.]

4. The crusades of the armed pilgrims to Jerusalem — *cum armis Jherusalem peregrinati sunt* — no doubt can be called holy wars. Of course, current moral theology is very critical of this expression. Charles Journet devotes a chapter to this question with the heading, "La guerre sainte et la croisade," in *L'Eglise du verbe incarné: essai de théologie speculative* (Brussels: Desclée de Brouwer, 1941). In his opinion, in a Christianity of the sacral type (*chrétienté de type sacral*), in which the canonical and non-canonical powers of the clergy were not distinguished sharply, there could have been only holy wars in the Christian sense. According to Journet, a purely holy war, i.e., one waged on the basis of the canonical authority of the pope, is impossible: "L'église comme telle ne fait pas la guerre." [Tr. The church as such does not wage war.] But one could call the wars encouraged and approved by the Church *just* wars. Yet, Journet also is uncompromising in this respect. According to him, if the definition of just war provided by Saint Thomas Aquinas (*Summa theologiae* II, II, question 40, Arts. 1 and 3) is taken seriously, one probably can count the number of actual and *completely just* wars on one's fingers. The Christian, as such, "en tant que chrétien," does not wage war. He can do so only "en chrétien." The distinction between "en tant que chrétien" and "en chrétien" is very subtle. But, I am uncertain whether or not Saint Louis was familiar with this distinction.

one and the same total order encompassing both warring parties. This means that they did not abolish or negate this total order. Therefore, they not only allowed, but necessitated a moral-theological and juridical evaluation of the question of whether they were just or unjust. However, one should not forget that the force of such moral-theological and juridical evaluations was derived not from themselves, but from concrete institutions. *Peace*, in particular, was not a free-floating, normative, general concept, but, rather, one oriented concretely to the peace of the empire, the territoral ruler, of the church, of the city, of the castle, of the marketplace, of the local juridical assembly.

*B. The Christian Empire as a Restrainer (*Katechon*) of the Antichrist*

The unity of this *respublica Christiana* had its adequate succession of order in *imperium* [empire] and *sacerdotium* [priesthood]; its visible agents, in emperor and pope. The attachment to Rome signified a continuation of ancient orientations adopted by the Christian faith.[5] The history of the Middle Ages is thus the history of a struggle *for*, not against Rome. The constitution of the army of the march to Rome was that of the German monarchy.[6] The continuity that bound medieval international law to the Roman Empire was found not in norms and general ideas, but in the concrete orientation to Rome.[7] This Christian empire was not eternal. It always had its own end and that of the present eon in view. Nevertheless, it was capable of being a historical power. The decisive historical concept of this continuity was that of the restrainer: *katechon*. "Empire" in this sense

5. The history of *Roma aeterna* provides the grandest examples of historical orientations. In the opinion of one respected author — Reginald Maria Schultes, *De ecclesia catholica* (Paris: Lethielleux, 1925) — the papacy is bound inseparably to Rome, in fact, to *Roman soil*, and the soil of Rome cannot disappear until the end of time. Bellarmine [Roberto Francesco Romolo, 1542-1621] also considers the orientation of Peter's successor to Rome to be legally and factually inseparable; Rome never will be without a clergy and without a faithful people. Charles Journet addresses this question in *L'église du verbe incarné*, *op. cit.*, p. 522. He subscribes to the other view, according to which Peter's successor is always the Bishop of Rome, regardless of where he actually resides. From the standpoint of orientation, the passage on *title* in Rudoph Sohm's *Kirchenrecht* (Munich and Leipzig: Duncker and Humblot, 1892-1923), Vol. 2, §28, pp. 284 ff., also appears in a new light.

6. This has been emphasized repeatedly by Eugen Rosenstock, e.g., in *Die europäische Revolution* (Jena: Diederichs Verlag, 1931), p. 69.

7. Legal continuity should not be sought historically in cultural and economic consistencies. See Alfons Dopsch, "Das Kontinuitätsproblem," reprinted in Alfons Dopsch, *Gesammelte Aufsätze: Beiträge zur Sozial- und Wirtschaftsgeschichte* (Vienna: L. W. Seidel & Sohn, 1938), Vol. II, pp. 253-276. Italian jurists mostly see only a continuity of norms and ideas, as does Balladore Pallieri in his outline of the Third International and as the "heritage of antiquity," in Balladore Pallieri, *Storia del Diritto Internazionale nel Medio Evo I* (Milan: Giuffrè, 1940).

meant the historical power to *restrain* the appearance of the Antichrist and the end of the present eon; it was a power that withholds (*qui tenet*), as the Apostle Paul said in his Second Letter to the Thessalonians.[8] This idea of empire can be documented in many quotations of the church fathers, in utterances of Germanic monks in the Frankish and Ottonian ages, above all, in Haimo of Halberstadt's commentary on the Second Letter to the Thessalonians and in Adso's letter to Queen Gerberga, as well as in Otto of Freising's utterances and in other evidence until the end of the Middle Ages. This provides a sense of an historical epoch. The empire of the Christian Middle Ages lasted only as long as the idea of the *katechon* was alive.

I do not believe that any historical concept other than *katechon* would have been possible for the original Christian faith. The belief that a restrainer holds back the end of the world provides the only bridge between the notion of an eschatological paralysis of all human events and a tremendous historical monolith like that of the Christian empire of the Germanic kings. The authority of church fathers and writers, such as Tertullian, Hieronymus, and Lactantius Firmianus, could be reconciled with the Christian transmission of sibylline prophecies, in the conviction that only the Roman Empire and its Christian perpetuation could explain the endurance of the eon and could preserve it against the overwhelming power of evil. For Germanic monks, this took the form of a lucid Christian faith in potent historical power. Anyone unable to distinguish between the maxims of Haimo of Halberstadt or Adso and the obscure oracles of Pseudo-Methodius or the Tiburtinian sibyls would be able to comprehend the empire of the Christian Middle Ages only in terms of distorting generalizations and parallels, but not in terms of its concrete historical authenticity.

Compared to the doctrine of *katechon*, the political or juridical structures that perpetuated the Roman Empire were not essential; they already were evidence of a decline and degeneration from piety to scholarly myth. They were able to take many forms: transpositions, successions, consecrations, or renovations of all types. Yet, with respect to the destruction of classical piety by the Oriental and Hellenistic deification of the political and military ruler in late antiquity, they also recovered the ancient unity of order and orientation. In the High Middle Ages, they had to conform organizationally to a feudal order of land ownership and to the personal bonds of a feudal system of vassalage; after the 13th century, they sought to maintain a disintegrating unity *vis-à-vis* a plurality of countries,

8. [Tr. Cf. II Thessalonians 2:6: "And now ye know what withholdeth that he might be revealed in his time." *The Holy Bible*, *op. cit.*, p. 1272.]

crowns, royal houses, and independent cities.

The medieval West and Central European unity of *imperium* and *sacerdotium* was never a centralized accumulation of power in the hands of one person. From the beginning, it rested on the distinction between *potestas* [power] and *auctoritas* [authority] as two distinct lines of order of the same encompassing unity. Thus, the antitheses of emperor and pope were not absolute, but rather *diversi ordines* [diverse orders], in which the order of the *respublica Christiana* resided. The inherent problem of the relation between church and empire differed essentially from the later problem of the relation between church and state. The significance of the state consisted in the overcoming of religious civil wars, which became possible only in the 16th century, and the state achieved this task only by a neutralization. The shifting political and historical situations in the Middle Ages caused the emperor to claim *auctoritas* and the pope to claim *potestas*. Misfortune did not arise until the 13th century, when the Aristotelian doctrine of the *societas perfectae* [perfect society] was employed to divide the church and the world into two types of perfect societies.[9] The medieval struggle between emperor and pope was not a struggle between two *societates*, whether one understands *societas* in terms of a society or a community; it was not a conflict between church and state similar to a Bismarckian *Kulturkampf*[10] or to a French laicization of the state; finally, it was not a civil war similar to the one between white and red, in the sense of a socialist class struggle. Here, all transferences from the sphere of the modern state historically are incorrect; but so, too, are all conscious or unconscious applications of the unifying and centralizing ideas tied to the concept of unity that has prevailed since the Renaissance, the Reformation, and the Counter-Reformation. Neither for an emperor, who had a

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9. A true historian, John Neville Figgis, has diagnosed and elaborated on this decisive antithesis in such well-known books as *From Gerson to Grotius* (Cambridge: Cambridge University Press, 1907) and *Churches in the Modern State* (London: Longmans, Green, and Co., 1913). I would like especially to draw attention to his lecture, "Respublica Christiana," in *Transactions of the Royal Historical Society*, Third Series (London: Offices of the Society, 1911), Vol. V, pp. 63-88.

10. [Tr. The *Kulturkampf* (literally, cultural struggle) was initiated when Bismarck passed laws in 1871-72 aimed at allowing the state to veto the clergy. These laws were in response to the Vatican Council or *Vaticanum* (1869-1870), which raised the papacy to the status of an absolute monarchy, thus changing the relation between church and state. Not only did the Vatican demand absolute freedom in the training of the clergy, it assumed a stance of ethical superiority *vis-à-vis* the state. In 1887, Bismarck ended the *Kulturkampf* by capitulating to the clergy. In more than one sense, this was a struggle between the Protestant state and the Roman Catholic Church.]

pope installed and removed in Rome, nor for a pope in Rome, who released the vassals of an emperor or a king from their oath of allegiance, was the unity of the *respublica Christiana* ever brought into question.

Given that not only the German king, but other Christian kings as well, assumed the title *imperator* [emperor] and called their realms *imperia* [empires], given that they received their mandates for missions and crusades — their legal titles to land — from the pope, they did not destroy, but rather confirmed the orientations and orders grounding the unity of the *respublica Christiana.* It seems to me important for the Christian concept of empire that the office of emperor in the belief of the Christian Middle Ages did not signify a position of absorbing or consuming power *vis-à-vis* all other offices. The emperor's office was inseparable from the work of the *katechon*, with concrete tasks and missions. This was true of a monarchy or a *crown*, i.e., of rule over a particular Christian land and its people. It was the elevation of a crown, not a vertical intensification — not a Kingdom over Kings, not a Crown of Crowns, not a prolongation of the monarch's power, not even, as was the case later, a bit of dynastic power — but a commission that stemmed from a completely different sphere than did the dignity of the monarchy. The *imperium* attached itself to indigenous formations, just as a sacred language of the empire became the vernacular of another sphere; in fact, it derived from the same common spiritual situation. Thus, as the *Ludus de Antichristo* demonstrates (in accord with the tradition dominated by Adso), the emperor, in all humility and modesty, and without compromising himself, laid down his imperial crown after completing a crusade. From the elevated heights of his imperial position, he returned to his natural status as merely king of his country.

C. Empire, Caesarism, Tyranny

The great theological and political thinkers of the empire certainly had no difficulty adjusting their doctrine of empire to the Aristotelian doctrine of the *communitates perfectae* that had gained ground since the 13th century. The perfect and autarkic communities (*communitates* [communities], *civitates* [commonwealths], *societates* [societies]) were able to fulfill their meaning and purpose, their goal and inner principle: to live the beautiful and autarkic life, *bene sufficienterque vivere* [to live sufficiently well]. If, as in Dante's *Monarchia*, empire is treated as the "most perfect" form of human community (*communitas perfectissima*), it is not conceived of as identical to the *regnum* [polity] and the autarkic *civitas* [commonwealth], i.e., as a still more perfect community, but only as a transcendent unity

that effects peace and justice among autarkic communities. For this reason alone, it is a higher, more comprehensive unity of a particular type.

Since the deepest antithesis separating the Christian empire of a *respublica Christiana* from medieval renovations, reproductions, and revivals of ancient heathen concepts was the unity of medieval Christendom and its "supreme power," it is necessary for us to understand its character. All such renovations, reproductions, and revivals disregarded the *katechon*. Consequently, instead of leading to a Christian empire, they led only to *Caesarism*. But, Caesarism is a typically non-Christian form of power, even if it concludes concordats. Both as a term and as a spiritual problem, this Caesarism is a modern phenomenon. It began with the French Revolution of 1789, and belongs historically to the time of the great parallel between the situation of early Christianity and that of the 19th century. The French Revolution spawned the words and concepts of Caesarism, civil war, dictatorship, and proletariat that emerged from the great parallel. This unique parallel between the present time and the beginning of the Christian era must not be confused with countless other historical parallels that abound among historians and politicians. This great parallel has been noted from various positions and has been presented in many variations — by Claude-Henri de Saint-Simon, Alexis de Tocqueville, Pierre Joseph Proudhon, and Bruno Bauer, all the way to Oswald Spengler.

The Bonapartist empire was the first and foremost recent example of pure Caesarism, i.e., one divorced from a monarchy and a royal crown. Thus, it was an "empire" in a completely different sense from that of the Christian Middle Ages. The parallel became even more intense and more modern after 1848 and the "empire" of Napoleon III. Every devout theologian from the 9th to the 13th century would have recognized the different character of this Caesarist concept of empire, if only because every theologian of the Christian Middle Ages understood the political-historical significance of the Jews' outcry just prior to the crucifixion of the redeemer: "We have no king but Caesar."[11] After the beginning of the 13th century, this knowledge of the meaning of Christian history gradually disappeared. The great philosophical systems also destroyed the concrete sense of history and dissolved the historical manifestations of the struggle against heathens and non-believers into neutral generalizations.

Once the German kings had created a dynasty, empire was a component of it. Thereby, the concept ceased to be the *elevation of a crown*

11. [Tr. John 19:15, in *The Holy Bible*, *op. cit.*, p. 1142.]

grounded in the work of a *katechon*, i.e., a monarchy grounded in a country and its people. Since the Luxembourgs and the Hapsburgs, the imperial crown had belonged to a "royal house," a dynastic family. The power base of a royal house was an accumulation of crowns, rights of ownership, claims to succession, and rights of reversion — an accumulation that included the Roman imperial crown, although this was a "crown" in a wholly different sense than was the crown of Saint Louis, Saint Stephen, or Saint Wenceslaus. However, in this way, the crown of the German *king* was robbed of its substance, i.e., of the fixed orientation in terms of space and land that had characterized other medieval crowns to such a high degree, especially the crown of Saint Stephen. The strong *katechon* of Frankish, Saxonian, and Salic times had become a weaker, but still more conservative upholder and preserver. Adoption of the concepts of *corpus juris* [body of law] also had a destructive, disorienting effect, and they did not have power to consecrate Rome anew. In the constructions of 14th and 15th century jurists of Roman law, the link between Christian empire and territorial monarchy that had served to uphold the work of a *katechon* had been forgotten. Bartolus de Saxoferrato [1314-1357] and all other 14th century Italian jurists and publicists recalled nothing of the emperor's task as *katechon*. They even had forgotten the legal-historical fact that he not only was the Roman emperor, but, in the first instance, the king of Italy *vis-à-vis* northern and central Italian cities.

The dissolution of the medieval order already was evident in the dissolution of such spatial concepts. Yet, even in the doctrine of the independent *civitates superiorem non recognoscentes* [commonwealths not recognizing a superior], strong elements of a comprehensive unity represented by emperor and pope were preserved. In the 14th century, the emperor still remained guardian of the law and of the freedom of any independent *civitates*. He retained the task of rendering harmless the enemies of law, of the freedom of a *civitas*, especially a tyrant. John of Salisbury's *Policratus, sive de nugis curiolium et de vestigiis philosophorum* (1159), which contains a theory of tyranny, is a document with the political power of a self-conscious *potestas spiritualis* [spiritual power]. Therein, awareness of the task of the *katechon* already is almost completely absent. But doctrines of secular jurists and authors of the Late Middle Ages (13th-15th century) went even further, because by then a multiplicity of recognized autarkic entities had relativized the political unity of the *respublica Christiana*. Still, in current doctrines, the tyrant remained an enemy of humanity, of a humanity that had found its order

and orientation in *imperium* and *sacerdotium*. For the order of the land, the tyrant was the common enemy, just as, for the order of the sea, the pirate was the enemy of the human race. Just as, in other times, when a maritime empire emerged, and the pirate appeared to be the enemy of humanity for the order of the sea, so the tyrant, because he exercised power contrary to order in an otherwise autarkic and autonomous system, was both the internal enemy of this system and the enemy of the empire as the comprehensive spatial order. As long as they were consistent with historical reality, such universal and core concepts of enmity as *tyrant* and *pirate* not only obtained their meaning from, but affirmed the existence of the concrete order of the international law of an empire.

However, as already noted, once (beginning in the 13th century) political units were formed that not only factually, but increasingly also legally withdrew from the *imperium* and sought to restrict the *auctoritas* of the *sacerdotium* to purely spiritual matters, the medieval Christian order began to dissolve. This was expressed in the French formula of the *civitates superiorem non recognoscentes*. Yet, two questions must be asked with respect to this formula. First, who was this "superior" who is not or no longer recognized? Second, is it possible that the formula was not meant to be absolute — that it left intact institutions or procedures of a superior *potestas* or *auctoritas*, though without conceiving of them as proceeding in a straight, ascending line, as a commander and as a "superior" or "predetermined authority" in the absolutist or decisionist sense of the 16th and 17th centuries? Numerous kings, lords, and cities withdrew from the *imperium* of the German king. No doubt, that endangered the structure of the whole order. But it still was able to exist, and to maintain such decisive spatial divisions in international law as the distinction between European-Christian and non-Christian soil, and between different types of enemies and wars, in particular wars among Christians and other wars.

In contrast to the German king, Christian kings, especially the king of France, who bore the title His Most Christian Majesty, attempted, if with little success, to take the place of the *imperium* by assuming leadership of the Crusades. It would be foolish to characterize this as "anti-empire," because there are no rightfully acquired rights to the position of the *katechon*. Spanish kings called themselves emperor (*imperator*), as they did in a holy war against Islam, the foe of Christianity. None of this can be grasped either with ahistorical concepts divorced from Rome or with modern, i.e., state-centered, centralistic, and positivistic concepts of the late 19th century. For the Italian *civitates superiorum non recognoscentes*, the

German king as emperor (if also, in practice, only owing to his position as king of Italy) remained the peacemaker, the settler of disputes, and the fighter of tyrants into the 14th century. Even when the imperial *potestas* had become a powerless name, the comprehensive order of medieval European international law remained, as long as the *auctoritas* of the pope sufficed to issue mandates for missions and crusades, and to award new missionary territory. As long as this endured, a bit of historical reality still was contained in the basic division of the spatial order, in the distinction between the soil of Christian princes and peoples *vis-à-vis* that of non-Christian countries, and in the consequent bracketing of wars, i.e., in the distinction between various types of wars, and, thereby, in the concrete order of peoples.

Only a completely different spatial order ended medieval international law in Europe. It arose with the centralized, spatially self-contained, continental European state that faced emperor and pope, as well as other, similarly organized neighboring states. Unlimited free space for overseas land-appropriations was open to all such states. The new legal titles characteristic of this new, state-centered international law, which were completely foreign to the Christian Middle Ages, were *discovery* and *occupation*. The new spatial order no longer was grounded in a secure orientation, but in a balance, an "equilibrium." Until then, there had been tumultuous conditions of a terrible sort, also on European soil — conditions of "anarchy," but not of "nihilism" in the sense of the 19th and 20th centuries. If "nihilism" is not to become an empty phrase, one must comprehend the specific negativity whereby it obtains its historical place: its *topos*. Only in this way can the nihilism of the 19th and 20th centuries be distinguished from the anarchistic conditions of the Christian Middle Ages. In the connection between *utopia* and *nihilism*, it becomes apparent that only a conclusive and fundamental separation of order and orientation can be called "nihilism" in an historically specific sense.

Chapter 4

On the Meaning of the Word Nomos

The Greek word for the first measure of all subsequent measures, for the first land-appropriation understood as the first partition and classification of space, for the primeval division and distribution, is *nomos*.

This word, understood in its original spatial sense, is best suited to describe the fundamental process involved in the relation between order and orientation. Although in antiquity *nomos* already had lost its original meaning and had sunk to the level of a general term lacking any substance, i.e., a designation for any normative regulation or directive passed or decreed in whatever fashion, I want to restore to the word *nomos* its energy and majesty. Originally, it was used for statutes, acts, measures, and decrees of all sorts, so that ultimately, in our 20th century, the struggle against what had become the obvious misuse of the acts and legal technicalities of a strictly state legality could be called *nomomachy*.[1]

A. Nomos *and Law*

The fact that *nomos* and land-appropriation are related has not been evident since the Sophists. Already in Plato, *nomos* signified a *schedon* — a mere rule[2] — and Plato's *nomoi* already contain something of the utopian plan-character of modern laws. Aristotle distinguished between the concrete order as a whole, the *politeia*,[3] and the many individual *nomoi*. He

1. The expression *nomomachie* comes from James Goldschmidt, "Gesetzesdämmerung," in *Juristische Wochenschrift*, Vol. 53 (1924), pp. 245-249. Cf. Carl Schmitt, *Verfassungslehre* (1928), 5th ed. (Berlin: Duncker & Humblot, 1970), p. 142.

2. [Tr. Schmitt's reference is to "Statesman," in *The Collected Dialogues of Plato*, including the letters, ed. by Edith Hamilton and Huntington Cairns, Bollingen Series LXXI (New York: Pantheon Books, 1961), p. 294 B: "Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time." P. 1063.]

3. [Tr. In German, the word usually is mistranslated as "state" or "constitution."]

reproached Plato's book, *Nomoi* [Laws], for dealing mainly with incidental *nomoi* and only slightly with the *politeia.*[4] Aristotle's pupil Theophrast, whose 24 books contain fragments of the *Nomoi*, seems to have understood the term as designating merely the numerous regulations of the various polities. Xenophon already had defined any written directive of the authorized ruler as *nomos*, whereby he equated plebiscites (*psephismata*) with *nomos*.[5]

Yet, at least with Aristotle, something of the original link between order and orientation remains recognizable, because *nomos* remains an expression and a component of a spatially conceived, concrete *measure.* Solon, for example, is for Aristotle the *nomothet* in a specifically untenable way. As did Lycurgus, he simultaneously created *nomoi* and a *politeia* through land-division and the liquidation of debt, whereas with Draco *nomoi* existed only within a given *politeia.* The Solonic oath that the heliasts swore amounted (according to Demosthenes) to a promise to judge according to the *nomoi*, while for them land-divisions and the liquidation of debts were forbidden.[6] The famous proverb about *nomos* as *ruler,* and the ideal that *nomos* as such should govern meant something completely different to Aristotle from what is commonly thought today. Aristotle said that *nomos*, rather than demo-cratic plebiscites, should be decisive. First, then, *nomos* signified an antithesis to *psephisma*; but second, the rule of *nomos* for Aristotle is synonymous with the rule of medium-sized, well-distributed landed property. In this sense, the rule of *nomos* means the rule of the middle classes as opposed to the rule of the very rich, on the one hand, and the rule of the masses of the poor, on the other. It is necessary to read these passages in Aristotle's "Politics"[7] very carefully, in order to recognize the difference with respect to modern ideologies of the "rule of law." In this Aristotle passage, *nomos* clearly can be seen as an original distribution of land.

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4. Aristotle, "Politics," in *The Basic Works of Aristotle*, ed. with an introduction by Richard McKeon (New York: Random House, 1941), Bk. II, Ch. 6, ln. 1265a, p. 1155.

5. [Tr. Xenophontis, *Memorabilia Socratis*, ed. and annotated by Ludovici Dinodorfii (Oxonii: E. Typographeo Academico, 1862), Book I, Ch. II, §42-43, p. 23.]

6. The authenticity of the passage in Demosthenes (XXIV, 149-151) is disputed. Cf. Robert v. Pöhlmann, *Geschichte der sozialen Frage und das Sozialismus in der antiken Welt*, 3rd ed. (Munich: Beck Verlag, 1925), Vol. I, p. 329n.; Georg Busolt and Heinrich Swoboda, *Griechische Staatskunde* (Munich: Beck Verlag, 1920-26), p. 1154n.; Friedrich Oertel, *Klassenkampf, Sozialismus, und organischer Staat in alten Griechenland* (Bonn: Gebr. Scheur, Bonner Universitäts Buchdr., 1942), p. 58n. The connection between *nomos* and land-appropriation remains recognizable in any case, regardless of the authenticity of the Demosthenes passage.

7. [Tr. Aristotle, "Politics," in *The Basic Works of Aristotle, op. cit.*, Book IV, Ch. 3, 1290a-1290b, pp. 1208-1209.]

Thus, the original meaning of *nomos* — its origin in land-appropriation — still is recognizable. The original meaning was destroyed by a series of distinctions and antitheses. Most important among them was the opposing of *nomos* and *physis*, whereby *nomos* became an imposed *ought* dissociated from and opposed to *is*. As a mere norm and act, *nomos* no longer could be distinguished from *thesmos* [law or legislation], *psephisma* [plebiscite], or *rhema* [command],[8] and from other categories whose content was not the inner measure of concrete order and orientation, but only statutes and acts. As they became more centralistic, they became more intense, until ultimately they meant nothing more than the legalitarian enactment of acts with the "chance to compel obedience."[9]

In contradistinction, when I use the word *nomos* (again in its original sense), the point is not to breathe artificial new life into dead myths or to conjure up empty shadows. The word *nomos* is useful for us, because it shields perceptions of the current world situation from the confusion of legal positivism, in particular from the muddle of words and concepts characteristic of 19th century jurisprudence dealing with domestic matters of state. Thus, it is necessary to recall the word's original meaning and its connection with the first land-appropriation. The coming *nomos* of the earth will not be an excavation of early institutions, but neither should it be confused with that system of norms called legality or with the legislative excesses of the last century. Despite the change in the way *nomos* was conceived and expressed, which already was evident in the classical age, originally the word did not signify a mere act whereby *is* and *ought* could be separated, and the spatial structure of a concrete order could be disregarded. This later application of the term belongs rather to the linguistic usage of a declining era that no longer knew how to connect with its origin and beginning, and that no longer distinguished fundamental law as concrete order and orientation from all the sundry acts, statutes, orders, measures, and decrees entailed in the management and control of a commonwealth. Latter-day rulers in the Hellenistic or Caesaristic style, who no longer constituted, but only controlled, were able to establish themselves on the remnants of

8. In the distich to Leonidas and the Thermopylae warriors, it reads: "*rhemasi peithomenoi*" — obedient to the *commands* (of the ephors). Later, this became *nominois peithomenoi*. Cicero translated it as *legibus obsequimur* [in compliance with the law], and Schiller "as the law (*Gesetz*) commands." See the significant little treatise by Hans Schaefer, "Die Schlacht in der Thermopylen," in *Die Wandlung: Eine Monatsschrift*, Vol. III, No. 6 (1948), pp. 504-517.

9. [Tr. Here Schmitt employs a concept (*Gehorsams-Erzwingungs-Chance*) adopted from Max Weber, which is a conjunction of three "value-free" terms: obedience, compulsion, and chance.]

older orders, which they used to create allegiance and obedience.

Not to lose the decisive connection between order and orientation, one should not translate *nomos* as law (in German, *Gesetz*), regulation, norm, or any simililar expression.[10] *Nomos* comes from *nemein* — a [Greek] word that means both "to divide" and "to pasture." Thus, *nomos* is the immediate form in which the political and social order of a people becomes spatially visible — the initial measure and division of pasture-land, i.e., the land-appropriation as well as the concrete order contained in it and following from it. In Kant's words, it is the "distributive law of mine and thine," or, to use an English term that expresses it so well, it is the "radical title." *Nomos* is the *measure* by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity. The *nomos* by which a tribe, a retinue, or a people becomes settled, i.e., by which it becomes historically situated and turns a part of the earth's surface into the force-field of a particular order, becomes visible in the appropriation of land and in the founding of a city or a colony. The often quoted expressions of Pindar and Heraclitus are not meaningful for just any law or even for a norm separated sophistically from the concrete *physis* and opposed to it as a "thesis," but only for such a *nomos*. In particular, *nomos* can be described as a wall, because, like a wall, it, too, is based on sacred orientations. The *nomos* can grow and multiply like land and property: all human *nomoi* are

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10. I have great respect for the efforts of Wilhelm Stapel and Hans Bogner, who have given *nomos* the meaning *Lebensgesetz* [law of life]. But, apart from the word *Leben*, which has degenerated into the biological, I am bothered by the word *Gesetz*, which must be avoided at all costs. Clarification of the word *Gesetz* is especially difficult in German. The German language today is largely one of theologians — the language of Luther's bible translation — and as well a language of craftsmen and technicians (as Leibniz observed). In contrast to French, it is not a language of jurists or of moralists. German gives a heightened, even sublime significance to the word *Gesetz*. Poets and philosophers love the word, which acquired a sacred tone and a numinous power through Luther's bible translation. Even Goethe's *Urworte orphisch* is nourished by this source: "*Nach dem Gesetz, nach dem du angetreten*" [According to the law by which you began]. Nevertheless, unlike the Greek word *nomos*, the German word *Gesetz* is not an *Urwort* [primeval word]. It is not even a very old word in written German. It is deeply entangled in the theological distinctions between (Jewish) law and (Christian) grace — the (Jewish) law and the (Christian) gospel. Ultimately, the word had the bad luck to lose its potential for substantive meaning precisely among the jurists who were supposed to keep it inviolate. In the contemporary world situation, it expresses only the positivistic artifice of what is *enacted* or *obliged* — the mere will to compliance, or, in Max Weber's sociological formulation, the will to realize a "chance to compel obedience."

"nourished" by a single divine *nomos*. A word like "nomo*cracy*" also makes sense, whereas one scarcely can speak of a "nom*archy*." Images like "wall" or "nourishment" are no more unscholarly than is Savigny's "source" of law, which was used even by 19th century legal positivists, although what Savigny took seriously became with them a mere metaphor. It surely is significant that *nomos* can refer also to a scale or succession of notes, i.e., to a musical order. But with all these various images, for our legal-historical context we must take heed that the word not lose its connection to a historical process — to a constitutive act of spatial ordering.[11]

Scholarly discussion of *nomos* until now has been bewildering, because most jurists still speak the language of the late — positivistic — 19th century, while philosophers and philologists (one cannot hold it against them) follow the concepts of jurists. The worst cross to bear in their vocabulary, however, is the word *law*. Through the application of this unfortunate word, terms, concepts, and conceptual antitheses of our contemporary, completely deteriorated situation are projected into discussions of the genuine and original word *nomos*. For decades, the contemporary situation has been characterized by the centralistic state's misuse of legality.[12] The only corrective is the concept of legitimacy that today is rather impotent.[13] Legality now is only the functional mode of a state bureaucracy, which, of course, must concern itself with enactment of acts emanating from the central command-post responsible for this bureaucracy. For legality and for the legal clients subordinated to it, this is "positivism." In an age such as this, it is inexpedient to Germanize *nomos* as "law."

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11. We have a simple and sure touchstone for the fact that the original meaning of *nomos* has been distorted. The Greek language contains many compounds in which the noun *nomos* is attached to a verb, such as *patronomein*, *basileuonomein*, *persinomein*. In this respect, see Hans Schaefer, "Patronomos," in Pauly's *Realencyclopädie der classischen Altertumswissenschaft*, revived by Georg Wissowa, continued by Wilhelm Kroll and Karl Mittelhaus, ed. by Konrat Ziegler (Stuttgart: Alfred Druckenmüller Verlag, 1949), Vol. 36, No. 3, pp. 2295-2306. Properly translated, these would be: rule of the fathers or paternal rule, rule of a king, Persian rule, etc. If, however, there were really a rule of *nomos* in the sense of rule by abstract laws, then there also should be the word *nomonomia*. Of course, this is not the case. Such a compound word only reveals the absurdity of the concepts on which it is based.

12. [Tr. Here Schmitt uses the word *Gesetzestaat* (literally: law state). Codification had ushered in the primacy of positive law. A *Gesetzestaat* is a legislative state whose jurists are no longer an autonomous estate within civil society, but rather a state bureaucracy. The "source" of law is no longer the established traditions of jurists, but the legislated enactments of bureaucratic mandarins.]

13. Cf. Carl Schmitt, *Legalität und Legitimität* [1932] (Berlin: Duncker & Humblot, 1968).

Counter-concepts to law, which are either antithetically or dialectically determined by this type of "legalism," can be used neither in their contemporary sense to represent *nomos* nor as antitheses to the law of the legalitarian state. Thus, it is no more expedient to translate *nomos* with words like tradition, custom, or contract than with the word law.

Today, the natural sciences also speak incessantly of "laws." In this respect, the concept of law may be even more bewildering in the positivism of the natural sciences than in the positivism of jurisprudence, precisely because the "natural law" of the natural sciences only denotes a calculable function without substance. The positivism of the natural sciences knows no origin and no archetype, only causes. It is interested, as its founder Auguste Comte said, solely in the "law of appearance," not in the law of inception. For it, home and origin are not core characteristics, which is why he abolishes the link between order and orientation. Philosophical criticism, from which one should expect clarification, only made the matter more bewildering. German philosophers and social scientists of the late 19th century, led by Heinrich Rickert and Wilhelm Windelband, divided the sciences into the natural and the intellectual (or cultural) sciences. This was a defensive action against the blind absolutization of the scientific ethos current at the time, which was rooted in the natural sciences. As an attempt to salvage historical thinking, it was not without meaning or merit. But, unfortunately, in the process the word *nomos* fell on the side of purely natural laws. It was not the intellectual, cultural, or historical sciences, but the natural sciences that Windelband characterized as "*nomo-thetic*." This was a manifestation of the power of a typical course of events no longer aware of its own existential situation: the functionalization of *nomos* into "law" in the style of the 19th century.

B. Nomos *as Ruler*

The aforementioned passage from Pindar,[14] handed down to us primarily by Herodotus[15] and Plato,[16] and reconstructed with the help of several scholia, speaks of *nomos basileus*: *nomos* as king. Characterizations of *nomos* as king, ruler, despot, and tyrant are numerous. We have seen what

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14. Pindar, *Carmina cum Fragmentis*, ed. by Bruno Snell (Lipsiae in Aedibus: B. G. Teubneri, 1955), fr. 169, p. 274.

15. Herodotus, in *The Greek Historians: The Complete and Unabridged Historical Works of Herodotus, Thucydides, Xenophon, Arrian*, ed. and annotated by Francis B. Goldolphin, 2 vols. (New York: Random House, 1942), Vol. I, Book III, No. 38, p. 181.

16. Plato, "Gorgias," in *The Collected Dialogues of Plato, op. cit.*, 484b, p. 267.

nomos as ruler means in Aristotle: first, it means a counter-concept to the rule of plebiscites; second, it means the rule of a medium-sized, well-distributed landed property.[17] A passage in Herodotus referring to the Spartans speaks of *nomos* as the despot.[18] In context, it is a reply to the Asiatic despot Xerxes, and does not necessarily have in view the specific military discipline of the Spartans; more likely, it refers to the structure of the Spartan order as a whole. In the Pindar passage,[19] it deals with the theft of cattle, an act of Heracles, the mythical founder of order, whereby, despite the violence of the act, he created law. In Plato, it is the Sophist Callicles who cites the Pindar passage and interprets it in the sense of a mere enactment of an act. In this reading, *nomos* would be nothing more than the arbitrary right of the stronger. It would be an expression of what one in Germany today calls the *normative power of the given* — an expression of the *metamorphoses* of *is* into *ought*, of actuality into law. And that would be an expression of modern legal positivism. In other passages,[20] Pindar appears to have been uncertain. But Hölderlin also confuses his interpretation of the Pindar passage by translating the word *nomos* as "law," and by taking the false path of this unfortunate word, although he knew that, in the strictest sense, law is mediation. In its original sense, however, *nomos* is precisely the full immediacy of a legal power not mediated by laws; it is a constitutive historical event — an act of *legitimacy*, whereby the legality of a mere law first is made meaningful.

In connection with this often mentioned Pindar passage, three more recent and significant treatises — by Hans Erich Stier, Hans Niedermeyer, and Alfred von Verdross, respectively — have been particularly useful to me in the philological and juridical clarification of the word *nomos*.[21] Stier praises characterizations of *nomos* as "the higher objective" or "the soul of the whole," which he considers to be "the best formulations." In reality, these are only idealistic-rhetorical paraphrases

17. Cf. Part I, Ch. 4, p. 67, note 3.
18. Herodotus, *op. cit.*, Vol. I, Book VII, No. 104, p. 423.
19. Pindar, *Carmina cum Fragmentis*, *op. cit.*, fr. 169, p. 274.
20. *Ibid.*, fr. 81, pp. 236ff.
21. Hans Erich Stier, "Nomos Basileus," in *Philologos: Zeitschrift für das klassische Altertum und sein Nachleben*, Vol. 83 (1928), pp. 225-258; Hans Niedermeyer, "Aristoteles und der Begriff des Nomos bei Lykophron," in *Festschrift für Paul Koschaker, mit Unterstützung der Rechts- und Staatswissenschaftlichen Fakultät der Friedrich-Wilhelms-Universität Berlin und der Leipziger Juristenfakultät zum sechzigsten Geburtstag überreicht von seinem Fachgenossen* (Weimar: Bolaus, 1939), Vol. III, pp. 140-171; and Alfred von Verdross, "Die Rechtslehre Heraklits," in *Zeitschrift für öffentliches Recht*, Vol. 22 (1942), pp. 498-507.

that miss the concrete spatial sense of the term, i.e., the first measurement of land. Occasionally, apt definitions of *nomos* can be found in Niedermeyer, such as "distributed power of a definitive type" or "real power and concretely effective."[22] Above all, Niedermeyer rightly saw that in Pindar and Solon *nomos* is used even for the singular act of distribution.[23] The correctness of this thesis lies in the fact that it manifests the connection between *nomos* and the first concrete and constitutive distribution, i.e., land-appropriation. This sense of *nomos* is uppermost in Pindar and Solon. Unfortunately, Niedermeyer devalues his extraordinarily important realization by characterizing this original meaning as "highly archaic." A remnant of substance can be found in Aristotle and Lycophron (who understands *nomos* as a "security for the substance of law"). Niedermeyer also calls this "archaic,"[24] because, rather than recognizing the normativistic formulations of a late positivism of enactments as mere degenerations, evasions, and disintegrations, he rates them as highly "progressive forms" and scientific achievements, and brings his own concepts into line with them. Finally, Verdross, entirely in keeping with his manner of jurisprudential thinking, is bound antithetically by his normativistic concept, even where he correctly recognizes the non-normative sense of Heraclitus' statement. Thus, he speaks of the "law of becoming," so that the reader must work hard for the real fruits of this valuable treatise in a constant struggle with normativistic suppositions.

By comparison, Jost Trier's research has made recognizable once again the orientational character of original words. This is especially true for words like "ridge" and "gable" and the word-groups for "house," "fence," and "enclosure." "In the beginning was the fence. Fence, enclosure, and border are deeply interwoven in the world formed by men, determining its concepts. The enclosure gave birth to the shrine by removing it from the ordinary, placing it under its own laws, and entrusting it to the divine." The enclosing ring — the fence formed by men's bodies, the manring — is a primeval form of ritual, legal, and political cohabitation. In the further course of our investigation, it will prove quite fruitful to refer to this realization that law and peace originally rested on *enclosures in the spatial sense*. In particular, it was not the abolition of war, but rather its bracketing that has been the great, core problem of every legal order. As

22. Niedermeyer, "Aristoteles und der Begriff des Nomos bei Lykophron," *op. cit.*, pp. 150 and 151n., respectively.
23. *Ibid.*, p. 152n.
24. *Ibid.*, p. 170.

regards the etymology of *nomos*, Trier proves beyond a doubt that it is a fence-word. "Every *nomos* consists of what is within its own bounds." *Nomos* means dwelling place, district, pasturage; the word *nemus* has the same root and can have ritual significance as forest, grove, woods.[25]

A certain danger in our emphasis on the spatial origin of legal concepts could lie in the fact that, when generalized too widely, this emphasis leads to the abstract philosophical problem of the relation between *space* and *time*, and runs onto the tracks of the old, banal, and beloved antithesis of space and time. The discussion then leads either into the train of thought of Bergsonian philosophy, and opposes intelligence to instinct by presenting space as something "intellectual" in contrast to "concrete time," or into a type of thinking that became fashionable in Germany after 1939, whereby a mere reversal of values in this antithesis occurred. The result: space appears to be concrete being, and time appears to be intellectually abstract. Both can be construed shrewdly, but neither is intended here. Thus, both should be avoided.

The original spatial character of the word *nomos* could not hold in Greek antiquity either. Solon's directives, which at first were called *thesmoi*, were later called *nomoi*. The designation *nomoi* for the provinces or districts of the Ptolemaic empire comes perhaps from the Egyptian word *nomes*. The fact that such uses of the Greek *nomos* as spatial designations still were possible in the Hellenistic age is not insignificant. On the whole, however, the Sophists' normativistic and positivistic reinterpretations of *nomos* as mere law and statute had been established in classical antiquity. This change in meaning had to occur as a consequence of the dissolution of the *polis*. It peaked in the Hellenistic and later in the Caesaristic cult of the political ruler. Since Alexander the Great was worshipped as a god, and since in the Hellenistic empires deification of the ruler became an institution, one no longer could distinguish between *nomos* and *thesis*. The positivism of the Sophists is only the expression of a typical, if abnormal development.

The paradox and aporia [dead-end] of the mere enactment of acts was at that time only a matter of a few philosophizing subjects. In no way was it perceived generally as "formal progress"; it remained embedded in heathen popular religion. Later, after the victory of Christ over the Caesars, a new religion took over the historical legacy of classical antiquity. Thus, the progress made by the Sophists was in no way historically the same as

25. Jost Trier, "Zaun und Mannring," in *Beiträgen zur Geschichte der deutschen Sprache und Literatur*, Vol. 66 (1943), p. 232.

19th century legal positivism, which had become un-Christian and atheistic. This modern positivism of enactments was the creation of disillusioned jurists, whose mental attitude after the political disappointments of 1848 was the basis for the claim of the supremacy of the natural sciences, of the progress of industrial-technical development, and of the new claim of the legitimacy of revolution. These jurists did not notice that, in the nihilism of such times as theirs, enactments become only destructive acts. Despite Savigny's warning, they did not once see the degree to which their putative legal positivism was calling into question their own historical, intellectual, and professional presuppositions. The law logically became an act oriented to state authorities with the power to apply it and the "chance to compel obedience." "Law" and "regulation" no longer could be distinguished. Every public or secret decree could be called a law, because it was executed by state authorities; its chance to compel obedience was not lower, but perhaps even higher than that of statutes, which, after the most unwieldy discussions, were acclaimed and proclaimed in the most public manner. From such a legal philosophy, no terminology or vocabulary could emerge that would provide a word[26] for *nomos*.

C. Nomos *with Homer*

Another phrase I would like to employ in the discussion of *nomos* threatens to lead us into a thicket of possible philological interpretations. I mean the well-known passage at the beginning of *The Odyssey*, which, in the standard version, reads: *χαὶ νόον ἔγνω.*[27] I prefer the variant: *χαὶ νόμον ἔγνω.*[28] The first lines of *The Odyssey* are:

> "Tell me, Muse, of the man of many devices, driven far astray
> after he had sacked the sacred citadel of Troy. Many were the
> men whose cities [*ἄστεα*] he saw and whose minds [*νόον* or *νόμον*]
> he learned, and many the woes he suffered in his heart upon

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26. [Tr. Here Schmitt literally says the "German" word for *nomos*, but the same consequences of legal positivism are evident in English and other Western languages.]

27. [Tr. Schmitt does not mention the standard German version, but see the English version: Homer, *The Odyssey*, with an English translation by A. T. Murray, revised by George E. Dimock, 2 vols. (Cambridge, MA: Harvard University Press, 1995), Vol. I, Book 1, Verse 3, pp. 12 (Greek) and 13 (English).]

28. Cf. Rudolf Hirzel, *Themis, Dike und Verwandtes: Ein Beitrag zur Geschichte der Rechtsidee bei den Griechen* (Leipzig: S. Hirzel, 1907); Georg Busolt, *Griechische Staatskunde* (Munich: Beck Verlag, c1920-1926), p. 456; and further references in the essays by Stier, Niedermeyer, and Verdross mentioned in Part I, Ch. 4, p. 73, n. 21. [Tr. The Greek text also gives this variant in a note, ascribing it to Zenodotus.]

the sea, seeking to win his own life and the return of his comrades."

Unlike Niedermeyer, I think it is both useful and fruitful to consider precisely this passage of *The Odyssey* in an attempt to clarify the word *nomos*. The standard version insists on *noos* [mind or sense] instead of *nomos*. We leave open whether these two words are etymologically unrelated or whether perhaps they can be traced to the same root. In any case, they no longer mean the same thing today. We can put aside, too, the problem of the other *noos* passages in *The Odyssey*,[29] without deciding whether *nomos* might be more appropriate in these passages as well. The fact that *nomos* does not occur otherwise in Homer is not a conclusive argument. On the whole, most convincing for me is that, at the beginning of *The Odyssey*, the poet speaks in Verse 3 of land, and in Verse 4 of sea; and it is *nomos* (rather than *noos*) that is associated with land in a specific way.[30]

According to the standard version, *noos* (rather than *nomos)* signifies the point at which Odysseus presumably "comprehended" the *noos*, i.e., the spirit, intellect, mentality, and character of many people or even of the cities of many people. The resourceful hero subsequently took an interest in the distinctive "spirit" of one of the various cities or of "many people," and presumably became something like the first social psychologist — a kind of predecessor of a Montesquieu, a Herder, or even a Hellpach or Count Keyserling. A truly moving rewriting of the old seafarer! And he even "comprehended" this *noos*, which is to say that Odysseus already was practicing epistemology as a neo-Kantian *avant la lettre* [before the fact]!

The joining of cities and citadels (ἄστεα) with a *noos* in the sense of spirit, intellect, and mentality seems to me to be completely absurd, because *noos* is common to all people. A fortified city (ἄστυ) does not *per se* have its own special *noos*, but it does have its own specific *nomos*. To attempt to comprehend the *noos*, which is something generally human, by differentiating among individual cities or even fortified cities would have been completely foreign to the thinking of antiquity. Only in modern psychological distinctions — relating to "spirit" or *esprit* — can "spirit" be a historical and social-psychological theme that can be applied to cities and citadels. Herodotus speaks precisely of the difference in the customs and habits of diverse peoples. He includes a description of these differences in

29. Homer, *The Odyssey*, *op. cit.*, Vol. I, Book 6, Verse 121, p. 228 (Greek) and p. 229 (English); Vol. II, Book 24, Verse 474, p. 446 (Greek) and 447 (English).

30. This is the viewpoint taken by Alfons Höltermann (Cologne) with reference to my book *Landund Meer* (Leipzig: Reclam Verlag, 1942).

a very famous passage in which he cites Pindar's maxim, *nomos basileus*. It never would have occurred to a Hellenist to relate these differences to *noos*, rather than to *nomos*. Neither can one speak of the *noos* of "many people," since *noos* is universally human — common not just to many, but to all thinking people — whereas something walled or enclosed, or a sacred place, all of which are contained in the word *nomos*, expresses precisely the divisional and distinguishing orders whose particularity necessarily would be of interest to a perceptive and "very wily" seafarer.

D. Nomos *as a Fundamental Process of Apportioning Space*

As long as the Greek word *nomos* in the often cited passages of Heraclitus and Pindar is transformed from a spatially concrete, constitutive act of order and orientation — from an *ordo ordinans* [order of ordering] into the mere enactment of acts in line with the *ought* and, consistent with the manner of thinking of the positivistic legal system, translated with the word *law* — all disputes about interpretation are hopeless and all philological acumen is fruitless. Matters are complicated further by the fact that most philological interpreters obviously have no sense of how totally the word *law* was functionalized by late 19th century jurists into the positivistic legal system of the modern state apparatus, until legality had become merely a weapon used at any given time by those legislating against the party excluded from legislation. In reality, the words of Heraclitus and Pindar mean only that all subsequent regulations of a written or unwritten kind derive their power from the inner measure of an original, constitutive act of spatial ordering. This original act is *nomos*. All subsequent developments are either results of and expansions on this act or else redistributions (*anadasmoi*) — either a continuation on the same basis or a disintegration of and departure from the constitutive act of the spatial order established by land-appropriation, the founding of cities, or colonization.

Such constitutive processes are certainly not everyday occurrences, but neither are they simply matters of bygone times and only of archeological or antiquarian interest today. As long as world history remains open and fluid, as long as conditions are not fixed and ossified; in other words, as long as human beings and peoples have not only a past but also a future, a new *nomos* will arise in the perpetually new manifestations of world-historical events. Thus, for us, *nomos* is a matter of the fundamental process of apportioning space that is essential to every historical epoch — a matter of the structure-determining convergence of order and orientation in the cohabitation of peoples on this now scientifically surveyed planet.

This is the sense in which the *nomos* of the earth is spoken of here. Every new age and every new epoch in the coexistence of peoples, empires, and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, and new spatial orders of the earth.

Chapter 5

Land-Appropriation as a Constitutive Process of International Law

The latest period of European international law, based on the great land-appropriations of the 16th and 17th centuries and now coming to an end, will be discussed fully in the following chapters. The period that preceded it was based on the results of the so-called *Völkerwanderung*, which was not so much a migration of peoples as a series of great land-appropriations.

Not every invasion or temporary occupation is a land-appropriation that founds an order. In world history, there have been many acts of force that have destroyed themselves quickly. Thus, every seizure of land is not a *nomos*, although conversely, *nomos*, understood in our sense of the term, always includes a land-based order and orientation. If we add the domain of the sea, then the relation between land and sea determines the spatial order of international law. If the domination of airspace is added as a third dimension, then still other new spatial orders arise. Even then, however, a land-appropriation of the earth's soil remains fundamentally significant. For this reason, our approach to the study of international law based on the concept of land-appropriation still is meaningful.

The term *Landnahme* (land-appropriation),[1] used here to describe a process of order and orientation that is based on firm land and establishes law, has been in common usage only in the last few decades. Earlier, one

1. Heinrich Brunner already uses the term *Landnahme*, whereas Karl Binding, for example, is not yet aware of it. See, respectively, Heinrich Brunner, *Deutsche Rechtsgeschichte*, 2nd ed. (Leipzig: Duncker Verlag, 1906), Vol. I, pp. 72f.; and Binding, *Das burgundisch-romanische Königsreich*, *op. cit.*). A rare instance of the conscious use of the term *Landnahme* in terms of jurisprudence occurred in a discussion of international law during the proceedings of the German Colonial Congress of 1905. *Verhandlungen des Deutschen Kolonialkongresses, 5, 6, und 7. Oktober 1905* (Berlin: Reimer, 1906), p. 410. There, Felix Stoerk spoke on "Das Phänomen der Landnahme, der Kolonisation und das Problem der (heute) unter der Kontrolle der gesamten Staatenwelt sich vollziehenden Landnahme."

spoke not of *Landnahme*, but only of Land-*Teilungen* (land-divisions). Of course, with any land-appropriation there is in some way also a division and distribution of the seized land. But the division is only a consequence of land-appropriation; it is the effluence and effect of the radical title established externally and internally by the land-appropriation.[2] The term *Landteilung* (land-division) no doubt still is influenced by Luther's bible translation, which refers to the seizure and division of the land (division by lot among the individual tribes),[3] and which, in the classic passage, reads: "So Joshua took [seized] the whole land, according to all that the Lord said unto Moses; and Joshua gave it for an inheritance unto Israel according to their divisions by their tribes. And the land rested from war."[4]

For our purposes, the term land-appropriation is better than land-division, because land-appropriation, both externally and internally, points clearly to the constitution of a radical title. As for the fact of the matter in international law, the word "division" directs attention too much to the internal process of distribution (by lots or other means) and the creation of various types of ownership of the seized land, be it public domain or fiscal property, royal domain or clan property, collective or individual property, or a feudal law of superior or inferior proprietorship.[5]

In all ages, all peoples who opened up new spaces and became settled after their wanderings — Greek, Italian, Germanic, Slavic, Magyar,[6] and other clans, tribes, and retinues — effected land-appropriations. The history of colonialism in its entirety is as well a history of spatially determined processes of settlement in which order and orientation are combined. At this origin of land-appropriation, law and order are one; where order and orientation coincide, they cannot be separated. Viewed in

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2. Until now, there has been only one comprehensive legal-historical monograph devoted to the land-appropriation of the Germanic tribes and peoples during the period of the *Völkerwanderung* — a book by the Breslau jurist Gaupp, published over 100 years ago, in 1844. It has the title *Die germanischen Ansiedlungen und Landtheilungen in den Provinzen des Römischen Weltreiches*, *op. cit.*

3. Numbers 34:13 in *The Holy Bible*, *op. cit.*, p. 212.

4. Joshua 11:23 in *The Holy Bible*, *op. cit.*, p. 272.

5. An excellent overview of the possibilities presented here is contained in an essay by Wilhelm Wengler, "Vergleichende Betrachtungen über die Rechtsformen des Grundbesitzes der Eingeborenen," in *Beiträge zur Kolonialforschung*, Vol. 3 (1943), No. 24, pp. 88-133.

6. I mention the Magyars in particular, because in Hungary the memory of the land-appropriation (895 AD) is especially strong and there, unlike in other countries, even the word for land-appropriation (*honfoglalás*) still is used.

terms of legal history, if we disregard the mere acts of violence that quickly destroy themselves, there are two different types of land-appropriations: those that proceed *within* a given order of international law, which readily receive the recognition of other peoples, and *others*, which uproot an existing spatial order and establish a new *nomos* of the whole spatial sphere of neighboring peoples. A land-appropriation occurs with every territorial change. But not every land-appropriation, not every alteration of borders, not every founding of a new colony creates revolutionary change in terms of international law, i.e., is a process that constitutes a new *nomos*. In particular, it depends upon whether there is free land to be had, and whether there are accepted forms for the acquisition of non-free land. For example, Vitoria's doctrine of just war made possible the appropriation of foreign, non-free land. The many conquests, surrenders, occupations, annexations, cessions, and successions in world history either fit into an existing spatial order of international law, or exceed its framework and have a tendency, if they are not just passing acts of brute force, to constitute a new spatial order of international law.

In principle, this typical antithesis of constitutive and constituted easily is understood. The differentiation between constitutive acts and constituted institutions, the juxtaposition of *ordo ordinans* and *ordo ordinatus* [order of the ordered], of *pouvoir constituant* [power to constitute] and *pouvoir constitué* [power to be constituted], is generally well-known. Yet, jurists of positive law, i.e. of constituted and enacted law, have been accustomed in all times to consider only the given order and the processes that obtain within it. They have in view only the sphere of what has been established firmly, what has been constituted; in particular, only the system of a specific state legality. They are content to reject as "unjuridical" the question of what processes established this order. They find it meaningful to trace all legality back to the constitution, or to the will of the state, which is conceived of as a person. However, they have an immediate answer for the further question regarding the origin of this constitution or the origin of the state; they say it is a mere fact. In times of unproblematic security this has a certain practical rationale, when one considers that modern legality, above all, is the functional mode of a state bureaucracy, which has no interest in the right of its origin, but only in the law of its own functioning. Nevertheless, the theory of constitutive processes and power manifestations that produces constitutions also involves questions of jurisprudence. There are several types of law. There is not only state legality, but also law that precedes the state, law that is external to the

state, and law among states.[7] As for international law in particular, in every period of history there are coexisting empires, countries, and peoples that develop multifarious ways of ordering their coexistence, the most important components of which are public and private principles and procedures for territorial changes.

With this consideration of the significance of land-appropriation in international law, we have obtained the possibility of comprehending in terms of legal history and legal philosophy the basic event in the history of European international law — the land-appropriation of a new world.

7. The most significant and superbly formulated modern discussion of this need to consider a plurality of types of law is that of the great French law professor, Maurice Hauriou. There are jurists who accept only statute law as juridical law, as "law in the legal sense," as Rudolph Sohm characteristically put it. Hauriou says: "Their error consists in their belief that there is only one type of law, whereas there are at least two: state law, and a law that precedes the state (*celui de l'Etat et celui antérieur à l'Etat*) and gives it an absolute value." According to Hauriou, the state is an institution whose law is restricted primarily to the sphere internal to the state and which presupposes a normal situation of peace. In foreign relations and during domestic unrest, particularly during a civil war, there is a primitive law that is no less law than that of state legality. Every state constitution has reference to a law that precedes the state; it is thus not a *mere fact*. Furthermore, one should not confuse the constitutional law of modern states and its constitutive power with these constitutive acts of the law of a *liberté primitive*. The *pouvoir constituant* in modern states can be conceived of only in state legality and can be only a particular kind of *pouvoir législatif*. See Maurice Hauriou, *Précis de droit constitutionnel* (Paris: Recueil Sirey, 1923), pp. 284 ff.

Part II

The Land-Appropriation of a New World

Chapter 1

The First Global Lines

No sooner had the contours of the earth emerged as a real globe — not just sensed as myth, but apprehensible as fact and measurable as space — than there arose a wholly new and hitherto unimaginable problem: the spatial ordering of the earth in terms of international law. The new global image, resulting from the circumnavigation of the earth and the great discoveries of the 15th and 16th centuries, required a new spatial order. Thus began the epoch of modern international law that lasted until the 20th century.

The struggle over land- and sea-appropriations of the New World began immediately after its discovery. The division and distribution of the earth increasingly became a concern of peoples and powers existing in close proximity. Lines were drawn to divide and distribute the whole earth. These were the first attempts to establish the dimensions and demarcations of a global spatial order. Since these lines were drawn during the first stage of the new planetary consciousness of space, they were conceived of only in terms of surface areas, i.e., superficially, with divisions drawn more or less geometrically: *more geometrico.* Later, when historical and scientific consciousness had *assimilated* (in every sense of the word) the planet down to the last cartographical and statistical details, the practical-political need not only for a geometric surface division, but for a substantive spatial order of the earth became more evident.

From the 16th to the 20th century, European international law considered Christian nations to be the creators and representatives of an order applicable to the whole earth. The term "European" meant the normal status that set the standard for the non-European part of the earth. *Civilization* was synonymous with *European* civilization. In this sense, Europe was still the center of the earth. With the appearance of the "New World," Europe became the Old World. The American continent was really a completely new world, because not even those scholars and

cosmographers of antiquity and the Middle Ages, who knew the earth was a ball and that India could be reached on the way to the West, had any inkling of the great continent between Europe and East Asia.

In the Middle Ages, Christian princes and peoples of Europe considered Rome or Jerusalem to be the center of the earth, and regarded themselves as part of the Old World. Many thought the world was old and close to ruin. For example, this attitude dominates part of Otto of Freising's historical work.[1] It was consistent with the Christian concept of the world, which saw the empire as a restrainer (*katechon*) of the Antichrist. By then, the most dangerous foe — Islam — was no longer new; in the 15th century, Islam was already an old foe. In 1492, when a "new world" actually emerged, the structure of all traditional concepts of the *center* and *age* of the earth had to change. European princes and nations now saw a vast, formerly unknown, non-European space arise beside them.

Most essential and decisive for the following centuries, however, was the fact that the emerging new world did not appear as a new enemy, but as *free space*, as an area open to European occupation and expansion. For 300 years, this was a tremendous affirmation of Europe both as the center of the earth and as an old continent. But it also destroyed previously held concepts of the center and age of the earth, because it initiated an internal European struggle for this new world that, in turn, led to a new spatial order of the earth with new divisions. Obviously, when an old world sees a new world arise beside it, it is challenged dialectically and is no longer old in the same sense.

A. Global Linear Thinking

The first attempts in international law to divide the earth as a whole according to the new global concept of geography began immediately after 1492. These were also the first adaptations to the new, planetary image of the world. Apparently, they were initially nothing more than crude seizures of land as part of an immense appropriation. Yet, the struggle among Europowers for land-appropriations made necessary certain divisions and

These sprang from what I call *global linear thinking*, which

a chapter in the historical development of spatial consciousness. It began with the discovery of a "new world" and the start of the "modern age," and kept pace with the development of geographical maps and of the

1. [Tr. During the German civil war, Otto of Freising (1114-1158) wrote *Chroni*- sometimes called *De duabus civitatibus*, in eight books. Following Augustine and it contrasts Jerusalem and Babel, the heavenly and the earthly kingdoms.]

globe itself. The word *global* captures the encompassing and planetary, as well as the external and superficial character of this type of thinking, based on the equation of land and sea surfaces. The compound term "global linear thinking" seems very fitting. At any rate, it is conceptually clearer and historically more accurate than are other characterizations, such as Friedrich Ratzel's word "hologaic" [literally, whole earth];[2] it is also better than "planetary" or similar designations, which refer to the whole earth, but fail to capture its characteristic type of division.

The question was political from the start; it could not be dismissed as "purely geographical." As scientific, mathematical, or technical disciplines, geography and cartography certainly are neutral. However, as every geographer knows, they can be instrumentalized in ways both immediately relevant and highly political. This is particularly evident with respect to the concept of the Western Hemisphere. Despite the neutrality of geography as a science, purely geographical concepts can generate a political struggle, which sometimes justifies Thomas Hobbes' pessimistic maxim that even arithmetic and geometric certainties become problematic if they fall within the sphere of the political: the intense friend-enemy distinction. For example, the fact that the prime meridian of the earth's cartographic grid is still the one that runs through Greenwich is neither purely objective and neutral nor purely coincidental; it was the result of a rivalry between various prime meridians. The French, who for 200 years were locked in a struggle with the English for domination of the sea and the world, regarded the Paris Observatory as the prime meridian since the 18th century. Only in the 20th century did they abandon their opposition to the Greenwich meridian. Only in 1916 did the Berlin Yearbook of Astronomy change over to the Greenwich meridian. Thus, it is not an excessive politicization of this apparently purely mathematical-geographical problem, if we consider the universal validity of the Greenwich prime meridian to be a symbol of the former English domination of the sea and the world.

No sooner had the first maps and globes been produced, and the first scientific concept of the true form of our planet and of the New World in the West been established, than the first global lines of division and distribution were drawn. Shortly after the discovery of America, the famous line in Pope Alexander VI's edict *Inter caetera divinae* (May 4, 1494)

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2. [Tr. Friedrich Ratzel (1844-1904) was known for the biologistic approach he used in his *Anthropogeographie* (2 vols., 1882-91) and *Politische Geographie* (1897), as well as for writing the first philosophy of world history: *Weltgeschichte* (9 vols., 1899-1907).]

was drawn.[3] It ran from the North Pole to the South Pole, 100 miles west of the meridian of the Azores and Cape Verde. The figure of 100 miles can be explained juridically by the fact that Bartolus [Bartoli of Saxoferrato, 1313-1357], Baldo [Ubaldi Baldo Degli, 1327-1400], and other teachers of law postulated the zone of territorial waters to be a journey of two days. The later antithesis of firm land and free sea, decisive for spatial ordering in international law from 1713 to 1939, was completely foreign to these divisional lines.

Pope Alexander VI's global line was consistent with the one drawn somewhat to the west of it, approximately through the middle of the Atlantic Ocean (370 miles west of Cape Verde), by the Spanish-Portuguese Treaty of Tordesillas (June 7, 1494), in which the two Catholic powers agreed that all newly discovered territories west of the line would belong to Spain and those east of the line to Portugal. This line was called a *partition del mar océano*, and was sanctioned by Pope Julius II. The Molucca Line gradually became the border on the other half of the globe. In the Treaty of Saragossa (1526), a *raya* [line] was drawn through the Pacific Ocean, at first along what is now the 135th meridian, i.e., through eastern Siberia, Japan, and the middle of Australia.

These first global lines are well-known to all historians, especially Spanish and Portuguese. But, in recent years, they also have been discussed with growing interest by international law scholars.[4] Similarly, the "amity

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3. Earlier Portuguese-Spanish demarcation lines were not global. Even the Portuguese line of 1443, upheld by the pope in 1455, was not global; it was a "sea barrier" meant to restrict Portuguese shipping beyond the line — beyond Cape Bojador. Cf. Frances G. Davenport, *European Treaties Bearing on the History of the United States and its Dependencies*, 4 vols. (Washington, D.C.: Carnegie Institution of Washington, 1917-1937), Vol. I. On the Treaty of Tordesillas and the implementation agreement (May 7, 1495), see pp. 84f. Cf. also Adolf Rein, "Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa," in *Ibero-Amerikanisches Archiv*, Vol. 4 (1930), p. 531; and E. Staedler, "Zur Vorgeschichte der Raya von 1493," in *Zeitschrift für Völkerrecht*, Vol. XXV (1941), pp. 57-72. The papal awards to the Portuguese Order of Christ — the edict *Inter caetera* of March 13, 1456 — also are not global in this sense. They reach *usque ad Indos*, but India still is thought to be located in the East.

4. From the German side, see Staedler, "Zur Vorgeschichte der Raya von 1493," *ibid.*, p. 57, and his article in the same issue of *Zeitschrift für Völkerrecht*, "Hugo Grotius über die '*donatio Alexandri*' von 1493 und der Metallus-Bericht," pp. 257-274. By regarding every contractual agreement as an expression of "modern" international-legal thinking, Staedler distinguishes too sharply between medieval-feudal law and "international-modern contractual thinking." This, however, does not diminish the historical value of his article. For the most recent Spanish literature, see Juan Manzano, "El decreto de la Corona de Castilla sobre el descubrimiento y conquista de las Indias de Ponente," in *La Rivista de Indias*, Vol. III (1942), pp. 397ff.

lines" initiated with the Spanish-French Treaty of Cateau-Cambrésis (1559) again have become a matter of particular concern in international law,[5] especially after Francis G. Davenport (between 1917 and 1934) and Adolf Rein (since 1925) clarified their significance for colonial history.[6]

Global linear thinking has its own development and history. The most important examples of its numerous forms constitute a coherent progression from the discovery of America in 1492 to the American declarations of World War II. Yet, it would be misleading, in view of the obvious continuity of this progression, to disregard the fact that these lines and the various stages of global linear thinking obtained in mutually distinct spatial orders, and, accordingly, have very different meanings in terms of international law. In neither a scholarly-theoretical nor a practical-political sense is the concept of global lines based indiscriminately on the same presuppositions and concepts of international law. The differences are concerned not only with the geographical delineations of meridians, but also with the content of the politically presupposed spatial concepts, the intellectual structure of the linear concepts, and even their inherent spatial order. First, I will define the various categories and then differentiate between the specific types and historical characteristics of global lines.

B. Rayas

The first distinction becomes apparent with the great historical transformation leading from the Spanish-Portuguese divisional lines — *rayas* — to the French-English friendship lines — amity lines. One might say that the historical type of *raya* was a world apart from the English amity

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5. Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht* (1941), 2nd ed. (Berlin: Duncker & Humblot, 1991), p. 57; "Raum und Großraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. XXIV (1940), p. 155.

6. The Treaty of Cateau-Cambrésis is reprinted in Davenport, *European Treaties*, *op. cit.*, Doc. 21, pp. 219ff; on this treaty, see the excellent work by Adolf Rein, which only recently has been given its due in international law scholarship, *Der Kampf Westeuropas um Nordamerika im 15. und 16. Jahrhundert, Allgemeine Staatengeschichte* 2/3 (Stuttgart-Gotha: Perthes Verlag, 1925), pp. 207ff. On the maxim "Beyond the equator there are no sins," see Rein, *ibid.*, p. 292; on the significance of overseas expansion for the European system of states, see *Historische Zeitschrift*, Vol. 137 (1928), pp. 28ff. On the history of the dividing line between America and Europe in international law, see Rein, "Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa," in *Ibero-Amerikanisches Archiv*, *op. cit.*, pp. 530-543. See also Ulrich Scheuner, "Zur Geschichte der Kolonialfrage im Völkerrecht," in *Zeitschrift für Völkerrecht*, Vol. XXII, (1938), p. 466; and Wilhelm Grewe, "Die Epochen der modernen Völkerrechtsgeschichte," in *Zeitschrift für die gesamte Staatswissenschaft*, Vol. 103 (1942), pp. 51ff.

line. For a *raya* to obtain, two princes, both recognizing the same spiritual authority and the same international law, had to agree on the acquisition of land belonging to princes and peoples of another faith. Even if it was a contractual agreement that led to establishment of the line, in the background these princes still shared the authority of a common *ordo* and a common arbitrational authority, which, as the last instance of international law, distinguished between the territory of Christian and non-Christian princes and peoples. Even if the pope did not allocate ownership of lands, but only freedom of missions,[7] this shared authority also was an expression of a spatial order that distinguished between the spheres of influence of Christian and non-Christian princes and peoples.

In practice, areas free for missions were not separated from those of navigation and trade. Thus, *rayas* presupposed that Christian peoples and princes had the right to be granted a missionary mandate by the pope, on the basis of which they could pursue their missionary activities and, in due course, occupy non-Christian territories. Even Francisco de Vitoria's *De indis y de jure belli relectiones* [hereafter, *relectiones* (literally, rereadings, but actually, lectures)],[8] which begin in an astonishingly

7. Julius Goebel emphasizes this point in *The Struggle for the Falkland Islands* (New Haven: Yale University Press, 1927), p. 84; so does Grewe in "Die Epochen der modernen Völkerrechtsgeschichte," *op. cit.*, p. 51. One should not overemphasize this antithesis, lest one lose sight of the latent spatial concept of papal missionary mandates. The papal edict of May 4, 1493 speaks first of the expansion of *fides catholica* and *christiana lex*, and of the conversion of barbarian peoples, but it also contains the "*donatio*" of territories, as in feudal law, and expressly makes the heirs of Castile and Leon into "*dominos cum plena libera et omnimoda potestate, auctoritate et jurisdictione.*" [Tr. lords with full, free, and every kind of power, authority and jurisdiction.] Just how easily and almost matter-of-factly the freedom of missions and the *liberum commercium* became a legal title of *bellum justum* and, thus, a right to occupation and annexation is seen best if one compares Vitoria's initial thesis with its end result. Cf. *Las relectiones de Indis y de jure belli*, ed. by Javier M. Barcels, with a reproduction of the Latin text from the 1696 edition (Washington, D.C.: Union Panamerica, 1963), Sec. III, *de titulis legitimis quibus barbari potuerint venire in ditionem Hispanorum*, especially pp. 7ff. With Vitoria, the right of land-appropriation appears in the *Septima conclusio*, in the explication of the legal title for the subjugation of barbarians by the Spaniards (because, in view of the refusal to concede the freedom of missions and free trade, they were waging a just war).

8. [Tr. Francisco de Vitoria (1486?-1546) was Primary Professor of Sacred Theology at the University of Salamanca. There are many editions of his *relectiones*, with varying titles in Spanish and Latin. Schmitt relies on Francisco de Vitoria, *Relectiones theologicae*, a critical edition in three volumes, with facsimiles prepared by Luis G. Getino, published by the Asociation Francisco de Vitoria (Madrid: Impr. La Rafa, 1933-35), Vol. I. For this translation, I rely on another edition known to Schmitt, *De indis de jure belli relectiones* (Washington, D.C.: The Carnegie Institution, 1917), ed. by James Brown Scott, which contains the sections on *de indis* and *de jure* (published together in most editions) extracted from Vitoria's posthumously published *Relectiones theologicae* XII.]

objective manner, end with the claim that the Spanish are waging a just war, and therefore may annex Indian lands if the Indians resist free *commercium* (not only "trade") and the free mission of Christianity.

As a rule, *rayas* were not global lines separating Christian from non-Christian territories, but were internal divisions between two land-appropriating Christian princes within the framework of one and the same spatial order. Accordingly, *rayas* were based on a consensus in international law concerning land-appropriation, whereby there was no distinction between land- and sea-appropriations. Those Christian princes and peoples who were engaged in land- and sea-appropriations, still within the spatial order of the *respublica Christiana* of the Middle Ages, had a common ground in their Christian faith and a common authority in the head of the Church, the Roman pope. Thus, they recognized each other as equal parties to a treaty of division and distribution concerning land-appropriation.

C. Amity Lines

Although the historical type of so-called *amity lines* was related to European land- and sea-appropriations of the New World, it was based on completely different premises. Amity lines first appeared (and were agreed upon only verbally) in a secret clause in the Treaty of Cateau-Cambrésis (1559).[9] Essentially, they belong to the age of religious civil wars between land-appropriating Catholic powers and Protestant sea powers. They were an important part of European international law during the 17th century, when jurists hardly knew what to make of them and treated them perfunctorily under the category of "truce."[10] Yet, they were acknowledged explicitly in many important treaties of European land-appropriating powers.[11] Even when amity lines were disclaimed, and (as, e.g., in the English-Spanish Treaty of November 15, 1630) it was agreed that prizes won beyond the equator also should be returned,[12] this principle remained in force for the whole epoch, i.e., that treaties, peace, and friendship applied only to Europe, to the Old World, to the area on this side of the line.

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9. See Davenport, *European Treaties*, *op. cit.*, Doc. 21, pp. 219ff.

10. According to Pufendorf, in *De jure naturae et gentium, libro octo*, Ch. 7, in most instances, a truce is something general, but it also can be limited to a locality. To date, there is still no scholarly monograph on the question of "lines" in the international law of the 17th and 18th centuries.

11. This is true in the English-Spanish negotiations and in the French-Spanish treaty of 1604. See Davenport, *European Treaties*, *op. cit.*, p. 248.

12. *Ibid.*, p. 306. The note on this treaty in the subject index may give the false impression that it put an end to amity lines, which, of course, was not the case.

Even the Spaniards occasionally asserted that otherwise valid treaties did not hold in "India," because this was a "new world."[13] The fact that the lines also gave free rein for looting, especially to English "privateers," is understandable and generally recognized. In its own specific way, the French government, given its purely political stance with respect to the religious wars of the 17th century, had every reason to appeal to the "line." The fact that the thoroughly Catholic King of France aligned himself with dangerous heretics and wild pirates, freebooters and buccaneers against the Catholic King of Spain and, together with such allies, pillaged Spanish cities in the Americas, can be explained only by the fact that these pirate raids were undertakings "beyond the line."[14]

Geographically, these amity lines ran along the equator or the Tropic of Cancer in the south, along a degree of longitude drawn in the Atlantic Ocean through the Canary Islands or the Azores in the west, or a combination of both. The cartographical problem of the precise determination of the line was very important, especially in the west, and resulted in explicit official regulations. Thus, Cardinal Richelieu made a declaration in the name of the French king on July 1, 1634, according to which French seafarers were forbidden to attack Spanish and Portuguese ships on this side of the Tropic of Cancer, but were given liberty to do so beyond this line, if the Spanish and Portuguese refused them free access to their Indian and American possessions on land and sea. All pilots, hydrographers, cartographers, globe-makers, and globe-engravers were forbidden to change any aspect of the old meridians or to draw any western meridian other than that of the old Ptolemaic zero meridian, which ran across Ferro Island in the Canary Islands. It was forbidden, under any pretext, to shift the western meridian beyond the Azores.[15]

At this "line," Europe ended and the "New World" began. At any rate, European law, i.e., "European public law," ended here. Consequently, so, too, did the bracketing of war achieved by traditional European international law, meaning that here the struggle for land-appropriations knew no bounds. Beyond the line was an "overseas" zone in which, for want of any

13. *Ibid.*, p. 248 (on the occasion of the Spanish-English Treaty of August 18-28, 1604).

14. Cf. the king of France's record in Moreau de Saint-Mercy, *Loix et constitutions des colonies françaises de l'Amérique sous le vent*, Vol. I, 1550-1703 (Paris: Chez l'auteur, 1784), p. 179.

15. *Ibid.*, pp. 25-27. Richelieu's order was based on the consultations of a scholarly conference. It is well-known in the history of geography, but its relation to the question of amity lines, significant both politically and in terms of international law, largely is ignored by geographers. Cf., for example, Hermann Wagner, *Lehrbuch der Geographie*, 10th ed. (Hannover: Hannsche Buchhandlung, 1920), Vol. I, p. 65.

legal limits to war, only the law of the stronger applied. The characteristic feature of amity lines consisted in that, different from *rayas*, they defined a sphere of conflict between contractual parties seeking to appropriate land, precisely because they lacked any common presupposition and authority. In part, however, these parties still shared the memory of a common unity in Christian Europe. But the only matter they could agree on was the *freedom* of the open spaces that began "beyond the line."

This freedom meant that the line set aside an area where force could be used freely and ruthlessly. It was understood, however, that only Christian-European princes and peoples could share in the land-appropriations of the New World and be parties to such treaties. But the commonality of Christian princes and nations contained neither a common, concrete, and legitimating arbitrational authority, nor any principle of distribution other than the law of the stronger and, ultimately, of effective occupation. Everything that occurred "beyond the line" remained outside the legal, moral, and political values recognized on this side of the line. This was a tremendous *exoneration* of the internal European problematic. The significance in international law of the famous and notorious expression "beyond the line" lies precisely in this exoneration.

A closer juridical consideration of amity lines in the 16th and 17th centuries reveals *two* types of "open" spaces in which the activity of European nations proceeded unrestrained: first, an immeasurable space of free *land* — the New World, America, the land of freedom, i.e., land free for appropriation by Europeans — where the "old" law was not in force; and second, the free *sea* — the newly discovered oceans conceived by the French, Dutch, and English to be a realm of freedom.

The freedom of the sea was a problem of spatial ordering of the utmost importance in international law. Completely terrestrial in their thinking, Roman jurists confounded the issue from the beginning with such civil concepts as *res communis omnium* [things common to all] and "matters of common use." In this respect, even the thinking of contemporary British jurists, such as Richard Zouch and Henry R. Selden, still was terrestrial. In reality, it was not Roman law that was groundbreaking in the 16th century with respect to the freedom of the sea, but rather the old, elemental fact that law and peace originally were valid only on land. But even on the firm land of the "new earth" — on American soil — there was as yet no location of law for Christian Europeans. For them, there was only as much law as the European conquerors imported and established, either in their Christian missions or in the accomplished fact of a European

system of justice and administration. The structure of European international law that emerged was based on this link between two "new" spaces — "free" spaces in the sense that they were not embraced by the former European order of firm land.

Such a division of free spaces recognized by Christian governments had universal repercussions. It challenged all traditional intellectual and moral principles. The catastrophe affected all new theories and formulas of the 17th century, to the extent that they were modern, i.e., to the extent that they had replaced the old theories and formulas inherited from antiquity or the Christian Middle Ages. Today, many of these 17th century ideas still are regarded abstractly and are cited often. For the most part, their historical connection with the "free" spaces of that century and with the designation of a conflict zone mostly is disregarded and even forgotten. Thus, a few examples should be mentioned.

The first is Pascal's famous statement: "A meridian decides the truth."[16] One should not impute to this expression of pain and astonishment a general, relativistic skepticism consistent only with the facts of the matter, as considered in the many deviations of positive law in various countries and at various times. It does not deal with such banalities, but rather with a fact almost inconceivable to a person of Pascal's mind, i.e., that in certain areas Christian princes and peoples had agreed to disregard the distinction between justice and injustice. Pascal's meridian is nothing other than the amity lines of his time, which had created an abyss between freedom (the lawlessness of the state of nature) and an orderly "civil" mode of existence.

The second is Thomas Hobbes' doctrine of the state of nature contained in his construction of the state. For Hobbes, the state of nature is a domain of werewolves, in which man is nothing but a wolf among other men, just as "beyond the line" man confronts other men as a wild animal. The axiom *homo homini lupus* [man is a wolf to man] has a long history, which, with the land-occupation of a new world, suddenly became intense and virulent. In his *relectiones*, Vitoria explicitly opposes his own *homo homini homo* [man is a man to man] formula to the old *homo homini lupus*, which referred back to Plautus and Ovid. He

16. In its larger context, the passage reads: "*Trois degrés d'élévation du Pôle renversent toute la Jurisprudence. Un Méridien décide de la vérité, ou peu d'années de possession. Les lois fondamentales changent. Le droit a ses époques. Plaisante justice qu'une rivière ou une montagne borne! Vérité en deça des Pyrenées, erreur au delà.*" [Tr. A three-degree rise of the Pole would ruin the whole jurisprudence. A meridian decides the truth or at least a few years of possession. Fundamental laws change. Law has its own epochs. Good justice is defined by a river or a mountain. Truth on this side of the Pyrenees is error on the other.]

says: "*non enim homini homo lupus est, ut ait Ovidius, sed homo*" [for man is not a wolf to man, as Ovid said, but a man to man]. This Spanish monk denied the formula *homo homini lupus*, as well as its opposite, *homo homini deus* [man is a god to man],[17] cited by Francis Bacon and Hobbes, and later by Ludwig Feuerbach.[18] Then, in the middle of the 19th century, this formula was buried by a contemporary of Karl Marx, Max Stirner.[19] However, in the 16th and 17th centuries, the *homo homini lupus* formula was revived, and the formula acquired a concrete meaning with amity lines, because now it was localized — it acquired its own space, recognized by Christian European governments, and, thereby, an unmistakable validity.

Hobbes' *homo homini lupus*, stemming from a newly discovered area of freedom, was the 17th century's response to Vitoria's repudiation of this heathen formula. In this respect, Hobbes obviously was influenced not only by the creedal civil wars in Europe, but also by the New World. He speaks of the "state of nature," but not at all in the sense of a spaceless utopia. His state of nature is a *no man's land*, but this does not mean it exists *nowhere*. It can be located, and Hobbes locates it, among other places, in the New World. In *Leviathan*, "the Americans" are an example of the wolf-character of men in the state of nature; and *Behemoth* refers to the atrocities committed by Spanish Catholics in the kingdom of the Incas. In other places, especially in the later stages of Hobbes' intellectual development, the elaboration of concepts takes precedence over concrete experiences in time and space. The state of nature is treated less as a historical fact and more as a hypothetical construct.[20] But this did not diminish the contemporary

17. This formula can be traced to Plinius, *Naturalis historia* II, 7.

18. Ludwig Feuerbach, *Das Wesen des Christentums* (Leipzig: O. Wigand Verlag, 1841), p. 402.

19. Max Stirner, *Der Einzige und sein Eigentum* (Leipzig: O. Wigand Verlag, 1845).

20. "It may peradventure be thought, there was never such a time, nor condition of war as this; and I believe it was never generally so, over all the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before." *The English Works of Thomas Hobbes of Malmesbury*, ed. by Sir William Molesworth (1839), Vol. III *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (Aalen: Scientia Verlag, 1966), Ch. 13, p. 114. My presentation of Hobbes' theory of the state of nature does not take into account the historical relation to amity lines. See my 1938 book, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, tr. by George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996).

historical significance of amity lines.[2]

The third example is a remarkable statement by John Locke, the great opponent of Hobbes. Also in Locke, concepts of the "state of nature" are linked in terms of contemporary history to the "New World." This state nature, however, already has become a tolerable state of society; it is no longer the old one "beyond the line." Remember that Locke's work is almost contemporaneous with the treaties of Nymwegen and Utrecht (1713), i.e., near the end of the heroic age of piracy. However, given the historical evaluations of Locke's doctrine of the state of nature and his model of society, also keep in mind the remarkable statement (made by an alleged rationalist at the beginning of the 18th century) that best elucidates the historical and spatial context of his thought: "In the beginning, all the world was America."[22] The astonishing transformation of consciousness that occurred toward the end of the century also affected notions of the state of nature and of their location in America: the New World.

The significance of amity lines in 16th and 17th century international law was that great areas of freedom were designated as conflict zones in the struggle over the distribution of a new world. As a practical justification, one could argue that the designation of a conflict zone at once freed the area on this side of the line — a sphere of peace and order ruled by European public law — from the immediate threat of those events "beyond the line," which would not have been the case had there been no such zone. The designation of a conflict zone outside Europe contributed also to the bracketing of

21. But this relation is very important, also in the history of philosophy. Hegel's construction of the state is reminiscent of Hobbes. Consequently, for Hegel, America is a society without a state. Ferdinand Tönnies, who knows Hobbes better than anyone, has shown in a masterful article how Hobbes increasingly "deepened" his concept of the state of nature. See Tönnies, "Hobbes und das Zoon Politikon," in *Zeitschrift für Völkerrecht*, Vol. XII (1923), pp. 471-488. That is correct, but it need not give rise to sterile antitheses of Being and Thinking or to those distinctions neo-Kantian epigones have used to empty philosophy of all historical content. A scholar like Tönnies was far removed from this sort of epigonism. Historically speaking, Hobbes can be understood only in terms of his time. Characteristic of his time were *lines* and the new, seemingly unlimited spaces of what was then a very concrete *freedom*. This does not rule out that he also had in mind with his "state of nature" the anarchy of feudal conditions of the expiring Middle Ages. Leo Strauss and Franz Borkenau have pointed to this historical connection between the state of nature and feudalism, respectively, in "Comments on Carl Schmitt's *Der Begriff des Politischen*" (1932), appendix to Carl Schmitt, *The Concept of the Political*, tr. by George Schwab (Chicago and London: The University of Chicago Press, 1996), pp. 87ff.; and *Der Übergang vom feudalen zum bürgerlichen Weltbild* (Paris: Felix Alcan, 1934), p. 458.

22. See Locke, "Of Civil Government," in *The Works of John Locke*, *op. cit.*, Vol. 5, §49, p. 366; see also Emil Roos' dissertation on John Locke's contractual theory and the state of nature (1943).

European wars, which is its meaning and its justification in international law.

Although the idea of designating a sphere outside the law and open to the use of force has a long history, until very recently this type of thinking had remained typically English; it had become increasingly foreign to the state-centered legal thinking of continental European nations. For this reason, English law has preserved a better sense for the particularities of different territorial statuses than has continental legal thinking, which, even in the 19th century, obtained only in a single territorial status: the state. The diversity of colonial possessions and the distinction between dominions and non-dominions kept alive the English sense for specific spatial orders and variations of territorial status.

English law also clearly distinguished between English soil — those areas ruled by common law — and other spatial areas; common law was regarded as the law of the land (*lex terrae*). The king's power was considered to be absolute on the sea and in the colonies, while in his own country it was subject to common law and to baronial or parliamentary limits of English law. The first struggle of the parliamentary opposition to King James I was over the issue of whether he should be allowed to extend his power over the sea, in order to levy tolls at will and without parliamentary restrictions. Arthur Duck still maintained (around 1650) that Roman law, rather than land law, was in force on the sea.[23]

This restriction of law to the land and to one's own territory has a long tradition in legal history. It has been characterized sociologically as "land-locked morality."[24] In my view, it is simply a matter of the age-old maxim: "All law is law only in a particular location." Thus, it is historically more correct to focus on the relation between order and orientation, and on the spatial context of all law. Then, the idea of amity lines and of an area designated as free of law easily becomes understandable as an antithesis to law in the Old World, i.e., to an old law in a particular location.

The English construction of a state of exception, of so-called martial law, obviously is analogous to the idea of a designated zone of free and empty space. In France, the state of exception as a state of siege became a recognized legal institution during the 19th century. By contrast, English

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23. Those sentenced to death by Admiralty Courts for murder, piracy, or other crimes did not thereby lose their property, because Roman law did not recognize this penalty, whereas English law expressly decreed otherwise. Cf. Ernest Nys, *Le droit romain: le droit des gens et le collège des docteurs en droit civil* (Brussels: M. Weissenbruch, 1910), p. 65.

24. See the excellent article by Michael Freund, "Zur Deutung der Utopie des Thomas Morus," in *Historische Zeitschrift*, Vol. 142 (1930), p. 255.

martial law remained limited: a suspension of all law for a certain time and in a certain space. In terms of time, it began with the declaration of martial law and ended with an act of indemnity; in terms of space, the precise area in which the normal legal order was suspended was specified. Within this context, everything required by the situation was permitted.[25] There is a vivid ancient symbol for this procedure, which Montesquieu also cites: the statue of liberty or justice is veiled for a certain period of time.

In another sense, there is also a historical and structural relation between such spatial concepts of free sea, free trade, and free world economy, and the idea of a free space in which to pursue free competition and free exploitation.[26] The "free" spaces created thereby may appear in the favorable light of zones designated for agonal tests of strength; however, they also may become a desolate chaos of mutual destruction. This is a matter of differently assessed constructions and of the free play of forces. In Hegel's philosophy of the state, the state appears to be a realm of morality and objective reason that rises *above* the non-state sphere of civil society. According to both Hegel and Marx, this is a beastly realm of ruthless (and in this sense, free) egoism. In Hegel's lectures on the philosophy of history, America is characterized specifically as an area lacking a state, as an area of civil society. In terms of intellectual history, this was an aftereffect of the 16th century practice of counterposing a realm of agonal freedom and civil society to the state as a realm of objective reason. It is also an example of the many variations in which Hobbes' distinction between the state of nature and civilized conditions survived and, in the 19th century, became relevant for the relation between politics and economics as two separate spheres of practical significance.

D. The Western Hemisphere

The third and last global line was the *Western Hemisphere*. In terms of international law, this line was the first counterattack of the New World against the Old, but its origins traced back both historically and dialectically to the lines that preceded it. As noted, like the English amity lines, the

25. On the English construction of martial law (as opposed to attempts to standardize and institutionalize the state of siege in continental *Rechtsstaat* law), see Carl Schmitt, *Die Diktatur: Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (1921), 4th ed. (Berlin: Duncker & Humblot, 1978), p. 174; see also Carl Heck, "Der Ausnahmezustand in England," in *Das Recht des Ausnahmezustandes im Auslande, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Vol. 9 (1929), pp. 192ff.

26. Schmitt, "Raum und Großraum im Völkerrecht," in *Zeitschrift für Völkerrecht*, *op. cit.*, pp. 164ff.

Portuguese-Spanish *rayas* belonged to European land- and sea-appropriations of the New World. They were spatial divisions that essentially ordered relations among the European powers. The Portuguese *raya* had a distributive purpose; even in the Treaty of Tordesillas, it was called a *linea de la particion del mar*. The English amity line had an agonal character. The designation of a zone of ruthless conflict was a logical consequence of the fact that there was neither a recognized principle nor a common arbitrational authority to govern the division and allocation of lands.

As long as there was a remnant of spiritual commonality left among the land-appropriating European powers, the concept of "discovery" was sufficient. Effective occupation — the *status quo* of possession, consolidated by states — ultimately became the only title of acquisition in the 19th century. Until then, discovery and the much discussed Roman civil concept of "occupation" were the only legal title to the land-appropriation of free soil. This had two consequences: first, it was a long and difficult struggle before a land-appropriation was accepted as real and permanent, or even recognized in any form by rival powers; second, war came to be judged in terms of its outcome, i.e., war became the recognized legal means of changing the *status quo* of any given possession. A rationalization, humanization, and legalization — a bracketing — of war was achieved against this background of global lines. At least with respect to continental land war in European international law, this was achieved by limiting war to a military relation between states.

Only after the new spatial order based on states had been achieved in Europe did the third and last global line of the Western Hemisphere appear. With it, the New World autonomously opposed the traditional spatial order of Europe and of Eurocentric international law. In so doing, it radically challenged the basis of this old spatial order. In terms of intellectual history, this began in the 18th century, with the War of Independence and the application of Rousseau's state of nature to those states freeing themselves from England and Europe. Yet, the practical effects of this global line of the Western Hemisphere did not begin until the 19th century. Then they developed fully and irresistibly in the 20th century. Thus, it first is necessary to discuss the formation of the spatial order of the international law established among European states, and the bracketing of war achieved thereby. Only then and, above all, only by contrasting different concepts of war can we appreciate the significance of the Western Hemisphere in international law. This global line made it possible for the United States to upset the spatial order of the European world and to introduce a new concept of war into world history.

Chapter 2

Justification of the Land-Appropriation of a New World: Francisco de Vitoria

For 400 years, from the 16th to the 20th century, the structure of European international law was determined by a particular course of events: conquest of a new world. Then, as later, there were numerous discussions about relevant legal and moral questions.[1] There also were numerous individual positions taken with respect to the justice or injustice of the *conquista* [conquest]. Nevertheless, the basic problem — *justification of European land-appropriations as a whole* — seldom was addressed in any systematic way outside moral and legal questions. In fact, only one monograph addressed this problem systematically and confronted it squarely in terms of international law. Originating in the first stage of the *conquista*, it directly posed the question of the future legal title to the great land-appropriation and answered it in a manner consistent with the scholastic method. It is the famous *relectiones* of Francisco de Vitoria. Given the intellectual courage these lectures exhibited in formulating questions, and given the perfection of their scholastic method, they influenced and dominated all further discussions of the problem. Of course, they also have been misunderstood and misused.

Vitoria's theses obtained within a scholastic-theological debate and appertained to late Spanish scholasticism. Until now, there has been no comprehensive treatment of this great European intellectual achievement,

1. An overview of 16th century literature can be found in Lewis Hanke, *Cuerpo de Documentos del Siglo XVI sobre los Derechos de España en las Indias y Filipinos*, ed. by Augustin Milliares Carlo (Mexico: D. F. Fondo de Cultura Económica, 1943), pp. 315-336; and Hanke, *The Spanish Struggle for Justice* (Philadelphia: University of Pennsylvania Press, 1949). A presentation of the diverse arguments can be found in Joseph Höffner, *Christentum und Menschenwürde, das Anliegen der spanischen Kolonialethik im goldenen Zeitalter* (Trier: Paulinus Verlag, 1947).

dating from the time of Charles V and Philip II. Such a treatment, as the German theologian and authority on late scholasticism Karl Eschweiler rightly observed, "only could have been written in Spain and only by a Spaniard."[2] From the standpoint of contemporary international law scholarship, I will discuss Vitoria's place in legal history and the scholarly uses of his much cited lectures, whose interpretation has its own history.

A. Vitoria's Scholastic Objectivity

A contemporary reader's first impression of Vitoria's *relectiones* is of extraordinary impartiality, objectivity, and neutrality. Consequently, the argumentation no longer appears medieval, but "modern." Seven *tituli non idonei nec legitimi* [titles neither suitable nor legitimate] and the same number of *tituli idonei ac legitimi* are discussed in varying detail and with equal objectivity.[3] Accordingly, all legal titles of the pope and the emperor deriving from claims to world domination are rejected unconditionally as inappropriate and illegitimate. This impression of total objectivity and neutrality also is sustained elsewhere. In particular, it is emphasized repeatedly that native Americans, though they may be barbarians, are not animals, and are no less human than are the European land-appropriators. Though not stated explicitly, this amounted to a rejection of a particular type of argument, especially in various justifications of the *conquista* by the humanist Juan Gines Sepúlveda (1490-1573), historiographer of Charles V and teacher of Philip II, for whom Las Casas[4] was an *hombre enemigo* [inimical man] and a *sembrador de discordias* [purveyor of discord].

Sepúlveda presented the natives as savages and barbarians (with reference to Aristotle), in order to place them outside the law and to make their land free for appropriation. At the beginning of the *conquista*, it had been argued that the Indians worshiped idols, sacrificed humans, and

2. Karl Eschweiler, *Die Philosophie der Spätscholastik, Spanische Forschungen der Görresgesellschaft*, Vol. I (Münster: Aschendorff, 1928), p. 264.

3. The seven *tituli non idonei nec legitimi* are: imperial world domination, papal world domination, *jus inventionis* (discovery), the rejection of Christianity, the crimes of barbarians, the ostensibly free consent of the Indians, and special divine conferment. The seven *tituli idonei ac legitimi* for just war are: *jus commercii* [right of commerce], *jus propagandae fidei* [right to propagate the faith], *jus protectionis* [right to protection] (of the Indians converted to Christianity), *jus mandati* (papal mandate), *jus interventionis* (against tyranny), *jus liberae electionis* [right of free elections], and *jus protectionis sociorum* [right to protect one's associates].

4. [Tr. Bartolomá de Las Casas (1474-1566), known to posterity as the "Apostle of the Indies," was the first priest ordained in the American colonies. Having developed a scheme for the complete liberation of the Indians, in 1530 he met Sepúlveda in public debate on the latter's recently published *Apologia pro libro de justis belli causis*, which maintained the lawfulness of waging unprovoked war against the natives of the New World.]

were cannibals and criminals of every sort. Aristotle's statement in the first book of his *Politics* that a barbarian is "by nature a slave" often was cited,[5] and Sepúlveda even is reported to have said: "Spaniards stand above barbarians as men above the apes."[6] Thus, to deny the Indians human qualities on such grounds had the practical aim of obtaining a legal title for the great land-appropriation and of *subjugating* the Indians which, incidentally, even Sepúlveda considered to be only servitude (*servidumbre*), not slavery (*esclavitud*).

This Aristotelian argument was inhuman in its outcome. But it derived from a particular concept of humanity: the higher humanity of the conqueror. It has an interesting history. The classic formulation is found first in the writings of the English philosopher Francis Bacon, whose tenets were adopted by Barbeyrac in his commentary on Pufendorf's concept of natural law.[7] Bacon said the Indians were "proscribed by nature itself" as cannibals. They stood outside humanity (*hors l'humanité*) and had no rights. By no means is it paradoxical that none other than humanists and humanitarians put forward such inhuman arguments, because the idea of humanity is two-sided and often lends itself to a surprising dialectic.

5. [Tr. "For that which can foresee by the exercise of mind is by nature intended to be lord and master, and that which can with its body give effect to such foresight is a subject, and by nature a slave; hence master and slave have the same interest." *The Basic Works of Aristotle*, *op. cit.*, "Politica," Bk I: Ch. 2, p. 1128.]

6. See the document of Democrates alter (or secundus), written in 1547, but not published at that time (owing, above all, to the opposition of Las Casas). It originally was published by M. Menéndez Palayo under the title "J. Genesi Sepúlvedar cordubensis Democrates alter, sive de justis belli causis apud indos," in *Bolitin de la Real Academia de la Historia*, Vol. XXI (October 1892), No. 4, pp. 260-369. Sepúlveda's first "Democrates" dialogue (*De convenientia militaris disciplinae cum Christiana religione dialogus cui inscribitur Democrates*) was published in Rome in 1535. Cf. Teodoro Andres Marcos, *Vitoria y Carlos en la soberania hispano-americana* (Salamanca: Imprentie Commercial Salmantina, 1937), pp. 178ff.; also, Ernest Nys, "Les Publicistes Espagnols du XVIe siècle et les droits des Indiens," in *Revue de droit international et de législation comparée*, Vol. XXI (1899), p. 550. Since then, the literature on Sepúlveda has proliferated. Unavailable to me was a study by Manuel García Pelayo, in *Juan Ginès de Sepúlveda tratado las justas causas de la guerra contra los indios* (Mexico: Fondo de Cultura Económica, 1941). On Sepúlveda's struggle with Las Casas, see Benno Biermann, "Der Kampf des Fray Bartolomé de Las Casas um die Menschenrechte der Indianer," in *Die neue Ordnung*, Vol. 2, No. 1-2 (March 1948), pp. 36f., and P. Honorio Muñoz, O.P., *Vitoria and the Conquest of America*, 2nd ed. (Manila: University of Santo Tomas Press, 1938), p. 56 (the disputation of 1550 in Valladolid at which Sepúlveda was defeated). See also Höffner, *Christentum und Menschenwürde*, *op. cit.*, pp. 169 and 177-180.

7. [Tr. The fame of the French jurist Jean Barbeyrac (1674-1744) rests chiefly on the preface and notes to his translation of Pufendorf's treatise, *De jure naturae et gentium*. In fundamental principles, he followed almost entirely Locke and Pufendorf.]

Given the coherence of this two-sided aspect of the idea of humanity, it should be remembered that Bacon also opposed the axiom *homo homini deus* to that of *homo homini lupus.*

In the Germany of the humanitarian 18th century, one probably would have used the word "inhuman" for this other aspect of humanity. At that time, the word emphasized the discriminatory power of division inherent in humanitarian ideology. Of course, the division between human and inhuman had a political meaning and, with some justification, could be traced back to Aristotle's *Politics*. In this extreme form, it was no longer Christian. But, in the 18th century, it was consistent with the victory of a philosophy of absolute humanity. Only when man appeared to be the embodiment of absolute humanity did the other side of this concept appear in the form of a new enemy: the *inhuman.* The expulsion of the inhuman from the human was followed in the 19th century by an even deeper division, between the *superhuman* and the *subhuman*. Just as the human presupposes the inhuman, so, with dialectical necessity, the superhuman entered history with its hostile twin: the subhuman.

In Vitoria's time, the argument that Indians were cannibals and barbarians was very widespread in practice, and often not unfounded. Nevertheless, despite Sepúlveda, it did not have the inhuman-humanitarian power to divide that it acquired in later centuries. The 16th century was still too deeply Christian, especially in Spain, given the worship of Mary as the Immaculate Virgin and Mother of God. In the general legal arguments of the 16th and 17th centuries, the inhuman-humanitarian distinction did not stand out as primary, although the higher European civilization did become a standard justification for colonization. Practically speaking, discrimination based on biological arguments was unknown. Yet, Hugo Grotius, in his dissertation, *De origine gentium Americanarum* (1642), claimed that the North American Indians were racially Nordic and were descended from Scandinavians. That did not protect them from extermination.

For Christian theologians, the natives were human beings and bearers of an immortal soul. St. Augustine had said: "*Gentes licet barbarae tamen humanae*" [The people may be barbarous, but they are human].[8] The formula *homo homini lupus* and the Aristotelian axiom that some people are "slaves by nature" were dismissed by Vitoria as "heathen." To both, he

8. St. Augustine, *The City of God*, tr. by Marcus Dods (New York: The Modern Library, 1950), Bk. I/14: "He has not failed His own people in the power of a nation which, though barbarous, is yet human . . . ," p. 19.

explicitly opposed his own *homo homini homo.*[9] This threefold *homo* has a somewhat tautological and neutralizing ring; it sounds Erasmian, but is still meant to be Christian. Thus, it is not surprising that Vitoria proceeds from Christian truth and emphasizes that non-Christian Indians may not be deprived of their rights for the benefit of Christian Europeans. But the general quality of being human need not level out the social, legal, and political distinctions developed in the course of human history. Vitoria also recognized that barbarians needed guidance. For him, war against non-Christians was different from war between Christians. Even though all Christian theologians knew that non-believers — Saracens and Jews — were human beings, the international law of the *respublica Christiana*, with its profound distinctions between various types of enemies and, consequently, various types of wars, was based on profound distinctions between human beings and on great disparities in their status.

Rejecting the contrary opinions of other theologians, Vitoria obviously treated Christians and non-Christians as equals in legal terms, at least from the standpoint of international law. Neither the pope, who had only spiritual power, nor the emperor, who was by no means the ruler of the world, nor any Christian prince could do as he wished with non-Christian peoples and their lands. As with the princes and peoples of Christian lands, barbarian princes in non-Christian lands also had authority (*jurisdictio*), and the native inhabitants also had ownership (*dominium*) of their soil. This view gained general acceptance among Spanish and non-Spanish authors alike in the 16th century. Consequently, a Spaniard professing Christianity had no direct right to appropriate the land of non-Christian princes and peoples. According to Vitoria, the right to appropriate land arose only indirectly, and then only by way of arguments favoring just war.

As already noted, it is not surprising that a Christian moral theologian would refuse to discriminate against non-Christians. In the case of Vitoria, however, at stake were actual political questions of great and immediate significance: those concerning the land-appropriation of a new world. This is why his theoretical conclusions, though they refer only to his arguments and avoid any practical decisions, can be astonishingly provocative and can be misinterpreted, especially when taken out of context, divorced from the coherence of his thinking, and generalized as abstract principles

9. In the discussion of the first *titulus legitimus*, at the end of the second *proposito*, we read: "*Non enim homo homoni lupus est, ut ait Ovidus, sed homo*," in Vitoria, *Relectiones teologicas*, *op. cit.*, Vol. I, pp. 384f.

of international law in a manner approaching the completely secularized and neutralized thinking of a modern scholar. Vitoria's seemingly unlimited objectivity and neutrality, based on his own wide-ranging generalizations, naturally suggested and inspired even more wide-ranging generalizations. One example of his neutralizing arguments best demonstrates his approach, i.e., his treatment of whether discovery constitutes a legal title for acquisition of discovered land.

Discovery was the recognized basis for a true legal title from the 16th to the 18th century. For Vitoria, it was not a legitimate title of acquisition, even for the discovery of a new world. Apparently, neither did it constitute for him any special entitlement to acquisition nor any foundation for a legal title, not even in the case of what would be called "inchoate title" in 19th and 20th century international law.[10] Evidently, events that today are considered to be enormously significant did not impress him, or at least did not have any great moral impact on him. Nor does he mention that the Spanish discoverers and conquerors took with them the sacred image of Mary to demonstrate their piety and to justify their historical acts. His ahistorical objectivity goes so far that he ignores completely not only this Christian-Marian symbol, but also the humanitarian concept of "discovery" so laden with history in the modern view. From a moral standpoint, the New World for him was not new, and the moral problems it entailed could be handled by the immutable concepts and standards of his scholastic system of thought. In historical reality, further development of the struggle for America was determined by global lines, especially amity lines. Of course, for Vitoria, recognition or even acceptance of lines beyond which the distinction between justice and injustice was suspended was a sin and an appalling crime.

10. This concept of "inchoate title" was developed in the 19th century, in particular by English jurists — Sir Travers Twiss [1809-1897], Sir Edward Marshall Hall [1858-1927], Sir Robert Joseph Phillimore [1810-1885], John Westlake [1828-1913], and Lassa Francis Lawrence Oppenheim [1858-1919]. A more recent work on this problem is Mark F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London and New York: Longmans, Green & Co., 1926), pp. 146ff., where in general it means: "Discovery gives only an inchoate title." From the practice of the International Court of Justice, of particular note is the decision of its president, Max Huber, of April 28, 1928, regarding the American-Dutch dispute over the island of Las Palmas, as well as the proceedings in the Hague regarding Greenland (the decision of April 5, 1933). On this last, see Franz Fuglsang, "Der Standpunkt der Parteien im Grönland-Konflikt," in *Zeitschrift für Politik*, Vol. 33 (1933), No. 6-7, p. 748; Ernst Wolgast, "Das Grönland-Konflikt des Ständigen Internationalen Gerichtshofes vom 5. April 1933," in *Zeitschrift für öffentliches Recht*, Vol. VIII (1933), p. 573; and Fritz Bleiber, *Die Entdeckung im Völkerrecht, Greifswalder rechtswissenschaftler Abhandlungen*, Vol. 3 (1933), pp. 63f.

The profound distinctions within the concept of "enemy," as well as those consequent elemental distinctions between regulated and unregulated wars — the specific limitations of war that developed within a spatial order in international law and that emerged so prominently in the international law of the Christian Middle Ages — also are subsumed in Vitoria's assumption of the general equality of mankind. Spaniards are and remain the barbarians' fellowmen; thus, here also the Christian duty to "love thy neighbor" is in force, and every person is our "neighbor." Concretely speaking, this was the basis of the moral and juridical conclusion that all the Spaniards' rights *vis-à-vis* the barbarians also were valid in reverse — they were reversible as *jura contraria* [contrary laws], as rights of barbarians *vis-à-vis* Spaniards, i.e., they were unconditionally reciprocal and invertible. If Christians and non-Christians, Europeans and non-Europeans, civilized peoples and barbarians have equal rights, all concepts necessarily are reversible. Consequently, such a legal title (*occupatio bonorum nullius* [non-possession of goods]) was of no more use to Spaniards than if the reverse had been the case, i.e., if Indians had discovered them: *non plus quam si illi invenissent nos* [no more than if they had found us].[11] Today, however, this claim has the ring of an all-too-abstract, neutral, apathetic, and, thus, ahistorical exaggeration.

In another passage, Vitoria contends that barbarians have no more right to exclude Spaniards from trade and legal commerce than Spaniards have to exclude Frenchmen.[12] This gives the impression that he no longer saw Europe as the center of the earth and the source of all standards, that he no longer recognized the spatial order of the medieval *respublica Christiana,* with its distinction between the territory of Christian peoples and that of heathens or non-believers. Today, it is still understandable how someone would be outraged by Pizarro's cruelty. Vitoria later wrote in a letter, with clear reference to Sepúlveda: "The Indians are human beings, not apes." But what would the representatives of modern civilization say about the fact that Vitoria says nothing about the right of a superior civilization or culture, the right of civilized peoples to rule over half-civilized or uncivilized peoples, or about "civilization," which has been a decisive concept in European international law since the 18th century?

This demonstrates the deep antithesis between the scholastic ahistorical

11. This passage is found in the Getino edition of Vitoria, *Relectiones teologicas, op. cit.*, Vol. II, p. 333. I was unable to find this passage in the reprints of the first volume of this edition. All quotations from Vitoria should be considered with the reservation that there is no authentic — authorized — edition of his works.

12. *Ibid.*, Vol. I, p. 387; Vol. II, p. 334.

approach and a historical mode of thinking, in particular the 19th century humanitarian philosophy of history. In his lectures on the philosophy of history, Hegel argues that the culture of the Mexicans and the Peruvians "had to perish as soon as the [world-]spirit approached them." This thesis exhibits the self-conscious arrogance of an idealist philosophy of history. But even so critical and pessimistic a 19th century historian as Jacob Burckhardt still referred to what he called "the sovereign right of culture to conquer and subjugate barbarians which, after all, is conceded by most people." Vitoria had an entirely different attitude. Not even the emergence of a new continent and a new world led him to adopt historical arguments based either on a Christian view of history or on the ideas of a humanitarian-civilizing philosophy of history. The lack of any historical concept at such a crucial time had to lead to a suspension and displacement of the predominant Eurocentric view of the world and of history in the *respublica Christiana* of the Middle Ages.

B. Vitoria as a Theologian

Yet, it would be a gross misinterpretation to say that Vitoria had claimed that the great Spanish *conquista* was unjust, although this false assumption certainly is widespread. In the case of some older authors, this misunderstanding can be explained by the political animosity toward Spain. Today, it can be explained simply by superficiality.[13] The main reason for the contemporary misunderstanding is the modern belief in progress and civilization. Since the destruction of the Christian view of history by the Enlightenment in the 18th century, this belief has become so widely accepted that many no longer grasp (or, for that matter, even notice) how far removed Vitoria is from such concepts as progress and civilization. Further difficulties arise from the fact that Vitoria only examines legal titles and arguments, but does not apply them to concrete circumstances and reach his conclusions on this basis.

If today a superficial reader learns that certain legal titles offered to support the *conquista* are rejected as inappropriate, he surmises that this constitutes a general rejection of the *conquista* as such. If he learns of Vitoria's critique of the injustices and cruelties associated with the *conquista*,

13. Teodoro Andres Marcos, a member of the law faculty in Salamanca, deserves credit for having authenticated *ex post facto* the true circumstances regarding this widespread and uncritical false interpretation. See Marcos, *Vitoria y Carlos V en la Soberania Hispano-Americana*, *op. cit.*; *Mas sobre Vitoria y Carlos V en la Soberania Hispano-Americana* (Salamanca: Imprentie Commercial Salmantina, 1939); *Final de Vitoria y Carlos V en la Soberania Hispano-Americana* (Salamanca: Imprimatur de Calatrava, 1942).

he understands this as a Rousseauean critique of the age or even as modern propaganda — as a general and civilized condemnation of the *conquista*. In reality, despite his rejection of seven legal titles (including the right of the emperor or of the pope to the earth), and despite his claim that the Indians are morally inferior, ultimately Vitoria's view of the *conquista* is *altogether positive*. Most significant for him was the *fait accompli* of Christianization.[14]

Undoubtedly, Vitoria's exposition is completely ahistorical. The positive conclusion is reached only by means of general concepts and with the aid of hypothetical arguments in support of a just war. Here, the neutral and hypothetical character of his thinking is striking. *If* barbarians opposed the right of free passage and free missions, of *liberum commercium* [free commerce] and free propaganda, then they would be violating the existing rights of the Spanish according to *jus gentium*; *if* the peaceful entreaties of the Spanish were of no avail, then they had grounds for a just war. In terms of international law, just war provided the legal title for occupation and annexation of American territory and subjugation of the indigenous peoples. There were additional grounds for just war by Spain against the Americans that, in modern parlance, would warrant "humanitarian intervention." Such grounds gave Spaniards rights of occupation and intervention if they were interceding on the part of people in their own country being suppressed unjustly by barbarians. The Spanish right of intervention was deployed especially on behalf of those Indians who had converted to Christianity.

The whole Spanish *conquista* could be justified by means of such general tenets and possible arguments. But Vitoria leaves this question unanswered. A concrete discussion would have to examine the matter case by case. For example, the situation of Cortez in Mexico might be completely different from that of Pizarro in Peru, so that the war in Mexico could

14. It did not occur to Vitoria to demand that the *conquista* be reversed, or to provide any other people, such as the French or the English, with a mandate for reparation and punishment of *in bello injusto versantes* [turning to an unjust war]. Here, too, his intention essentially was to determine the truth of the arguments, rather than to consider the reality of the historico-political situation. He also does not distinguish clearly the various practical methods of exercising the rights of missions, as was done in later discussions of this question outlining three opposing views: the apostolic promulgation lacking any force (from the standpoint of Las Casas); the prior subjugation of the peoples to be converted (the practice of the conquistadors); and missionary work under military protection, i.e., under simultaneous military escort (the standpoint of Domingo de Soto). On these three ways of *de procuranda salute indorum* [procuring the welfare of the inhabitants], see, above all, the description of José de Acosta, S. J. (1588), missionary to Peru, in Höffner, *Christentum und Menschenwürde*, *op. cit.*, pp. 246ff.

prove to be just and the war in Peru unjust. However, the scholastic account keeps a normative distance from the matter. Its theses are concerned only with arguments; its conclusions are not directly related to the concrete historical case and do not attempt to pass historical judgment on it.

How can this astonishing neutrality and objectivity be explained? First of all, there should be clarity about the existential situation in which it obtained; it should not be confused with a modern, free-floating intelligentsia lacking any presuppositions or standpoints. For this reason, it is necessary to remember that the lectures of the great Dominican do not constitute a juridical treatise similar to international law scholarship in the following centuries. Vitoria was a theologian. He did not claim to be a jurist, and even less did he wish to provide arguments for disputes between state governments. He speaks of jurists with a certain condescension.[15] His practical intention is not that of a crown counsel or advocate. By no means should he be associated intellectually with the likes of Balthasar Ayala, Alberico Gentili, or Richard Zouch, all of whom, being jurists of international law, eschewed theological arguments.

Vitoria speaks as a moral counsellor and teacher of future theologians, above all the moral counsellors of political actors. The relation of a father-confessor to the concrete situation of a penitent is different from that of a legal counsellor to his client or of a justice official to a defendant. The fact that legal questions may have some meaning as questions of conscience for active people is illustrated nicely by the will Hernando Cortes left his son upon his death in 1537. The conquistador gave detailed instructions for the reparation of injustices done to the Indians. Even a warrior like Cortes recognized questions of conscience. He also consulted theological moral counsellors. But certainly he would not have thought of allowing the right of his *conquista* to be challenged juridically for moral reasons, and even less of turning it over to the advocate of a political enemy.

As a theologian, Vitoria posed the question of the "right" of the *conquista* and of the *justa causa belli* from a thoroughly moral-theological standpoint with, at least at first glance, an entirely unpolitical objectivity

15. A disdain for jurists was not unusual at this time. The great Cisneros founded the University of Alcalá (1510) without a juridical faculty. "*Nam a civilibus et forensibus studiis adeo natura sua abhorrebat, ut multi serio affirmantem audiverint, quidquid illius disciplinae pectore concepisset, se si fieri posset libenter evomiturum.*" [Tr. Indeed, his nature disdained civic and forensic studies, as many may have heard seriously asserted, that whatever of these disciplines had been digested should be freely regurgitated.] Cf. Marcel Bataillon, *Erasme et l'Espagne: Recherches sur l'histoire spirituelle du XVIe siècle* (Paris: E. Droz, 1937), p. 14.

and neutrality. For this reason, it is insufficient merely to observe that he was a church theologian and not a state jurist. The great jurist must not be situated in the empty space of a neutral objectivity in the modern sense. The Spanish Dominican also must be seen in his historical context and in the totality of his existence — in his thoroughly concrete thinking as a representative of the Roman Catholic Church, i.e., as an agent of the concrete authority of international law from which the Crown of Castile received its missionary mandate for the New World and, thus, legal title for the great land-appropriation. The arguments in favor of just war, which appear to be so general and neutral, obtain their decisive legal force precisely from the missionary mandate; their abstract generality in no way diminishes the existential reality of a concrete historical standpoint.

The *papal missionary mandate* was the legal foundation of the *conquista*. This was not only the pope's position, but also that of the Catholic rulers of Spain, who recognized the missionary mandate to be legally binding. Above all, they emphasized the duty of the mission in their many instructions and orders to their admiral, Christopher Columbus, and to their governors and officers. This duty was given particular emphasis in the often asserted stipulation in Queen Isabella's will of 1501. In the December 1501 bull *Piae devotionis*, the pope transferred Church tithes to Catholic rulers and, in return, imposed upon them the maintenance of priests and churches. In a 1510 bull with the same title, he determined that they did not have to pay tithes from the gold and silver of the Indians. In an August 1508 bull, he established the patronage of the Spanish rulers over the churches in America.

All these arrangements, mentioned here only as examples, must be judged in terms of the *jus gentium* of the *respublica Christiana* of the Christian Middle Ages — not in terms of present-day international or interstate law, which sharply distinguishes between an internal *domaine exclusif* and an external international law. The structure of the relation between the Crown of Castile and the Roman Church would be inconceivable in principle, because the completely secularized international law now in force is based on the territorial sovereignty of states, each of which might conclude its own concordat [with the Vatican], none of which recognizes any spiritual authority with regard to international law, and all of which treat religious questions as purely internal state matters. These sovereign states divided the firm land among themselves and left the open sea free — free of the state, not open to occupation. In other respects, discovery and occupation were for them the only legal title for

land-appropriation. Vitoria explicitly rejects discovery and occupation as legal title for land-appropriation, because, for him, the territory of America was neither free nor unclaimed.

Thus, the papal missionary mandate, even if only indirectly, by means of a just war, was the true legal title to the *conquista.* To this extent, however, Vitoria's arguments are consistent with the spatial order of the international law of the *respublica Christiana.* Throughout the Christian Middle Ages, the distinction between the territory of Christian and non-Christian princes and peoples remained fundamental to and characteristic of that spatial order. For this reason, war between Christian princes, understood as limited by *jus gentium*, was, of course, different from war between Christians and non-Christians. The pope could issue mandates for either missions or crusades to the lands of non-Christian princes and peoples, which established both the justice of war in international law and the legitimacy of territorial acquisition. Thus, as early as the 10th century, in the Ottonian era, German emperors received missionary mandates to convert the heathen Slavic peoples and to expand their territory in the East. The pope's proclamation of a crusade against the infidels became a title of great political significance in international law, because it constituted the basis for the acquisition of the territory of the Islamic Empire. In its first stage, on which Vitoria's arguments are based, the Crown of Castile's appropriation of American soil was completely in line with the international law of the Christian Middle Ages. In fact, it was at once its apogee and its climax.

The Dominican order, to which Vitoria belonged, and the other orders engaged in converting the Indians were guardians and executors of the missionary mandate from which the *jure gentium* of legitimate title for a secular *conquista* could be developed. These orders also were agencies of the pope and of the church as an authority in the *international law* of the *respublica Christiana.* They took seriously their spiritual task with respect to the secular authorities and officials of the Spanish government. Of course, there were constant tensions and disagreements between the Spanish government's colonial officials and all the missionary orders: Dominican, Franciscan, Augustinian, Hieronymite, and Jesuit. However, these disputes should not be understood in terms of modern struggles between church and state. They were no Bismarckian *Kulturkampf* and no manifestation of laicism in the sense of the French church controversy. Rather, what was true of the medieval antithesis of emperor and pope was true also here: emperor and pope, empire and church constituted an inseparable unity; disputes between them were neither conflicts between two

different political entities nor between two different *societates*, but tensions and disagreements between two orders of one and the same unity, between two *diversi ordines*. Also in this respect, the Spanish *conquista* was an extension of the concepts of the spatial order of the *respublica Christiana* of the Middle Ages. This medieval *jus gentium*, with all its specific concepts of international law, above all, those of just war and of legitimate territorial acquisition, was overcome only by the self-contained, sovereign, territorial state of the *jus publicum Europaeum*.

It is known that the Dominicans deserve special credit for their role in the Christianization of the Indians of the Americas. One need only mention Las Casas, who first came to Spain as a Dominican in 1530 to protect the Indians of Peru from the cruelties of their conquerors. Moreover, the Dominican order was qualified, as the representative of the scholastic tradition of St. Thomas Aquinas, to consider and to formulate the controversial questions that arose from the new situation — the land-appropriation of the New World — within the systematic structure and with the methods of scholastic theology and philosophy. The concrete historical fact of the land-appropriation of a new world thus occasioned Vitoria's intellectual construction in his *relectiones*, with their balancing of pros and cons, arguments and counter-arguments, distinctions and conclusions, altogether constituting an intellectual unity, an indivisible totality concerned not with the concrete situation and its practical consequences, but only with the validity of arguments.

C. Vitoria's Legacy

It is necessary to reiterate that Vitoria did not present the Spanish conquest of the Americas as "unjust." There is no need to discuss in detail all the "legitimate legal titles" he explicates, but only to restate that his conclusions ultimately justified the *conquista*. His lack of presuppositions, his objectivity and neutrality, have their limits, and do not go so far as to disregard the distinction between Christians and non-believers. On the contrary, the practical conclusion is completely consistent with Vitoria's Christian convictions, which found their true justification in Christian missions. It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions. This is the limit of the absolute neutrality of Vitoria's arguments, as well as of the general reciprocity and reversibility of his concepts.

Vitoria may have been an Erasmian,[16] but he was no advocate of the absolute humanity fashionable in the 18th and 19th centuries; he was no follower of Voltaire or Rousseau, no freethinker or socialist. For Vitoria, the *liberum commercium* was not the liberal principle of free trade and of free economy in the sense of the "open door" of the 20th century; it was only an expedient of the pre-technical age. The freedom of missions, however, was truly a freedom — a *libertas* of the Christian Church. In the thinking and terminology of the Middle Ages, *libertas* was synonymous with law. Thus, for Vitoria, Christian Europe was still the center of the earth, both historically and concretely oriented to Jerusalem and to Rome.

Vitoria was not a forerunner "of modern lawyers dealing with constitutional questions,"[17] as an especially critical 19th century Hegelian called those scholars who assumed a purely formal pro and con standpoint of inner neutrality with respect to questions of the existence of Christianity. Abstracted entirely from spatial viewpoints, Vitoria's ahistorical method generalizes many European historical concepts specific to the *jus gentium* of the Middle Ages (such as people, prince, and war), and thereby strips them of their historical particularity. This allowed theology to become a moral doctrine and, in turn (with the aid of an equally generalizing *jus gentium*), a "natural" moral doctrine in the modern sense and a merely rational law. Following in the footsteps of Vitoria

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16. According to the references provided by Bataillon (*Erasme et l'Espagne*, *op. cit.*, pp. 260ff.), Vitoria can be called neither an Erasmian nor an anti-Erasmian. At the Valladolid Conference of 1527, Vitoria emphasized many of Erasmus' dogmatic errors (*ibid.*, pp. 273f.). It is more a question of his general attitude toward Erasmus, in particular with respect to war. As is well-known, Pelayo regarded Vitoria as an Erasmian, while Getino refuted this claim. See Luis G. Alonso Getino, *Vida el Maestro Fray Francisco de Vitoria y el renacimiento filosofico teologico del siglo XVI* (Madrid: tip. de la "Rev. de arch., bibl. y museos," 1914). The core of the matter lies not in biographical or theoretical details, but in what might be called the *historico-intellectual slant* of Vitoria's arguments and their tendency to be neutral. After completing this chapter, I became acquainted with an important lecture by Alvaro d'Ors that rightly emphasizes the "neutral tendency" inherent in Vitoria's arguments: "*Vitoria liquida el orden de ideas que prevalecia en la Edad Media; liquida, en el campo del Derecho de gentes, la concepción teológica, para dar paso a una concepción racionalista.*" [Tr. Vitoria eliminated the order of ideas prevalent in the Middle Ages; in the field of *jus gentis*, he eliminated the theological concept in order to pave the way for the rationalist concept.] See Alvaro d'Ors, "Francisco de Vitoria, Intellectual," in *Revista de la Universidad de Oviedo* (1947), p. 12.

17. "Those legal scholars who assumed the role of arbiters in the medieval dispute between secular and spiritual power, and who regarded the question of the existence of Christianity in antiquity as one of form that could be decided arbitrarily and without prejudice in terms of its pros and cons, were already forerunners of modern lawyers who, for instance, also believed they were upholding the life of the state."

and Suarez,[18] 17th and 18th century philosophers and jurists, from Grotius to Christian Wolff, consistently developed this moral doctrine of late scholasticism into a still more general, more neutral, and purely *jus naturale et gentium* [natural and international la

These philosophers and jurists discarded the distinction, essential for Spanish Dominicans, between Christian believers and non-believers. It thus became possible to use Vitoria's arguments for other and even antithetical political goals and intentions. With the purest motives of a moral-theological objectivity, Vitoria rejected any discrimination on the basis of Christian and non-Christian, civilized and barbarian, European and non-European. But this is precisely what doomed his theses and definitions to be misused, and paved the way for completely heterogeneous aims strong enough to overpower scholastic concepts and formulas. Abstractly conceived, particular principles and ideas can be divorced from the concrete unity of a complex intellectual structure and from the concrete historical situation, making it both possible and easy to apply them generally to entirely different situations. An especially widespread and improper use of Vitoria's thinking is the transposition of his moral-theological doctrines into a context centuries later, where no longer theologians of the Roman Church, but rather jurists of neutral (with respect to religion) powers developed arguments in international law. In this essentially different intellectual milieu of untheological — purely moral or purely juridical — expositions, his thinking is misconstrued.

In itself, this is not unusual; it has occurred frequently in history. For example, the British historian John Neville Figgis, who is well-acquainted with the struggle between pope and synod in the 15th century, concluded that disputes between governments and parliaments over modern parliamentarism during the 19th century were no different from those between the pope and the synod in the 15th century. Similar arguments and viewpoints also were voiced in conflicts between pope and emperor, spiritual authority and secular power. Thus, many of Vitoria's arguments could be divorced from the concrete historical problem — justification by papal missionary mandate of the European land-appropriation of a non-European new world — and could be applied to other situations. Few authors have had their arguments transplanted in such a way, and few names have become so famous as a result. In this respect, Vitoria's reputation has its own history and requires special treatment. The almost mythical renown Vitoria's name has acquired in certain quarters over the last few decades is an interesting historical phenomenon in itself. It is instructive for

18. [Tr. Francisco Suarez (1548-1617) was a Spanish theologian and philosopher.]

international law scholarship, which is why it is necessary to be historically specific, at least to the extent of offering two or three examples of how his thinking has been used.

I do not have in mind primarily true jurists, such as Gentili, who refers frequently to Vitoria without appropriating his arguments in any systematic way. In contradistinction to the theologians, Gentili is too much the secular jurist. Grotius is a different matter. He also distinguished himself from theologians, but he was inclined to use their arguments. Of particular note is his well-known treatise, *Mare liberum*,[19] in which he adopted Vitoria's arguments on *liberum commercium* and the freedom of missions. That same *freedom* that Vitoria sanctioned for Spanish Catholics *vis-à-vis* heathen Indians, Grotius advanced for Dutch and English Protestants *vis-à-vis* Portuguese and Spanish Catholics. Thus, a train of thought that a Spanish theologian had expounded as an altogether internal, Spanish-Catholic matter within the firm framework of the Dominican order and within the political unity of the Spanish-Catholic empire, was used only a few decades later against Spain by a polemical jurist of a hostile country as propaganda in European trade wars. Grotius even claimed that he was bringing the question of free trade before the tribunal of conscience and was appealing to those very Spanish jurists versed in divine and human law.

The extent to which Grotius appropriated the arguments of earlier authors generally is known. Not always recognized, however, is that, in another time, these arguments meant something completely different. The distribution of the earth had reached a different stage, and this Protestant instrumentalization neutralized the specifically Catholic character of Vitoria's intentions. Having become mercantilist, European states no longer accepted the arguments of *liberum commercium*. Luis de Molina [1535-1600] had concluded that every state had a right to expel unwelcome visitors,[20] and Samuel Pufendorf [1632-1694] had become openly

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19. Hugo Grotius, *Mare liberum: sive de jure quod Batavis competit ad Indicana commercia dissertatio* (1607). [Tr. Schmitt refers to the edition published in Washington, D.C. by the Carnegie Endowment for International Peace, 1916. Cf. Hugo Grotius, *The Freedom of the Seas: or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade* (New York: Oxford University Press, 1916).]

20. The Strasbourg theses of Johann Paulus Silberrad, advocated in 1689 under the presidency of Johannes Joachim Zentgrav, are instructive for the late 17th century. The line of argument for just war is retained, but (with reference to Pufendorf) non-Christian princes also are conceded the right to exclude unwelcome visitors from their lands. See Johann Paulus Silberrad, *De Europaeorum ad indorum regiones jure* (Argentorati: J. Welperi, nd), p. 15.

mercantilist. This transformation of arguments was crucial for the history of modern international law and for the problem of just war. The various uses of Vitoria's arguments and the transformation of his intentions has been recognized by historians for centuries and should be obvious.

Almost 300 years later, the Spanish Dominican's arguments were inserted, in an even more astonishing manner, into a system of thought completely foreign to him. After World War I, a "renaissance" of Vitoria and late Spanish scholasticism marked an especially interesting phenomenon in the history of international law. The great Spanish theologians had not been forgotten completely, especially in Spanish and Catholic traditions. The astonishing degree to which Suarez dominated German and Protestant universities during the 17th century never was forgotten completely, even if it was Eschweiler who, in 1928, again called attention to it.[21] In the history of international law, Spanish theologians were known to all good 19th century authors, such as Baron Karl von Stacheu Kaltenborn and Alphonse Rivier, as "forerunners of Grotius."[22] But, only after 1919 did Vitoria's name suddenly become known and famous throughout the world. There is no need here to discuss the misinterpretations that made a journalistic myth of the great Dominican.[23] However, there is still something specific that requires our attention.

Following James Lorimer,[24] a major 19th century Belgian jurist, Ernest Nys, frequently referred to Vitoria in his legal-historical studies of international law in the Middle Ages and in the 16th century.[25] It was Nys who broke the ground and paved the way for the Vitoria renaissance after World War I, which has resulted in a large bibliography. The thrust of Nys' work was a function of his faith in humanitarian civilization and progress. There is no need to belabor this point,

21. Eschweiler, *Die Philosophie der Spätscholastik*, *op. cit.*

22. Joseph-Barthélemy, *Les fondateurs de droit international . . . leurs oeuvres, leurs doctrines*, ed. with an introduction by Antoine Pillet (Paris: 1904).

23. These have been refuted by Marcos, in *Vitoria y Carlos V*, *op. cit.*

24. In his *Institutes of International Law* (1883-84), translated into French by Nys, Lorimer named Vitoria, Soto, and Suarez as the founders of international law.

25. Nys refers to Vitoria in many important works, beginning with "Les publicistes Espagnols du XVIe siècle et les droits des Indiens," in *Revue de Droit international et de Législation comparée*, Vol. XXI (1889), pp. 532-560, and concluding with James Brown Scott's 1917 edition of Vitoria's *relectiones*, *op. cit.* Cf. also by Nys, *The Papacy Considered in Relation to International Law*, tr. by Rev. Ponsonby (London: H. Sweet, 1879); *Le droit de la guerre et les précurseurs de Grotius* (Brussels: C. Muquardt, 1882); *Les droits des Indiens et les publicistes espagnols* (Brussels: P. Weissenbruch, 1890); *Les initiateurs du droit public moderne* (Brussels: P. Weissenbruch, 1890); *Les origines du droit international* (Brussels: A. Castaigne, 1894).

since Nys himself quite openly avowed his beliefs, not only in occasional remarks and formal addresses,[26] but also in an important scholarly treatise on the modern history of international law.[27] Like all the works of the great scholar, this treatise is extraordinarily rich and is a crucial document with respect to *le crime de l'attaque*, the criminalization of aggressive war.

The most recent and modern chapter in the history of the use of Vitoria's arguments is related directly to Nys' works. James Brown Scott, the world-renowned American jurist, founder and president of the American Institute of International Law and the American Society for International Law, Secretary of the Carnegie Endowment for International Peace and Director of its International Law Division, who died in 1943, dedicated himself to becoming the official exponent of Vitoria's fame. Andrew Carnegie, in his December 14, 1910 letter establishing the Endowment, characterized

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26. Camilo Barcia Trelles' lectures constituted the strongest breakthrough for the world at large. See Barcia Trelles, "Francisco de Vitoria et l'école moderne du droit international," in *Recueil des Cours*, Vol. 17 (1927), No. 2, pp. 113-337. As early as 1925, in a lecture in Salamanca, Barcia Trelles hailed Vitoria as a precursor even of the Monroe Doctrine (America for the Americans). Alejandro Alvarez called the Monroe Doctrine the "true gospel of the new continent," in *Le droit international américain: son fondement et sa nature: d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (Paris: A. Pedron, 1910). Of course, this modern gospel is not identical with the one Vitoria espoused. In 1928, in the same city (Valladolid) in which Barcia Trelles' book on Vitoria as the founder of modern international law appeared (*Francisco de Vitoria et l'école moderne du droit international du XVI siècle* [Paris: Hachette, 1928]), Scott delivered a lecture on the Spanish origins of modern international law. Fernandez Prida Joaquin has published a book on the influence of Spanish writers on modern international law (*Influencia de los tratadistas espanoles en la formación de la ciencia del derecho international publico* [Madrid: Imp. Artistica Saez Hermanos, 1929]). For further information, see Rodrigo Octavio, "Les sauvages américains devant le droit," in *Recueil des Cours*, Vol. 31, No. 1 (1930), pp. 218ff. An association founded at the university in Utrecht proclaimed Vitoria to be the leading authority on colonization. See Gesina Heremina Johanna van der Molen, *Alberico Gentili and the Development of International Law. His Life, Work and Times* (1937), p. 270, n. 14 [2nd revised ed. (Leyden: A. W. Sijthoff, 1988)]; see also A. H. Böhm, *Het recht van kolonisatie, Francisco de Vitoria's lesson over het recht tot koloniseeren in verband met de Spaansche kolonisatie het optreden der Pausen en het internationale recht* (Utrecht: A. Oosthoek, 1936) and *Les leçons de Francisco de Vitoria sur les problèmes de la colonisation et de la guerre*, ed. and tr. by Jean Baumel (Montpellier: Imprimerie de la Presse, 1936). These references are sufficient here. For more information, see Friedrich August Freiherr von der Heydte, "Franciscus de Vitoria und sein Völkerrecht: Zum 400. Geburtstag der Völkerrechtswissenschaft," in *Zeitschrift für öffentliches Recht*, Vol. 13, No. 2 (1933), pp. 239-268. See also the outstanding work by the Hungarian László von Gajzago on the Spanish origin of international law (*A háború és béke joga* [Budapest: Stephaneum Nyomda, 1942]); and Höffner, *Christentum und Menschenwürde*, *op. cit.*

27. See Ernest Nys, *Idées modernes, Droit international et Franc-Maçonnerie* (Brussels: M. Weissenbruch, 1908).

war as essentially criminal, though without distinguishing between aggressive and defensive wars and, of course, without citing any theologians. Scott, however, found Spanish theologians to be a great resource. He delivered numerous lectures on Vitoria and Suarez as the founders of modern international law and espoused his thesis in various publications.[28]

D. Situating Vitoria's Thinking

Scott's zeal succeeded in making Vitoria's name well-known and even popular in circles far beyond the scholarly disciplines of history and international law. His efforts also marked a new stage in the instrumentalization of Vitoria's arguments, which has reached the point of political myth-making. Even in official and semi-official United States declarations there is a "return to older and sounder concepts of war," by which is meant, above all, Vitoria's doctrines on free trade, freedom of propaganda, and just war. War should cease to be simply a legally recognized matter or only a matter of legal indifference; it again should become *just* in the sense that the aggressor is declared to be a felon, meaning a criminal. The former right to neutrality, grounded in the international law of the *jus publicum Europaeum* and based on the equivalence of just and unjust war, also should be eliminated.

We need not elaborate on the general antithesis between medieval Christian and modern civilized beliefs. In the Middle Ages, just war could be a *just war of aggression.* Clearly, the formal structures of the two concepts of justice are completely different. As far as the substance of medieval justice is concerned, however, it should be remembered that Vitoria's doctrine of just war is argued on the basis of a missionary mandate issued by a *potestas spiritualis* that was not only institutionally stable, but intellectually self-evident. The right of *liberum commercium* and the *jus peregrinandi* [right to travel] were to facilitate the work of Christian missions and the execution of the papal missionary mandate. They were

28. [Tr. Cf. *Vitoria et Suarez: Contribution des theologiens au droit international moderne*, with a preface by James Brown Scott (Paris: A. Pedone, 1939).] James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations*, introduction to an edition of Vitoria's writings (Oxford: Clarendon Press, 1932). See the reviews of James Brown Scott, *The Catholic Conception of International Law* (Washington, D.C.: Georgetown University Press, 1934), by William Renwick Riddell and John T. Vance, in *Georgetown Law Review*, Vol. XXIII (1935), pp. 904-908 and 908-915, respectively. Scott's book also was published under the title *The Spanish Conception of International Law and of Sanction* (New York: Carnegie Endowment for International Peace, 1934). For further bibliography, see Heydte, "Francisco de Vitoria und sein Völkerrecht," *Zeitschrift für öffentliches Recht*, *op. cit.*; Gajzago, *A háború és béke joga*, *op. cit.*; and Höffner, *Christentum und Menschenwürde*, *op. cit.*

not the same as the principle of the "open door" for industrial penetration, and a relativistic or agnostic renunciation of the truth should not be confused with the call for free propaganda supported by Matthew 28:19.[29] We are interested only in the justification of land-appropriation, which Vitoria conceived in terms of the general problem of just war. All significant questions of an order based on international law ultimately coalesce in a concept of just war. Consequently, this is where the heterogeneity of intentions reached its highest degree of intensity.

Despite many internal anomalies, the medieval doctrine of just war at least was grounded in the framework of a *respublica Christiana.* On the one hand, it distinguished various types of feuds and wars; on the other, it recognized the legal validity of the feudal right of challenge and the baronial right of resistance. It had to distinguish among feuds, wars between Christian belligerents (those subject to the church's authority), and other wars. Crusades and missionary wars authorized by the church were *eo ipso* just wars, without any distinction between aggression or defense. Princes and peoples who obstinately evaded the church's authority, such as Jews and Saracens, by definition were *hostes perpetui* [perpetual enemies]. All this presupposed the authority of a *potestas spiritualis* in international law. Medieval Christian doctrines never could be abstracted from this church authority in international law, least of all when one of the belligerents was a Christian prince.

Formally speaking, the church's authority was decisive in the determination of just war. Accordingly, from the standpoint of substantive law, a just war was one waged *ex justa causa* [from just cause], i.e., for the purpose of pursuing legal demands, regardless of whether the war was aggressive or defensive, either strategically or tactically. The fact that *justa causa* set the standard precluded the purely juridical protection of property (upon which, for example, the 1924 Geneva Protocol is based) from being the only factor deciding the justice or injustice of war. Definitions of the aggressor, such as those underlying the 1924 Geneva Protocol or the 1932-34 Disarmament Conference, were intended to prevent any reference to the causes of war or to the justice or injustice of such causes, in order to avoid interminable and futile discussions of guilt in matters of foreign policy.

Based on relations between states, post-medieval European international law from the 16th to the 20th century sought to repress the *justa causa.* The formal reference point for determining just war no longer was the church's authority in international law, but rather the *equal*

29. [Tr. "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost."]

sovereignty of states. Instead of *justa causa*, international law among states was based on *justus hostis*. Any war between states, between equal sovereigns, was legitimate. Given this juridical formalization, a rationalization and humanization — a bracketing — of war was achieved for 200 years. It is sufficient (but obviously also necessary for restoration of the true image of Vitoria) to note that the turn to the modern age in the history of international law was accomplished by a *dual division* of two lines of thought that were inseparable in the Middle Ages. These were the definitive separation of moral-theological from juridical-political arguments, and the equally important separation of the question of *justa causa*, grounded in moral arguments and natural law, from the typically juridical-formal question of *justus hostis*, distinguished from the criminal, i.e., from becoming the object of punitive action.

The decisive step from medieval to modern international law — from the theological system of thought predicated on the church to a juridical system of thought predicated on the state — lies in this dual division. Such a step not only concerned theoretical questions of concept formation; it exemplified, both institutionally and organizationally, the profound antithesis between two concrete orders and two distinct authorities. Sociologically, it was the structural antithesis of two leading elites — politically active groups and their advisors — and of the methods and means by which their respective political convictions and opinions were formed. A true jurist of this transitional period, Gentili, formulated the battle cry and coined what may be considered to be the slogan of the epoch in terms of the sociology of knowledge: *Silete theologi in munere alieno!* [literally: Theologians should remain silent within foreign walls!; figuratively: Theologians should mind their own business!].

Despite all his neutrality, objectivity, and humanity in other respects, in these two points — the relation between theological and juridical thinking, and the question of *justa causa* — Vitoria's thinking belongs to the Christian Middle Ages, rather than to the modern international law among European states. As already noted, he chose to remain a theologian, and never became a jurist. He is a theologian not only because he designates Jews and Saracens as *hostes perpetui* or because in his *relectiones*, he insists that a war undertaken to harm Christianity is *eo ipso* unjust, but primarily because he does not advance from the problem of *justa causa* to a fundamental discussion of *justus hostis*. Although he appears to move in this direction, what matters to him is that Indians, though they are not Christians and may be guilty of many crimes, should not be treated as criminals,

but as opponents in war, and that Christian Europeans should deal with them in the same way as with Christian European enemies. Vitoria thus was able to justify the Spanish *conquista* with reference to the general argument of the right to war, without discriminating against barbarians or non-Christians. In so doing, he approached the non-discriminatory concept of war characteristic of the new international law among states. But he did not expand this position juridically into a new doctrine of *justus hostis*, as did Gentili, for example, but substantiated this non-discrimination with general references only to the question of *bellum justum* [just war] in the Christian moral theology of the Middle Ages.

By contrast, the present theory of just war aims to discriminate against the opponent who wages unjust war. War becomes an "offense" in the criminal sense, and the aggressor becomes a "felon" in the most extreme criminal sense: an outlaw, a pirate. Yet, the injustice of aggression and the aggressor lies not in any substantive or material establishment of guilt in war, in the sense of determining the cause of war, but rather in the *crime de l'attaque*, in *aggression as such*. Whoever fires the first shot or engages in any equivalent action is the "felon" in this new criminal offense. The problem of *justa causa* remains outside the definition of terms. For this reason alone, the modern distinction between just and unjust war lacks any inherent relation to medieval scholastic doctrine and to Vitoria. Both recognize the validity of a just war of aggression, a *bellum justum offensivum* [just and offensive war], although Vitoria was aware of the doctrine's thoroughly questionable nature. One need only consider the five *dubia circa justum bellum* [doubts concerning just war] or the nine *dubia quantum liceat in bello justo* [doubts concerning what is permitted in just war] in his *relectiones*, to understand that the great advance of modern international law among European states consisted in substituting the doctrine of the juridical equality of *justi hostes* for the doctrine of *justa causa.*

Should this doctrine be abandoned today? After several hundred years of rationalization in thinking about relations among states, it is not easy to return to a pre-state doctrine. It is even more difficult to transfer juridical concepts from a system based on a *ordo spiritualis* [spiritual order] to a system lacking any such order.[30] If today some formulas of the doctrine of just war, rooted in the institutional order of the medieval *respublica Christiana,* are utilized in modern and global formulas, this does not

30. The modern criminalization of unjust war will be dealt with in the chapter on "Transformation of the Meaning of War," in Part IV, Ch. 4.

signify a return to, but rather a fundamental transformation of concepts of enemy, war, concrete order, and justice presupposed in medieval doctrine. For scholastic theologians, even an unjust war still was war. The fact that one of the belligerents was pursuing a just war and the other an unjust war did not negate the concept of war. However, if the justness of a war could be determined according to *justa causa*, there always was a latent tendency to discriminate against the unjust opponent and, thus, to eliminate war as a legal institution. War quickly became a mere punitive action; it acquired a punitive character. The many serious *dubia* of the doctrine of *bellum justum* were forgotten quickly. The enemy became a criminal, and the rest — the deprivation of rights and the plundering of the opponent, i.e., destruction of the concept of the enemy (still formally presupposing a *justus hostis*) — followed as a matter of course.

Vitoria says: "*Princeps qui habet bellum justum fit iudex hostium . . . .*" [A prince who fights a just war becomes a judge of the enemy]. In Cajetan,[31] one already can read: "*Habens bellum justum gerit personam iudicis criminaliter procedentin*" [Fighting a just war produces a person who prosecutes like a judge in a criminal matter]. But if the "punitive" character of just war is so described, this should not be understood in terms of modern concepts of criminal justice, even less in terms of criminal police actions, but possibly only in the sense of a modern penal code, which by now is nothing more than social pest control. Thus, the doctrine of just war in the sense of *justa causa belli* [just cause of war] had not yet gone so far as to eliminate the concept of war altogether, thereby transforming a belligerent action into a purely judicial or police action in the modern sense. This was not yet possible, if only because, in the age of the feudal right of challenge and the baronial right of resistance, a central state judiciary and police in the modern sense did not exist. The rights of self-defense and of resistance were valid in the medieval legal order. The judiciary and the police in the modern state eliminated this type of self-defense, and transformed it into such criminal offenses as high treason, sedition, and disturbance of the peace.

As soon as the institutional foundations of the medieval doctrine of

31. [Tr. Cardinal Cajetan (1470-1534), also called Gaetanus, from his birthplace in Gaeta (Naples). A Dominican like Vitoria, Cajetan acquired his reputation as a theologian in a public disputation with Pico della Mirandola at Ferrara (1494). Being as adept at diplomacy as at theology, he was employed by the pope in several negotiations and transactions. He is known best for his appearance at the Augsburg diet, where in 1519 he helped draw up the bull of excommunication against Luther.]

just war were disregarded, the dissolution of the concept of war was close at hand. A Lutheran contemporary of Vitoria, the jurist Johann Oldendorp (1480-1567), said matter-of-factly that just war is not war, but justice, and that unjust war is not war, but rebellion. In so doing, he had no idea that this abolition of war had created a new and difficult problem for Europe: creedal civil war. Faced with the problem of these European civil wars, the juridical founders of modern interstate international law — Ayala, Gentili, and Zouch — divorced the question of *bellum justum* proper from that of *justa causa belli*, and made war into a mutual relation between sovereign states in which *justi et aequales hostes* [just and equal enemies] confronted each other indiscriminately.

In Vitoria's thinking, as in medieval doctrine, war remains war on both sides, despite its "punitive character." Vitoria does not deny that a just war waged by Christian princes *against non-Christian* princes and peoples is a real war, and he thus regarded the opponent in such a war as a *justus hostis*. In the modern, discriminatory concept of war, the distinction between the justice and injustice of war makes the enemy a felon, who no longer is treated as a *justus hostis*, but as a criminal. Consequently, war ceases to be a matter of international law, even if the killing, plundering, and annihilation continue and intensify with new, modern means of destruction.

Since, on one side, war becomes a punitive action in the sense of modern criminal law, on the other, the opponent no longer can be a *justus hostis*. It is no longer war waged against him, any more than against a pirate, who is an enemy in a sense completely different from that in European international law. He has committed an offense in the criminal sense: the crime of aggression, *le crime de l'attaque*. Thus, the action taken against him is no more war than a police action against a gangster. It is merely the execution of justice and, ultimately, with the modern transformation of penal law into social pest control, only a measure taken against a parasite or trouble-maker: against a *perturbateur* who is disarmed with all the means of modern technology, e.g., rendered harmless by a police raid. War is abolished, but only because enemies no longer recognize each other as equals, morally and juridically. This may be a return to an older standpoint. In some respects, however, it also is a retreat from the juridical concept of *justus hostis* to a quasi-theological concept of the enemy. In this case, it is the antithesis of a non-discriminatory reciprocity taken to its extreme, which Vitoria expresses in a clearly Christian sense.

The history of how Vitoria's arguments have been used in international law from the 16th century until now offers striking examples of unexpected

transformations and reinterpretations. But no thought is safe from reinterpretations, and any argument is subject to a fate that often can be more surprising than is suggested by the well-known expression *fata libellorum* [fate of libels]. In Vitoria's case, we have a member of an order who remained true to his principles and who, as a moral theologian and a prudent teacher, conscientiously considered the pros and cons of his arguments. He presented his thoughts before his co-religionists, and accommodated his conclusions to the indivisible unity of his propositions and distinctions.

From the intellectual unity of a controversy at once internal to the Church and to Spain, other authors, non-ecclesiastical and anti-Spanish alike, extracted arguments and formulas that served their purposes as juridical trump-cards. Thereby, the power of such a scholastically thorough and open a thinker as Vitoria was harnessed to causes not only foreign, but often even hostile to his intentions. The melody conceived for a pious Catholic text thus was set to an entirely different and totally worldly libretto. This, too, belongs to the heterogeneity of intentions so often at work in the history of the human spirit.

All this is not surprising. Our intention is not to polemicize against it, but to recall it in a scholarly consideration of the facts. With respect to Vitoria's remarkable *relectiones*, we have not pointed to such tragic possibilities of heterogeneous uses either to detract from the stature of his work or to diminish the honor of his name. On the contrary, our intention has been to strip his image of added layers of false veneer and to restore to his words their true meaning. His reputation loses nothing in the process. The less shrill the resonance, the truer the sound.

Chapter 3

Legal Title to the Land-Appropriation of a New World: Discovery and Occupation

The new European international law began with Gentili's entreaty that theologians should remain silent with respect to the question of just war: *Silete theologi in munere alieno*!

A. The New Territorial Order of the State

One of the results of the Reformation was that theologians were barred from dealing with international law. This meant the disappearance of the *potestas spiritualis* that had obtained in the Middle Ages. Medieval theologians did not argue in a vacuum. They all belonged to an institutional order, and their words can be understood concretely only within that order. Beginning in the 16th century, however, jurists (now in the service of a government) carried questions of international law further: in part, theoretically, by secularizing scholastic moral-theological arguments into a "natural" philosophy and a "natural" law of general human reason; in part, practically and positively, by using concepts of Roman law, as required by contemporary civil jurisprudence and legal practice. This resulted in a hybrid of moral-theological doctrines of just war and such secular juridical-civil concepts as *occupatio*, which were applied to the struggle for the land-appropriation of the New World. However, the concrete ordering and bracketing of war in international law was the result not only of the extension of moral-theological doctrines and the deployment of Roman legal concepts and norms, but, in particular, of the concrete spatial order of states then developing in Europe and of the balance being established among those states.

Continental European international law since the 16th century, the *jus publicum Europaeum*, originally and essentially was a law among *states*, among European sovereigns. This European core determined the *nomos*

of the rest of the earth. "Statehood" is not a universal concept, valid for all times and all peoples. Both in time and space, the term described a concrete historical fact. The altogether incomparable, singular historical particularity of this phenomenon called "state" lies in the fact that this political entity was the vehicle of secularization. The conceptual elaboration of international law in this epoch had only one axis: the sovereign territorial state. It eliminated the holy empire and the imperial house of the Middle Ages. It also eliminated the pope's *potestas spiritualis*, and sought to instrumentalize Christian churches for its own political ends. The Roman Catholic Church retreated to a lesser position, as a mere *potestas indirecta* [indirect power], and, as near as I can determine, no longer spoke of an *auctoritas directa* [direct authority]. Other historical and meaningful institutions in the medieval *respublica Christiana*, such as the "crowned heads," also lost both their place and their typical character, and were instrumentalized by the developing state. The king, i.e., the sacred bearer of a crown, became a sovereign head of state.

France was the leading power and the first state to become sovereign in terms of its juridical consciousness. Toward the end of the 16th century in France, the creedal civil war was overcome by the concept of sovereignty, i.e., by the king as the sovereign head of state. In Spain and Italy, the belligerents never succumbed to open civil war. In Germany and England, they openly engaged in war or civil war only in the 17th century. French legists, most prominently Jean Bodin, were the first to formulate clear definitions, which spread like wildfire throughout Europe. In Bodin's *Six Books of the Commonwealth*, the word *respublica* already must be translated as "state." Bodin's work had a greater and more immediate impact than had any other book by a jurist in the history of law. It appeared in 1576, four years after the St. Bartholomew's Eve massacre in Paris (August 24, 1572), and, like the state it defined, it was a product of creedal civil war. Therein lies the existential truth and the European validity of this remarkable book.

Ayala's and Gentili's treatises appeared a few years later (in 1582 and 1588, respectively), and outlined the new international law among states. Both were influenced directly by Bodin. In this context, we must consider the all-embracing concept of the sovereign "state" in its concrete particularity in terms of the history of international law. This political entity upset the axis of the spatial order of the *respublica Christiana* of the Middle Ages, and replaced it with a completely different type of spatial order.

Vitoria had no doubt that the legal title for the great land-appropriation [of the New World] could be conferred neither by the emperor nor by the

pope. This is precisely what such Spanish authors as Domingo de Soto [1494-1560] and Ferdinando Vasquez [1509-1566] had emphasized in 16th century controversies. Ayala, who cited them, likewise had no such doubts, although he was on the Spanish-Catholic side. From a scholarly and sociological standpoint, the dethroning of emperor and pope meant the detheologization of argumentation. Practically speaking, it meant not only discarding concepts on which the previous spatial order of the *respublica Christiana* had rested, but eliminating the justification of war they had entailed. This spelled the end of the medieval doctrine of the tyrant, i.e., of the possibility of intervention by emperor and pope, as well as the end of the rights of challenge and resistance, and of the old "peace of God." These were supplanted by a peace guaranteed by the state. Above all, this type of state signaled the end of the Crusades, i.e., of papal mandates as recognized legal titles for land-appropriations of non-Christian princes and peoples.

This was only the negative side, only the end of the Middle Ages, but not yet the beginning of any new spatial order. On the European continent, this new order was created by the state. Its historical specificity, its characteristic historical legitimation was secularization of European life as a whole. First, it created clear internal jurisdictions by placing feudal, territorial, estate, and church rights under the centralized legislation, administration, and judiciary of a territorial ruler. Second, it ended the European civil war of churches and religious parties, and thereby neutralized creedal conflicts within the state through a centralized political unity. (In a somewhat crude and primitive, yet clear and appropriate way, the German formula *cujus regio, ejus religio* [whose is the territory, his is the religion] expressed this new relation between religious belief and a spatially closed territorial order.[1]) Third, on the basis of the internal political unity the

1. This formula was in keeping with the reality of the European state that arose in the 16th century. Its most important right was everywhere the *jus reformandi*, i.e., the right to determine a state religion and a state church: *religio est regula jurisdictionis*. Perhaps the formula *cujus regio, ejus religio* stems from a later stage of the latent or open creedal civil war that began with the Reformation. Such sharpening of slogans usually results from later historical experiences. Johannes Heckel traced this formula back to the originator of Episcopalianism and author of the first textbook of Protestant church law (Joachim Stephani, *Institutiones iuris canonici*, 2nd ed. [Frankfurt, 1612]), in "Cura religionis. Jus in sacro. Jus circa sacra," in *Kirchenrechtliche Abhandlungen: Festschrift Ulrich Stutz zum siebzigsten Geburtstag* (Stuttgart: Verlag von Ferdinand Encke, 1938), p. 234. Nevertheless, Heckel attempts to prove that the principle of the matter did not originate in the Protestant, but in the Catholic camp. For our purposes, all posthumous questions of guilt are irrelevant. They also are irrelevant with respect to the modern formula *cujus regio, ejus economia* [whose is the territory, his is the economy], which helps us understand the core of the contemporary problem of *Großraum*.

state achieved *vis-à-vis* other political unities, it constituted within and of itself a closed area with fixed borders, allowing a specific type of foreign relations with other similarly organized territorial orders.

Thus arose the territorial order of the "state" — spatially self-contained, impermeable, unburdened with the problem of estate, ecclesiastical, and creedal civil wars. It became the representative of a new order in international law, whose spatial structure was determined by and referred to the state. Characteristically and specifically, the state's international law became inter-state law. Only as a consequence of the clear demarcation of self-contained territories did *jus gentium* become distinctly and clearly *jus inter gentes* [law among nations], *inter gentes Europaeas* [among nations of Europe]. At that time, the *gentes* appeared on the European stage as princes, houses, crowns, and regions, often still in medieval garb. Nonetheless, the spatial core of the new European order was this new entity called "state."

The distinction between *jus gentium* and *jus inter gentes* was well-known to medieval theologians and jurists. As an abstract antithesis, it was not a scientific discovery. It was not new to Vitoria. But the transformation of the *gentes* into centralized, self-contained, and limited territorial states gave rise to a new spatial structure. The *jus inter gentes* thereby was freed from the supra-territorial ties that had obtained until then, i.e., the ubiquitous ties to the supra-territorial church, the hotchpotch of feudal ties of a personal sort, and, finally, from the overlapping of baronial and religious partisanship. It took more than 100 years for the *jus gentium* to rid itself of traditional forms and to become a purely political *jus inter gentes*. Princely "houses," such as the Hapsburg and the Bourbon, i.e., the great dynastic families, aggregated various crowns under one power, such as the Bohemian and the Hungarian, as well as lands, rights of succession, and other legal titles. They became and remained, into the 18th century, the true agents of European politics and, thus, also the subjects of international law. Most European wars were waged as wars of succession and had their *justa causa* in the divine right of kings. But all this was only preliminary. Philip II of Spain, when he occupied and seized Portugal (1580), dispensed with this type of legal title. The purely state structure of international law became clear in the title of one of Zouch's works,[2]

2. Richard Zouch, *Iuris et iudicii fecialis, sive, iuris inter gentes, et quaestionum de codem explicatio, qua quae ad pacem e bellum inter diversos principe, aut populos spectant, ex praccipuis historico-jure peritis, exhibentur* (Oxford: 1650) [(Washington, D.C.: Carnegie Institution, 1911)].

where *gentes* refers to sovereign territorial orders.

The struggle for the land-appropriation of the New World and for land still free and outside Europe now became a struggle among European power complexes, which, in this specific sense, are "states". Whoever lacked the capacity to become a "state" in this sense was left behind. It is impressive to see how the first great land-appropriator, Spain, or more precisely, the Crown of Castile and Leon, inaugurated this epoch. While remaining bound to the Church's legal title that had legitimated its great land-appropriation in the Middle Ages, Spain was at the forefront of this development away from the Church.

B. Occupation and Discovery as Legal Title to Land-Appropriation

How did the new jurists of international law answer the great question concerning legal title to the land-appropriation of the New World? The crucial point is that they no longer answered it as a question pertaining to Europe as a whole. They answered it in terms of the struggle among individual European powers vying for land-appropriations. Only in this way — in terms of their interest in internal European conflicts over land-appropriations of non-European territory — can we explain their use of the Roman legal and civil concept of *occupatio* as the essential legal title, and their failure to recognize the true European legal title: discovery.

To the extent that it presupposed the distinction in international law between European territories of European princes and peoples and other territories "overseas," the legal title *occupatio* corresponded to contemporary reality. The New World was open for occupation. With this thesis, 17th and 18th century jurists assumed that the New World was open only to European states. It was understood that the territory of the occupied colonies would not be identical to the territory of the occupying state. Both in the case of trade and of settlement, colonial territory remained distinct. Occupation differed essentially from what, since the end of the 19th century, has been called "effective occupation," i.e., incorporation of a given territory into the governmental and administrative system of a state recognized as a member of the international community. This "effective occupation" meant suspension of a specifically colonial territorial status and its transformation into state territory.

In the 16th, 17th, and 18th centuries, this was out of the question. The mere fact that immense spaces were conquered and dominated by autonomous trading companies ruled out such an equalization of European and colonial territory. More colonial territory was acquired in the form of feudal

land grants. It should not be forgotten, however, that the elaboration of *occupatio* as the international juridical title of acquisition was designed to make each occupying power independent *vis-à-vis* its European rivals and to create an original juridical title independent of them. To the extent that the juridical discussion focused on the legal title of *occupatio*, European legal consciousness had to forget the common European origin of the matter. As a result, the core problem — the common land-appropriation of non-European territory by European powers — also was forgotten.

In reality, the only justification for the great land-appropriations of non-European territory by European powers was *discovery*. Once the medieval spatial order of the *respublica Christiana* had been destroyed and every theological argument had been discarded, the only true legal that remained for a Eurocentric international law was to discover — *reperire*, *invenire*, then *découvrir* — previously unknown (i.e., by Christian sovereigns) oceans, islands, and territories. Obviously, it is necessary to understand the new concept of discovery, with all its technical designations (such as *descobrimiento*, *découverte*, etc.) in its total historical and intellectual particularity. Merely discovering a territory previously unknown to the finder did not constitute legal title *jure gentium*. The many islands and countries found and perhaps even briefly occupied by daring pirates and whale hunters over the centuries were not effectively "discovered" in the sense of international law. Nor could any symbolic acts of seizure, such as laying a stone or hoisting a flag, "as such" establish legal title. True legal titles obtained only within the framework of a recognized order of international law, for which such symbols have a legal force. Discovery, then, is not a timeless, universal, and normative concept; it is bound to a particular historical, even intellectual-historical situation: the "Age of Discovery."

Vitoria's arguments demonstrate that this specific historical concept had no meaning for scholastic philosophy. It was all the same to Vitoria whether Europeans found Indian territory or Indians found European territory. He viewed these as reciprocal and reversible events, and, for him, this very reciprocity and reversibility suspended the meaning of the concept of discovery, both historically and in terms of international law. This was so because the meaning of the legal title "discovery" lay in an appeal to the historically higher position of the discoverer *vis-à-vis* the discovered. This position differed with respect to American Indians and other non-Christian peoples, such as Arabs, Turks, and Jews, whether or not they were considered to be *hostes perpetui*. From the standpoint of the

discovered, discovery as such was never legal. Neither Columbus nor any other discoverer appeared with an entry visa issued by the discovered princes. Discoveries were made without prior permission of the discovered. Thus, legal title to discoveries lay in a higher legitimacy. They could be made only by peoples intellectually and historically advanced enough to apprehend the discovered by superior knowledge and consciousness. To paraphrase one of Bruno Bauer's Hegelian aphorisms: a discoverer is one who knows his prey better than the prey knows himself, and is able to subjugate him by means of superior education and knowledge.

European discovery of a new world in the 15th and 16th centuries thus did not occur by chance and was not simply one of many successful campaigns of conquest in world history. Neither was it a just war in any normative sense. Rather, it was an achievement of newly awakened Occidental rationalism, the product of an intellectual and scientific culture that arose in the European Middle Ages, with the necessary assistance of systems of thought that had reconstituted classical European and Arabic thinking in Christian terms, and had molded it into a great historical power. Columbus was influenced by legendary and incorrect notions, but the scientific character of his thinking is unmistakable. The intense scientific awareness of his discoveries was documented in cosmographic expositions that spread like wildfire throughout Europe. Thus, it is completely false to claim that, just as the Spaniards had discovered the Aztecs and the Incas, so the latter could have discovered Europe. The Indians lacked the scientific power of Christian-European rationality. It is a ludicrous anachronism to suggest that they could have made cartographical surveys of Europe as accurate as those Europeans made of America. The intellectual advantage was entirely on the European side, so much so that the New World simply could be "taken," whereas, in the non-Christian Old World of Asia and Islamic Africa, it was possible only to establish subjugated regimes and European extraterritoriality.

The common European legal title of discovery should not be confused with the use of individual discoveries by European powers against their rivals. Most jurists wrote their books only in the interest of a European government, and against the jurists of other European governments. In the process, they lost the possibility of recognizing a common title of acquisition in international law. To this extent, it was unfortunate that the jurists drove the theologians out of international law. Yet, the practice of European international law confirmed the common legal title of discovery. The cartographical archives are of great significance, both for navigation and

for international law argumentation. A scientific cartographical survey was a true legal title to a *terra incognita* [uncharted territory]. Such a legal title lost its manifest character to the extent that it lost the intellectual presupposition upon which it was based: the distinction between "known" and "unknown" territory. When this stage was reached, it signaled that the historical hour of another, completely different type of legal title had arrived, "effective occupation," which arose along with and as a consequence of 19th century positivism. Historically, it also indicated something different from the Roman law formula of "effective appropriation." Unfortunately, 16th and 17th century juridical thinking was not equal to the task of understanding the importance of the legal title of discovery. Ultimately, it was even more ahistorical than that of the scholastic theologians, and remained helpless within the formulas of a purely civil property law.

C. Jurisprudence Confronts the Land-Appropriation of a New World, Grotius and Pufendorf in Particular

What did the jurists of international law do at that time? Outwardly, they retained numerous formulas of medieval scholasticism and jurisprudence, although these had originated in a completely different, pre-global spatial order and presupposed either concepts lacking any spatial sense or a fundamentally different type of *nomos*. They added ostensibly purely juridical or "civil" concepts from late medieval commentaries, as well as the humanistic erudition of an often seriously misunderstood antiquity. They did so not only as scholars in the style of their age, but, above all, as jurists following the professional and objective necessities of their rank, in order to assert their independence *vis-à-vis* the theologians. As state jurists, they had to provide distinct and specifically state-juridical arguments *vis-à-vis* church theologians. The outcome is easy to imagine. In the internal struggle within Europe, every European government sought to utilize the formulas and concepts of a now dislocated Roman civil law to its own advantage and to the disadvantage of its opponents. Great systems of legal philosophy arose only later, during the Baroque Age. At first, the right of war constituted the core of every international law, and, in practice, diplomatic law was central to the discussion. For the rest, every state sought to create (by means of specific treaties) a positive *jus publicum Europaeum* that would give it a juridical advantage by stabilizing a favorable *status quo*.

However, the most important treaties and agreements, above all those (such as amity lines) establishing a spatial order, at first were secret. They even were not written down, but only verbally agreed upon. Obviously, this

type of secrecy constituted an insurmountable barrier to any legal positivism, even if it referred to secret treaties or decrees. Within such a context, the moral theologian of the church was in a privileged position. As a father-confessor or teacher of such, he had a particular authority in this regard and, as the agent of a *potestas spiritualis*, was actually in his element. By contrast, the state jurist no longer could get close to the central question – the common land-appropriation of non-European territory by European powers — despite all the wars fought among these powers. The way in which juridical questions were posed in international law lacked the most important distinctions, because, after Grotius and Pufendorf, the differences in territorial status, as well as those appertaining to a general concept of war, no longer were handled by jurists.

Such a science of international law no longer could remain conscious of its own historical premises. It split into two antithetical tendencies. On the one side, a systematic philosophical approach based on natural law (Pufendorf, Thomasius, Christian Wolff, and Kant) sought to produce a purely intellectual system of thought independent of any state secrecy, in order to maintain a type of *potestas spiritualis*. Theoretically, this led to such neutral humanitarian entities as "mankind" and *civitas maxima* [great commonwealth]; in terms of concrete practice and matters internal to the state, it led to promotion of the *Rechtsstaat* [literally: law state; figuratively: liberal state] and a civil society based on individualism as the constitutional world standard. On the other side, however, a practical-positivistic approach (Samuel Rachel [1628-1691], Johann Wolfgang Textor [1638-1701], Johann Jacob Moser [1701-1785], and Johann Ludwig Klüber [1762-1837]) turned the jurist into a mere assistant to the state and a mere functionary of the legality of a *status quo* fixed in international treaties. In relation to philosophical international law, this gave the jurist the advantage of closer proximity to the positive material, thereby elevating the international law jurist to the rank of an initiate and giving him access to the *arcana* [secrets] of foreign policy.

Both Grotius and Pufendorf, the two most celebrated and influential teachers of 17th century international law, belong to this situation in legal history. By no means were they pioneers in the sense of having formulated the fundamental concepts of the new international law among states, least of all the new concept of war. This honor goes to those jurists of the last decades of the 16th century: Ayala and Gentili. In comparison with Bodin's conceptual clarity, Grotius' method was a scientific regression or, euphemistically speaking, a "conservatism." Grotius was no trailblazer, but

e cleared the path to the Enlightenment for jurisprudence with his "natural ligion."[3] His fame in the history of law is based on the *droit de conquête* w of conquest], which is why he finds his place between Suarez and obbes, i.e., between scholastic theologians and modern philosophers.

For a consideration of international law, first Bodin, then Ayala, Gen-i, and Zouch must be included among those authors whose thinking is idical in a specific sense, because they made the concept of *justus hostis* itful for the new international law among states. Grotius had a strong, neral pathos for justice, but no juridical and scientific awareness of the oblem. This may explain his irrepressible popularity. From the stand-int of propaganda, this served a practical purpose for him, which we do t wish to dispute. Grotius and Pufendorf had different styles and meth-s. As a court historiographer, Pufendorf was no stranger to the *arcana*; m the standpoint of jurisprudence, he is a typical representative of the stematic philosophical approach. Like such others as Zouch, Grotius cked the clear objectivity of a pragmatic jurist. Compared to the great ilosophers, he belongs to the positivistic approach, insofar as he con-nted many practical questions without a thoroughly considered system d without clear concepts, however quotable they may be.

As great as the contrast between the philosophical and the positivistic proaches may seem, none of these teachers of international law appears have recognized the central question, i.e, the new spatial order emerg-g with the European land-appropriation of the New World. It threw m all into confusion, which naturally arose when the formulas of theo-gians that still presupposed the medieval spatial order of the *respublica hristiana* were combined with concepts lacking any spatial sense — ncepts similar to those adopted by humanistic jurisprudence from the vil property rights of Roman law. Only in the second half of the 18th ntury did international law jurists begin to appreciate the spatial prob-m of a European *balance*. Yet, they held to an internal European per-ctive and, for the most part, did not see that the order of the *jus blicum Europaeum* was already global.

It is easier to understand how purely pragmatic positivists could fail to cognize the problem of a global spatial order than how philosophers of manity could fail to recognize the problem of the unity of mankind. With otius and Pufendorf, mention of the global lines of their time, amity lines

3. In a short, but substantial and rich book, Paulo Manuel Merea has established proper place of Grotius in legal history. See *Suarez, Grocio, Hobbes: licoes de história doutrinas politicas feitas na Universidad de Coimbra* (Coimbra: A. Amádo, 1941).

in particular, is so incidental and peripheral that, for this reason alone, the international law expositions of both touch only on secondary disputed questions, and miss the concrete structure of contemporary European international law. Nevertheless, both retained some memory of the reality of land-appropriation, even though they failed to draw any connection between their concepts of original property rights and the very concrete land-appropriation of non-European territory by European powers that was occurring on a gigantic scale before their very eyes in western and eastern "India."

Grotius alone became creator and innovator of a new civil law construction that all jurists still take for granted, most without being aware of its origin. Specifically, he discerned the distinction between original and derivative acquisition of property that arose in the 17th century in the course of efforts to find a new *nomos* of the earth that had been necessitated by the great land-appropriation. The antithesis of original and derivative land-acquisition was obvious, because, despite some treaties concluded by European discoverers and conquerors with native princes and chiefs, no European power considered itself to be the legal successor of the natives. Rather, European powers regarded their colonial land acquisitions as original, both with respect to earlier non-European inhabitants and to their European rivals. From the standpoint of the history of civil law, the distinction between original and derivative acquisition is not classical. It derives from a chapter in Grotius' *De jure belli ac pacis*.[4] The distinction became one of the most remarkable cases of the further development of Roman civil law, which was occasioned by projections of a situation in international law that became effective intellectually before it became recognized juridically.

Grotius speaks in general terms, without referring to America, of a land-division, a *divisio*, as a type of original property acquisition that had occurred in ancient times. By *divisio*, he understands the *divisio primaeva*, the first original land-division and land-appropriation. He articulates this thesis at the beginning of the chapter, and it is the point of departure for a subsequent exposition on property acquisition, though it refers only to material property and remains entirely on the level of civil

4. Cf. Hugo Grotius, *De jure belli ac pacis* (1625), reprint (The Hague: Martinus Nijhoff, 1948), Book 2, Ch. 2. See Barone Pietro de Francisci, *Il transferimento della proprietà: Storia e critica di una dottrina* (Padova: L. Litotipo, 1924), p. 116; Valentin Al. Georgescu, *Études de philologie juridique et de droit romain*, I, *Les rapports de la philologie classique et de droit romain* (Paris: Librairie A. Rousseau, 1940), pp. 336, 343 and 390. See the review of Georgescu's book by Walter Hellebrand, in *Zeitschrift der Savigny-Stiftung, Rom. Abt.*, Vol. 61 (1941), pp. 451-457.

law.[5] As for Pufendorf, he recognizes a type of original property acquisition that takes the form of a "common seizure by a majority of persons." He characterizes it as the creation of "general property," and thus distinguishes it from the origin of specific private property.[6] This is very close to actual land-appropriation.

Unfortunately, these glimmers quickly were extinguished, because they immediately became part of a discussion of the acquisition of private material property. For this reason, it is not difficult to distinguish the question of original property acquisition within an organized and settled community from the entirely different question of the land-appropriation of a particular territory by a community (with the ensuing "division"). By the same token, any jurist should understand that the land-appropriation of an entire people is "original" in a completely different sense from acquisition of land by a single member of the group. Both Grotius and Pufendorf distinguish between *jus gentium* and *jus civile* [civil law]; both emphasize the difference between public authority (*imperium* or *jurisdictio*) and private or civil ownership (*dominium*). Nevertheless, neither deals with the central question: European appropriation of non-European territory. They leave *jus gentium* in the grey area that obtains when concepts of Roman civil law are elevated to generalities of natural law, and leave the concept of *occupatio* in an even greyer area — between *jus gentium* and *jus civile*, as well as between the acquisition of *imperium* (or *jurisdictio*) over human beings and the acquisition of *dominium*, i.e., private ownership of things. Whereas Vitoria still has the central problem in view — the legitimacy of the land-appropriation of American territory as a process *jure gentium* — these ostensible founders of modern international law speak only of the acquisition of things in general.

Again, the title of acquisition that occupation represents pertained only to relations among the land-appropriating European powers. However, the first question in international law was whether the lands of non-Christian, non-European peoples and princes were "free" and without authority, whether non-European peoples were at such a low stage of civilization that they could become objects of organization by peoples at a

5. Grotius, *De jure belli ac pacis*, *op. cit.*, Book 2, Chs. 2 and 3. The point of departure is the thesis: "*Singulare jure aliquid nostrum fit acquisitione originaria aut derivativa. Originaria acquisitio olin fieri potuit etiam per divisionem.*" [Tr. Something is ours by right either of original or derivative acquisition. Original acquisition could at times even occur through division.]

6. Pufendorf, *De jure naturae et gentium*, Book 4, Ch. 6 (Acquisition by virtue of the right of the initial occupant).

higher stage. This was the question Vitoria posed so clearly and answered so negatively. For 17th and 18th century international law, this was no longer an essential question; its practical interest was directed to the struggle among European states on European soil that had been ignited by the land-appropriation of the New World. The legal title of the Portuguese and the Spanish, based on papal awards of missionary mandates, no longer was applicable. This left discovery and occupation as the only legal title to land-appropriation recognized by the European powers.

European jurists thus could and did portray discovery as a component of occupation, often in a vague way.[7] Civil jurists considered the mere act of finding a previously unknown land to be too uncertain to constitute the basis for a title of acquisition. When they spoke of occupation, what they had in mind was a material thing: an apple, a house, or a plot of land. There was hardly any mention in the 17th century of the freedom of missions and the freedom of propaganda, which had such great significance for Vitoria. With Pufendorf, even *liberum commercium* ceased to be a legal aspect of *justa causa*. It simply was dropped, like "natural law," in favor of a state mercantilism that increasingly had become a matter of course.[8] By then, however, the spatial form able to support a specifically new international law — the *jus publicum Europaeum* — had crystallized.

7. Goebel praises Johann Gryphiander's (Griepenkerl) *Tractatus de insulis* (1623) for having reestablished Roman law under modern conditions. See *The Struggle for the Falkland Islands*, *op. cit.*, pp. 115ff. Gryphiander insists on *invenire* [discovery] and *corporalis apprehensio* [physical apprehension], and means that where there is no *dominium* there is also no *territorium*, i.e., no *imperium* or *jurisdictio* of the prince. Compared to those of Grotius, his explanations are refreshingly clear. But he does not solve the great problem of European land-appropriation. He logically proceeds from private law to public law, which, in many cases, expresses the reality of French, Dutch, and English land-appropriations, but misses precisely the Spanish *conquista*, which was not at all private and, to this extent, was purely a matter of public law.

8. Pufendorf, *De jure naturae et gentium*, *op. cit.*, Book 4, Ch. 5 (at the end).

Part III

The *Jus Publicum Europaeum*

Chapter 1

The State as the Agency of a New, Interstate, Eurocentric Spatial Order of the Earth

The appearance of vast free spaces and the land-appropriation of a new world made possible a new European international law among states: an interstate structure. In the epoch of interstate international law, which lasted from the 16th to the end of the 19th century, there was real progress, namely a limiting and bracketing of European wars. This great accomplishment can be explained neither in terms of traditional medieval formulas of just war nor in terms of Roman legal concepts. It arose solely from the emergence of a new spatial order — a balance of territorial states on the European continent in relation to the maritime British Empire and against the background of vast *free spaces*. Given the fact that independent powers, with unified central governments and administrations, and well-defined borders had arisen on European soil, the appropriate agencies of a new *jus gentium* were in place. The concrete spatial order of these territorial states gave European soil a specific status in international law, not only within Europe, but in relation to both the free space of the open sea and to all non-European soil overseas. This made possible a common, non-religious and non-feudal international law among states that lasted 300 years.

A. The Overcoming of Civil War by War in State-Form

The first effective rationalization of the spatial form "state," in terms of both domestic and foreign policy, was achieved by the detheologization of public life and the neutralization of the antitheses of creedal civil wars. In other words, the supra-territorial loyalties of opposing sides in 16th and 17th century civil wars had been overcome, and creedal civil wars had ceased. The conflicts between religious factions had been resolved by a public-legal decision for the territorial domain of the state — a decision no longer ecclesiastical, but political, even state-political.

Detheologization had an obvious effect on the new interstate order of the European continent and on the inter-European form of war that had arisen since the European land-appropriation of the New World: the rationalization and humanization of war, i.e., the possibility of bracketing war in international law. As we will see, what made this possible was that the problem of just war had been divorced from the problem of *justa causa*, and had become determined by formal juridical categories.

It was a true European achievement that every aspect of war was limited to conflicts between sovereign European states, and that war could be authorized and organized only by states. This was made possible by the overcoming of creedal disputes which, in the religious wars of the 16th and 17th centuries, had justified the worst atrocities. War had degenerated into civil war. Even in the Middle Ages, when there was still a common spiritual authority, the dangerous side of the doctrine of just war had been evident. For example, the Latteran Council of 1139 had attempted to limit war between Christian princes and peoples by forbidding the use of long-range spears and mechanical devices. While this restriction is cited often, less known, but far more significant, is the fact that commentaries on the effect of this restriction made it immediately problematic. In actuality, they had precisely the opposite effect, because the restriction referred only to an unjust war, whereas, in a just war, the just side could use any and all means of violence. Thus, the relation between just war and total war already was visible,[1] as was the equally significant relation between just and total war and domestic and civil war in the religious wars of the 16th and 17th centuries.

The purely state war of the new European international law sought to neutralize and, thereby, to overcome the conflicts between religious factions; it sought to end both religious wars and civil wars. War now became a "war in form," *une guerre en forme*. Only in this way, only by limiting war to conflicts between territorially defined European states, could a conflict between these spatially defined units be conceived of as *personae publicae* [public persons][2] living on common European soil and belonging to the same European "family." Thus, it was possible for each side to recognize the other as *justi hostes*. Thereby, war became somewhat analogous to a duel, i.e., a conflict of arms between territorially distinct *personae*

1. *Decretalium Gregori* IX, lib. V de sagittariis. Ernest Nys, *Les origines du droit international* (Brussels: A. Castaigne, 1894), p. 192 (Decret Innocenz II).

2. [Tr. This is understood in the sense of an institution constituting a "legal person," but it was possible and more generally understandable because the heads of European governments also were the heads of royal houses.]

morales [moral persons], who contended with each other on the basis of the *jus publicum Europaeum*, because European soil had been divided under their aegis. The non-European soil of the rest of the earth in this global, but not yet completely Eurocentric spatial order was free, i.e. free to be occupied by European states. In a certain sense, European soil became the theater of war (*theatrum belli*), the enclosed space in which politically authorized and militarily organized states could test their strength against one another under the watchful eyes of all European sovereigns.

Compared to the brutality of religious and factional wars, which by nature are wars of annihilation wherein the enemy is treated as a criminal and a pirate, and compared to colonial wars, which are pursued against "wild" peoples, European "war in form" signified the strongest possible rationalization and humanization of war. Both belligerents had the same political character and the same rights; both recognized each other as states. As a result, it was possible to distinguish an enemy from a criminal. Not only was the concept of enemy able to assume a legal form, but the enemy ceased to be someone "who must be annihilated." *Aliud est hostis, aliud rebellis* [It is one thing to be an enemy, another to be a rebel]. A peace treaty with the vanquished party thus became possible. In this way, European international law succeeded in bracketing war, with the help of the concept of "state." All definitions that glorify the state, and today no longer generally are understood, hark back to this great accomplishment, whether or not they later were misused and now appear to have been displaced. An international legal order, based on the liquidation of civil war and on the bracketing of war (in that it transformed war into a duel between European states), actually had legitimated a realm of relative reason. The equality of sovereigns made them equally legal partners in war and prevented military methods of annihilation.

The concept of *justus hostis* also created the possibility of neutrality for third party states in international law, even as it had neutralized the murderous justice of religious and factional wars. The justice of wars pursued by the *magni homines* [great men], by the *personae morales* of the *jus publicum Europaeum* among themselves on European soil, is a special type of problem. But in international law, in no case can it be considered to be a moral-theological question of guilt. Juridically, it no longer implies any question of guilt, any substantive moral question, and, above all, any juridical question of a *justa causa* in a normative sense. Obviously, international law permits only just wars. The justice of war no longer is based on conformity with the content of theological, moral, or juridical norms, but

rather on the institutional and structural quality of political forms. States pursued war against each other on one and the same level, and each side viewed the other not as traitors and criminals, but as *justi hostes*. In other words, the right of war was based exclusively on the quality of the belligerent agents of *jus belli*, and this quality was based on the fact that equal sovereigns pursued war against each other.

One should not exaggerate the analogy of war between states and a duel, but it largely is accurate and provides many illuminating and heuristically useful viewpoints. Where a duel as an institution is recognized, the justice of it is based similarly on the sharp distinction between *justa causa* and the form, between abstract norms of justice and the concrete *ordo*. In other words, a duel is not "just" because the just side always wins, but because there are certain guarantees in the preservation of the *form* — in the quality of the parties to the conflict as agents, in the adherence to a specific procedure (effected by bracketing the struggle), and, especially, in the inclusion of witnesses on an equal footing. Here, right (law) has become a completely institutionalized form; here, men of honor have found a satisfactory means of dealing with a matter of honor in a prescribed form and before impartial witnesses. Thus, a challenge to a duel (*défi*) was neither aggression nor a crime, any more than was a declaration of war. Pursuing either one or the other in no sense made one an aggressor. In its ideal form, this also was true of internal European wars between states in European international law, in which neutral states functioned as impartial observers. Precisely in the sense of the European international law of the interstate epoch, all wars on European soil between the militarily organized armies of states recognized by European international law were pursued according to the European laws of war: interstate war.[3]

B. War as a Relation Among Equally Sovereign Persons

From whence came these honorable men able to solve their differences by amicably arranging this new type of war? A decisive step toward this great, new institution called "state" and the new interstate international law was taken in that these new, contiguous, and contained power complexes were represented as *persons*. This is how they obtained the quality that made the analogy between war and a duel meaningful. These states were conceived of as *magni homines*. In human fantasy, they actually were sovereign persons, because they were the representative sovereigns of human persons, of the agents of old and newly crowned heads, of kings

3. Cf. Part III, Ch. 2, pp. 152ff.

and princes not precisely specified. These kings and princes now could be "great men," because they had become absolute. They separated themselves from church, feudal, estate, and all other medieval ties, thereby entering into ties of a new spatial order.

Personification was important for the conceptual construction of the new interstate international law, because only thereby did 16th and 17th century jurists, schooled as they were in Roman legal concepts, find a point of departure for their juridical constructions. This was of great significance, because thereby war became a relation among persons who mutually recognized a rank. Sovereigns recognized one another as such, i.e., as having a mutual and common relation. Only in this way was the concept of *justus hostis*, found among ancient authors, able to obtain a concrete new significance. This concept of *justus hostis* acquired a completely different and higher power of order than *justum bellum*.

It is obvious that there are many reasons in the history of ideas for the origin of *personae morales* and "great men," and that one of these reasons, at least since Jacob Burckhardt, has been the effect of Renaissance individualism, which often is cited. While we will not elaborate on this, we must note the psychological phenomenon of Renaissance individualism. Still, it alone did not create any new international law,[4] which was much more a matter of the connection between spatial power complexes and representative persons. From the standpoint of the history of ideas, already in the 16th century the personification process of (spatially-closed as well as other) political power complexes was fully operational and was influenced strongly by the allegorical tendency of the Renaissance. This is why it was customary for European jurists to think in terms of a personification of political powers, and to speak of Spain, England, France, Venice, and Denmark as great individuals.[5] But only in the

4. Franz W. Jerusalem rightly has emphasized the relation among sovereignty, individualism, heightened consciousness, glory, and prestige, first in *Völkerrecht und Soziologie* (Jena: G. Fischer, 1921), then often in his sociological works.

5. The writings of Traiano Boccalini [1556-1613] are a singular and significant example of such personalizations through allegorization. Venice, France, Spain, England, etc. are some of many "persons" spoken of and dealt with. Shakespeare's dramas, to the extent that they are political, also are determined by the same principle of political personalizations. Lilian Winstanley convincingly has demonstrated this for *Othello*, a tragedy especially important for the verbal history of "state," owing to its utilization of the word. See Lilian Winstanley, *"Othello" as the Tragedy of Italy: Showing that Shakespeare's Italian Contemporaries Interpreted the Story of the Moor and the Lady of Venice as Symbolizing the Tragedy of their Country in the Grip of Spain* [1924] (Norwood, PA: Norwood Editions, 1977).

Baroque Age of the 17th century did representative, sovereign, state personalities develop in full measure. After 1648, with the Peace of Westphalia, the practice of political relations also was conceived of, in some measure, in terms of such constructions.

Now the state was conceived of juridically as the vehicle of a new spatial order, as the new legal subject of a new international law; as a juridical concept, it had become irresistible. However, essentially this state was a unified, self-contained area of European soil that became recognized as a *magnum homo* [great man]; only now it was in form a legal subject and a sovereign "person." Only with the clear definition and division of territorial states was a balanced spatial order, based on the coexistence of sovereign persons, possible. The new *magni homines* had equal rights that were mutually recognized as such. But their equality as personal members of a close community of European sovereigns differed from the equality or weight that each — even the smallest — had in the system of a territorial equilibrium. Owing not only to the public character of each sovereign person, but also, and above all, to the fact that this order was a true spatial order, it was a "public legal" (*publici juris*) order. For this reason alone, this order was able to displace the remnants of the medieval unity of a *respublica Christiana*, partly in the internal state sphere and partly in a purely private sphere.

After so many wars and conferences, so many battles, and so many ink and ceremonial disputes since the 16th century, the dissolution of the *respublica Christiana* made it a foregone conclusion precisely who these new *magni homines* in Europe really were. Moreover, European sovereigns remained personally a close-knit family, through consanguinity and succession. They continued to wage their wars as wars of succession into the 18th century. However, the decisive spatial perspective was that of England, i.e., the view from the *sea*, of the balance of territorially defined continental European states represented as sovereign persons. Without it, there would have been no European international law. Philosophers and jurists then could argue about how the new *magnus homo* would be conceived. Later, they also could question whether the state was the representative person of princes or whether it was represented by them as a territorial entity, and whether the state should be considered to be the essential representative and true subject of sovereignty and of the new interstate *jus gentium*. One need not be diverted by the sharp controversies of 19th century German jurists. These have been exaggerated in a highly abstract way, both for domestic political reasons and for reasons of international and

constitutional law regarding distinctions of dynastic and state persons. At any rate, they are secondary questions of only posthumous interest, compared to the dominant reality of the new, interstate spatial order on European soil and its personal representation in "sovereigns."

At that time, jurisprudence meant the science of Roman law. The science of the new international law thus could not be separated from Roman law. However, Roman civil law now found a point of reference for juridical thinking in the *persona publica* [public persons] of European states. It fulfilled this task in that it construed the contiguity and coexistence of these persons, the concrete reality of several sovereign territorial orders existing side-by-side in a particular space at a particular time, sometimes as a society (*societas*), sometimes as a community (*communitas*), and sometimes as a family of equally sovereign persons. As such, it sought to promote practical solutions. In any case, these sovereign persons created and sustained the *jus publicum Europaeum*, thereby maintaining their mutual relations with one another as human individuals, clearly not as small men, such as private individuals dominated by the state, but as "great men" and *personae publicae*.

As a consequence of personalization, relations among sovereign states were able to be conducted with *comitas* (courtesy) and with *jus* (probity). Here, too, philosophical and juridical interpretations vary, but one should not be distracted by secondary questions of the character of the new — less spiritual than spatial — order. For example, one such secondary question is the dispute about whether one should think of these "great men" as existing in a "state of nature" beyond an amity line and, in turn, should consider this state of nature (in the sense of Hobbes) to be an asocial struggle of leviathans, or (in the sense of Locke) already to be a social community of thoroughly proper gentlemen, or whether one should regard relations among these great men ostensibly in terms of statute law more analogous to a *societas* based on civil law, or in terms of a *communitas* based on civil law.

At any rate, thereafter, the analogy between states and human persons in international law — the international personal analogy — became predominant in all international law considerations. Moreover, Hobbes' theory of *magni homines* in the state of nature exercised the strongest historical power and proof in all scholarly constructions. Both lines of international law — the philosophical and the statutory — shared this common concept that sovereign states, which, as such, exist in a state of nature, have the character of persons. Rousseau, Kant, and

even Hegel[6] all speak of the state of nature shared by peoples (organized as states).[7] Only in this way did the *jus gentium*, as treated by jurists, become amenable and, thereby, a new and independent discipline of the juridical faculty. Only through the personalization of European territorial states did a jurisprudence of interstate *jus inter gentes* arise.

From Hobbes and Leibnitz to Kant, from Samuel Rachel to Johann Ludwig Klüber, all significant authors have claimed that in international law states live as "moral persons" in a state of nature, i.e., that the representatives of *jus belli*, without a common, institutional, higher authority, confront one another as sovereign persons with equal legitimacy and equal rights. One can view this situation as anarchistic, but certainly not as lawless. Such a situation clearly differed from that which existed under feudalism, with its laws of personal combat and resistance overseen by a *potestas spiritualis*, which also was not lawless. Because sovereign persons "by nature," i.e., in a state of nature, are equal, namely in the equal quality of sovereign persons, they have neither a common legislator nor a common judge over them: *Par in parem non habet jurisdictionem.* Because each is the judge of his own affairs, he is bound only by his own treaties, whose interpretation is his own business. Because each is as sovereign as the other, each has the same *jus ad bellum* [right to war]. Even if one accepts that "man is a wolf among other men" in the *bellum omnium contra omnes* [war of everyone against everyone] of the state of nature, this has no discriminatory meaning, because also in a state of nature none of the combatants has the right to suspend equality or to claim that only he is human and that his opponent is nothing but a wolf. As we will see later, already evident here was the new, non-discriminatory concept of war that made it possible for belligerent states to have equal rights in international law, i.e., to treat one another as *justi hostes*, both legally and morally on the same level, and to distinguish between the concepts of enemy and criminal.

C. The Comprehensive Spatial Order

How was such an international legal order and a bracketing of war possible among equal sovereigns? At first glance, everything in this interstate international law among equal sovereigns appears to have hinged on the thin thread of treaties that bound these leviathans together, on *pacta sunt*

6. See *Hegel's Philosophy of Right*, *op. cit.*, pp. 213f.
7. See the numerous examples provided in the extraordinarily important article by Edwin de Witt Dickinson, "International Personal Analogy," in *The Yale Law Journal*, Vol. XXII (1916-17), pp. 564-589.

servanda [pacts are observed], on ties voluntarily contracted by sovereigns who otherwise would have remained unrestrained. That would be a very problematic and highly precarious type of law. It would be a society of egoists and anarchists, whose binding commitments might remind one of the "bonds of an escape artist like Houdini." But, in reality, strong traditional ties — religious, social, and economic — endure longer. Thus, the *nomos* of this epoch had a completely different and more solid structure. The concrete, practical, political forms, arrangements, and preconceptions that developed for the cohabitation of continental European power complexes in this interstate epoch clearly demonstrated that the essential and very effective bond, without which there would have been no international law, lay not in the highly problematic, voluntary ties among the presumably unrestrained wills of equally sovereign persons, but in the binding power of a *Eurocentric spatial order* encompassing all these sovereigns. The core of this *nomos* lay in the division of European soil into state territories with firm borders, which immediately initiated an important distinction, namely that this soil of recognized European states and their land had a special territorial status in international law. It was distinguished from the "free" soil of non-European princes and peoples open for European land-appropriations. In addition, there arose yet a third area as a result of the new freedom of the sea, which in this form had been unknown to the previous international law. This was the spatial structure inherent in the idea of a balance of European states. It made possible a continental law of European sovereigns against the background of the immense open spaces of a particular type of freedom.

Through a consideration of this new spatial order of the earth, it becomes obvious that the sovereign, European, territorial state (the word "state" always is understood in its concrete historical sense as characteristic of an epoch from about 1492 to 1890) constituted the only ordering institution at this time. The former bracketing of war overseen by the church in international law had been destroyed by religious wars and creedal civil wars. Its institutional power of creating order obtained only as a *potestas indirecta*, while the union of political spatial order and the organizational form of the state were based on the astounding fact that for 200 years a new bracketing of European wars had been successful, because it again had become possible to realize the concept of a *justus hostis*, and to distinguish the enemy from a traitor and a criminal in international law. The recognized sovereign state also could remain a *justus hostis* in wars with other sovereign states, and war could be terminated with a peace treaty, even one containing an amnesty clause.

D. Hegel's Doctrine of the State and Rousseau's Doctrine of War

Hegel's definition of the state as a "realm of objective reason and morality" has been cited countless times, either to support it or to refute it, but seldom has it been recognized that Hegel's reputedly metaphysical constructions have a thoroughly practical and political historical meaning. In the highest degree, they are ontonomous, ontological, and give expression to a historical reality two centuries old. Hegel's supposedly high-flown metaphysical formulations signify the fact that the state was the spatially concrete, historical, organizational form of this epoch, which, at least on European soil, had become the agency of progress in the sense of increasing the rationalization and the bracketing of war. In this respect, Hegel's thesis has precisely the same meaning as what an experienced, but by no means extravagant statesman of the *jus publicum Europaeum*, Talleyrand, wrote in his memorandum on the continental blockade of 1805: All progress of the *droit des gens*, everything that mankind has developed thus far in what is called international law, consists of one singular accomplishment of continental European jurists and governments in the 17th and 18th centuries, an accomplishment that was perpetuated in the 19th century: the rationalization and humanization of war. This meant that European war was limited to conflicts on European soil, and was conceived of as a relation among states and among armies organized by states.

Talleyrand's statement goes back to Rousseau's thesis. Rousseau had affirmed Jean Portalis' often cited formulations made in 1801 when the French prize court was instituted.[8] Rousseau's world-famous maxim is found in his *Contrat social*: "*La guerre est une relation d'Etat à Etat.*"[9] To obtain a precise overview of the development of the concept of war from the end of the 16th to the end of the 18th century, one first must understand the historical genesis of such a formulation, which we will address in the next chapter. Here, we will focus only on the reasons Rousseau advanced for his epoch-making maxim, even though we know we will be somewhat disappointed, because this reputedly exacting philosopher proceeded on the basis of a perplexing and almost primitive artifice.

Rousseau took advantage of the ambiguity the word *état* allows. One

8. George Lassudrie-Duchêne, *Jean-Jacques Rousseau et le droit des gens* (Paris: H. Jouve, 1906); and Cuno Hofer, *L'influence de J.-J. Rousseau sur le droit de la guerre: Leçon inaugurale du cours de droit de la guerre professé à l'Université de Genève* (Geneva: Georg, 1916).

9. "War is a relation between one state and another." See Jean-Jacques Rousseau, *On the Social Contract*, tr. and ed. by Donald A. Cress (Indianapolis: Hackett Publishing Company, 1987), Book I, Ch. IV, p. 21.

can write it either in lower or in upper case: *état* or *Etat*. According to Rousseau, war is a condition, an *état de guerre* (*état*, lower case). On this basis, he should have written that war is possible for an *état*, only *Etat to Etat* (*Etat*, now upper case). That is actually the whole argument. It is highly significant, but scarcely possible to conceive of such a condition. Accordingly, one might claim that war is not the result of personal, but only of practical relations (*relations réelles*). Why? Because war is an *état* (again, lower case), while the state (*Etat*, again upper case) means that consequently it can have not a man, but only another state (*Etat*) as an enemy. With such word-play, the great problem of world history is disposed of in a few sentences. This museum piece of a *raison raisonnante* [reasoning reason] is presented in a chapter titled "On Slavery." Obviously, the fact that it was so successful is more important than whether it was a good or a bad argument; also, it was easily explainable. The great effect of any reference to *état* and *Etat* presupposes the whole rationalizing power of the concept "state." Rousseau's chapter put the final touches on real arguments from the jurisprudential literature of the 17th and 18th centuries. The ripe fruit of 200 years of mental effort was shaken from the tree of the European spirit. This turn of mind concerns the concept of *justus hostis*, and will be elaborated on in the next chapter.

It is a tragic irony that Rousseau's *social contract*, with its purely state-centered concept of war, turned up in the Jacobin Bible. It even turned up among those Jacobins who defamed the classical, purely military war among states that had developed in the 18th century. They claimed that it was a "museum piece" of the *ancien régime*, and rejected, as the work of tyrants and despots, the liquidation of civil war and the bracketing of foreign war that the state had achieved. They replaced purely state war with national war and the democratic *levée en masse* [mass uprising]. Yet, Rousseau's formulation proved to be successful in the 19th century, when the interstate concept of war was reaffirmed in the restoration work of the Congress of Vienna. The state had become the obvious form of political unity, and the feeling of security provided by the state of the *ancien régime* was so strong that word-play about *état* and *Etat* served only to produce something like a *communis opinio*, even among diplomats. Even after the tremors of the Napoleonic wars, this common opinion still had the power to reestablish and restore the specific state-bracketing of war for the entire 19th century.

In fact, this is how war, at least land war on European soil, was limited and bracketed. The transformation of creedal, international civil war in the 16th and 17th centuries into "war in form," i.e., into state war circumscribed

by European international law, was nothing short of a miracle. After the merciless bloodletting of religious civil wars, the European state and its bracketing of European land war into purely state war was a marvelous product of human reason. Obviously, it required laborious juridical work. In order to understand the astounding fact that there were no wars of destruction on European soil for two hundred years, we must examine the evidence.

Chapter 2

The Transformation of Medieval Wars (Duels or Feuds) into Non-Discriminatory State Wars: From Ayala to Vattel

One need not rely on the isolated formulas of Rousseau or Talleyrand to gain a perspective on the great intellectual accomplishment responsible for interstate, European international law. It is much more useful to examine the thinking from the 16th to the 18th century that became crystallized in a humanized concept of war. In this respect, special attention should be paid to a few great jurists of international law who elaborated the concept of war within an interstate European spatial order. Already at the end of the 16th century, Jean Bodin, the real founder of this new, specifically state law, had enunciated the essential point, namely the bracketing of war through a new, specifically state-centered order.

A. Balthazar Ayala

Let us begin with Balthazar Ayala who, as legal advisor to the Spanish army leader in the rebellious Netherlands, in 1582 published his three books "On the Law of War and of Duties Connected with War and on Military Discipline."[1] John Westlake has asserted that Ayala is more a teacher than a thinker.[2] Generally, this is true. But Ayala demonstrates, often with reference to Bodin's *Respublica* and his *Methodus*, the transparent effect of Bodin's legal expertise in general and of his new, state-centered concept of sovereignty in particular. At least in Book I of Ayala's work, the decisive step over Vitoria and the whole of the Middle

1. Balthazar Ayala, *De jure et officiis belliciis et disciplina militari*, 3 vols., The Classics of International Law, Vol. II, ed. by James Brown Scott (Washington, D.C.: Carnegie Institution, 1912).

2. See John Westlake's introduction to Ayala's three books in *ibid.*

Ages is taken. This cannot be said even of such 16th century authors as Soto, Vasquez, and Corarruvias. These Spanish Dutchmen naturally defended their position with respect to the rebellious Netherlands, stressing the distinction between civil wars and wars pursued by representatives of sovereign state power among themselves. Only armed struggle between state sovereigns was war in the sense of international law, and only this type of struggle fulfilled the requirements of the concept of *justus hostis*. Everything else was criminal prosecution and suppression of robbers, rebels, and pirates.

Private war was expressly designated as non-war: *Nam ad privatum nun spectat bellum movere.* If a private person pursued a rebellion, he was a rebel, and a rebel was no *justus hostis*; laws of war did not apply to him, no *jus postliminii* [right of restoration]. He would not be treated as a prisoner of war and had no right to war booty: *Aliud est hostis, aliud rebellis.* Ayala concedes no diplomatic rights to a rebel. The very concept of *justus hostis* shifted the whole problem of the legitimacy of war to the clearest formalization of war pursued between two sovereign states. The question of *bellum justum* was distinguished sharply from that of *justa causa belli. Justum bellum* is war between *justi hostes*; "just" in the sense of "just war" means the same as "impeccable" or "perfect" in the sense of "formal justice," as when one speaks of *justum matrimonium* [law of marriage]. In this sense, classical authors knew the perfect formal justice even of *a justus exercitus, a justa acies, a justus dux* [from the order of the army, to the order of battle, to the order of the leader]. The humanistic jurisprudence of the 16th century, especially that of Alciatus [Andrea Alciati, 1492-1550] and Budaeus [Guillaume Budé, 1468-1540], strongly emphasizes this, and the founder of the new international law among states relied on the definition of humanistic jurists. Justice in a purely formal sense applied only to public war, which meant any public war pursued by equal sovereigns recognizing one another as equals and playing by the same rules. The non-discriminatory concept of war based on parity — the *bellum utrimque justum* [just war on both sides] — was developed with even greater clarity out of the concept of a just enemy recognized by both sides. To the essence of *hostis* belongs the *aequalitas.* Robbers, pirates, and rebels are not enemies, not *justi hostes*, but objects to be rendered harmless and prosecuted as criminals.

Ayala sharply clarifies this in the second chapter of Book I, under the heading *De bello justo et justis belli causis* [From Just War to the Just Cause of War]. Reading this chapter, one has the impression not only of a humanistic teacher, but of a thinker as well. Here the Spanish-Dutch

jurist was confronted with an actual situation — the developing order of European states, whose historical significance lay in the overcoming of creedal civil wars. By comparison, the first chapter of Book II is a notable deterioration. It presents a detailed discussion of why a war should be undertaken only for just reasons, *non nisi ex justa causa* [not unless from a just war], and elaborates this thesis in the style of humanistic-rhetorical scholarship with an anthology of quotations. But this does not alter the fact that the medieval concept of war already had been transformed by the turn to interstate war. This transformation was based on four arguments, which were implicit in the late medieval doctrine, but which obtained their groundbreaking and world-historical power in international law only through Bodin's concept of state sovereignty. Three of these four arguments are recognizable in Ayala's works, which is why they constitute a historical turning point in the history of law.

First, the characteristic of "war in the legal sense" is removed from the substantive justice of *justa causa*, and is shifted to the formal qualities of one of the sovereign representatives of *summa potestas* [highest power], of public-legal, i.e., of interstate war.

Second, the concept of just *war* is formalized by the concept of a just *enemy*; the concept of the enemy then is reoriented in the concept of *justus hostis* to the qualities of the state sovereign; thereby, without regard to *justa* or *injusta causa*, the parity and equality of the belligerent powers is established and a non-discriminatory concept of war is achieved, because the belligerent sovereign state without a *justa causa* remains a *justus hostis*, because it is a state.

Third, whether or not a *justa causa* obtains is a decision exclusive to each state sovereign.

To these three formal viewpoints, already recognizable with Ayala, was added a typically relativistic and agnostic argument that developed over time and became increasingly important. This is the consideration that it is difficult, even impossible to determine unequivocally and conclusively which side has just grounds for war. Ayala certainly did not share this view. With respect to *justa causa*, he insisted that both sides of a war cannot be just. This is consistent with his tendency not to grant any rights of any kind to rebels. Yet, already in the 16th century, relativistic doubts were spreading.

B. Doubts about Just War

The medieval doctrine of just war became extremely problematic, given the number of provisos and distinctions regarding its practical

application. St. Augustine speaks of war in Book XIX of *The City of God*, and in the wonderful Chapter 7 he says, with stirring words, that, for a wise man, human imperviousness makes the idea of just war even more discouraging than the idea of war itself.[3] In Chapter 8, Augustine discusses the frightful difficulty of distinguishing correctly between friend and enemy.[4] Aquinas offers four requisites for just war: the pure goal of peace without hatred and ambition; *justa causa*; declaration of war by legitimate authority; and the prohibition of any untruths.[5] Concerning his elaboration of these four points, we previously cited an exposition of this theme: if one is familiar with St.Thomas' definition of just war, one wonders exactly how many wars can be described as having been completely just.[6] We have referred to Vitoria's many *dubia* about just war. Here, too, one could ask which war in all of human history can be described as completely just from beginning to end. It is no wonder that a modern theological author ultimately came to the conclusion that only saints are capable of realizing the unity of inner love and outer struggle essential to just war.[7]

Under the influence of new intellectual currents, the postulate of *justa causa* has been destroyed by agnostic, skeptical, and decisionist reservations. What agnostic and skeptical motives came up with, humanists

3. St. Augustine, *The City of God*, tr. by Marcus Dods (New York: The Modern Library, 1950), p. 683. ["If I attempted to give an adequate description of these manifold disasters, these stern and lasting necessities, though I am quite unequal to the task, what limit could I set? But, say they, the wise man will wage just wars. As if he would not lament the necessity of just wars, if he remembers that he is a man; for if they were not just he would not wage them, and would therefore be delivered from all wars. For it is wrong-doing of the opposing party which compels the wise man to wage just wars; and this wrong-doing, even though it gave rise to no war, would still be a matter of grief to man because it is man's wrong-doing."]

4. *Ibid.*, p. 684: "In our present wretched condition we frequently mistake a friend for an enemy, and an enemy for a friend. . . ."

5. Thomas Aquinas, *Summa theologica* (New York: Benziger Brothers, Inc., 1947), Vol. II, Part II, Question 40 (On War), pp. 1359-1363.

6. Journet, *L'église du verbe encarné*, *op. cit.*, p. 364n. Journet says that, also in the *régime sacral* of the Middle Ages, the crusader *en chrétiens mais non pas en tant que chrétiens* would be active. Cf. Part I, Ch. 3, p. 58n.

7. Gustave Thibon, *Etudes carmélitaines* (Brussels: Desclée de Brouwer, 1939), pp. 66 and 67, cited by Journet, *op. cit.*: "*Si la guerre éclate, il faudra — et ce ne sera pas chose facile, et seuls les saints en seront pleinement capables — que le chrétien allie sans cesse le souci de vaincre au souci de ne pas se laisser dénaturer — ou plutôt désurnaturaliser — par la guerre, il faudra qu'il réalise ce paradoxe de garder l'amour en faisant le gestes de la haine.*" [Tr. If war erupts, it is necessary — and this is not easy, and only saints are fully capable — for a Christian to reconcile the desire to vanquish with the concern to overcome the worry of becoming denatured — or rather desupernaturalized — by war; he must realize this paradox in order to preserve love while committing acts of hatred.]

elaborated on with gusto. Increasingly, it was claimed that it is scarcely possible to decide concretely which of the warring states is actually and fully in the right. Erasmus had found many conclusive formulations of this skeptical attitude, and had asked: *Cui non videtur causa sua justa*? [Who does not see his own cause as just?] This was uttered in the spirit of humanistic skepticism. Gentili spells out his ideas along these same lines in a chapter titled *Bellum juste geri utrumque* [War Justifies Everything] (I, 6). A religious, spiritualistic current stemming from deeper motives reached a superior, "non-partisan" understanding of the justice and, even more, the injustice of both sides.[8] The practical difficulties of clarifying the circumstances of the *causa* on both sides are obvious and insurmountable. Of course, one must concede the possibility that both sides can be in the wrong. The *bellum utraque parte injustum* [war is unjust on both sides] was a principle of medieval doctrine. By the same token, the other and opposite possibility of a *bellum utraque parte justum* [war is just on both sides] existed, at least in the subjective convictions of both sides. Then, there is the further possibility that war begins with right on one side and becomes a just war on the other side through, for example, excessive reprisals during military operations.

As we have seen, there is hardly a war that is completely just. How is it with partially just wars? Who should answer all these endless and entangled questions of action and guilt, given the fact of allied wars and in an age of politics behind closed doors? How can a conscientious judge, who is not coincidentally the father-confessor of all important parties, become conversant with the state secrets of both sides of the dispute, i.e., the *arcana* without which there can be no great politics? And how great is the possibility that both sides are convinced of the rightness of their causes and have good reason to believe that their opponent, who took advantage of his right in a particular case, should be considered to be a dangerous enemy?

At least since Bodin, a true jurist would confront this skeptical and agnostic disposition with a *decisionist* formulation of the question that is immediately given with the concept of state sovereignty: who then is in a position to decide authoritatively on all the obvious, but impenetrable questions of fact and law pertinent to the question of *justa causa*? The asserted juridical right and moral legitimacy of one's own cause and the alleged injustice of the opponent's cause only sharpen and deepen the belligerents' hostility, surely in the most gruesome way. That we have

8. The concept of "non-partisan" appeared first with spiritualists like Erich Seeberg, *Gottfried Arnold: Die Wissenschaft und die Mystik seiner Zeit. Studien zur Historiographie und zur Mystik* (Meerane: E. R. Herzog, 1923), pp. 227f.; Ch. 4: "Die historische Methode."

learned from the feuds of the feudal age and from the creedal civil wars over theological truth and justice. But state sovereigns ended such murderous assertions of right and questions of guilt. That was the historical and intellectual accomplishment of the sovereign decision. In reality, juridical interest no longer was concerned with the normative content of justice and the substantive content of *justa causa*, but rather with form, procedure, and jurisdiction in international as well as domestic law. A simple question was raised with respect to the interminable legal disputes inherent in every claim to *justa causa*: Who decides? (the great *Quis judicabit?*). Only the sovereign could decide this question, both within the state and between states. But, in the interstate law of sovereigns, there is no highest instance or court of last resort over both parties, owing to the principle of the equality of sovereigns: *Par in parem non habet jurisdictionem* [Equals have no jurisdiction over each other]. The *aequalitas* of "just enemies" leads third parties to neutrality. There can be only a decisionist answer: each sovereign state-person decides autonomously concerning *justa causa*. The state that does not decide remains neutral and, vice versa, the neutral state abstains from deciding the justice or injustice of the belligerent states.

European state war thus became an armed struggle between *hostes aequaliter justi*. How should the question of just war be decided otherwise, if there is no spiritual authority? Should one of the subjects of one of the belligerent states decide on the justice or injustice of his government? That would produce only civil war and anarchy. Or a lone soldier? That would produce only mutiny and treason. Or the neutral state, which then no longer would be either non-partisan or neutral? It must be remembered that the historical significance of the modern state consists in its having ended the whole struggle over *justa causa*, i.e., concerning substantive right and substantive justice understood in the early feudal-legal, estate-legal, or creedal-theological sense. Thereby, every state became a representative of the new spatial order within the confines of own territory, and thus was in a position to overcome civil war with a sovereign decision. Within this state, there were no more enemies, and state jurists knew they no longer would begin with the concept of enmity.[9]

The sovereign territorial state initiated war "in form" — not through norms, but through the fact that it bracketed war on the basis of mutual

9. "The concepts of enmity (feud) and vengeance posed a peculiar difficulty for legal historians. All legal history is ultimately the history of the *contemporary* legal order. But enmity is not aware of this." See Otto Brunner, *Land und Herrschaft: Grundfragen der territorialen Verfassungsgeschichte Südostdeutschlands im Mittelalter* (1939), 2nd ed. (Vienna-Baden: Rohrer Verlag, 1942), p.

territoriality, and made war on European soil into a relation between specific, spatially concrete, and organized orders, i.e., into a military action of state-organized armies against similarly-organized armies on the opposing side. Many medieval authors had promoted the idea that war must be "public," and must be conducted by a "prince or emperor." But they still designated private war as war. However, when Ayala and Gentili said that "war must be public on both sides," this meant that it must be between states. When these humanistic jurists insisted that war on both sides must be conducted by "princes," this also meant that it must be fought by sovereign territorial states. Everything that can be said about the legitimacy of state wars lay in this new concept of "state." A non-public war is a non-state war. Not only was it illegitimate; it was no longer war in the sense of the new international law. It could be anything else — rebellion, mutiny, breach of the peace, barbarism, and piracy — but not war in the sense of the new European international law.

C. Alberico Gentili

Gentili's first commentary, "On the Law of War,"[10] appeared a few years after Ayala's three books. Gentili's fame, like Vitoria's, has a history, but not to the same degree and extent. Nevertheless, it is comparable and is a shining example of the history of great thinkers in international law. But we are not concerned with the history of this fame.[11] As with Ayala, the direct influence of Bodin on Gentili is recognizable. Only in this way were the learned perceptions of such great jurists as Budaeus and Alciatus concretely realized in international law. Many of Gentili's

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10. Alberico Gentili, *De jure belli*, 3 vols. (London: 1859; the 1612 edition has been reproduced photographically, with a translation by John C. Rolfe and an introduction by Coleman Phillipson, in The Classics of International Law, Vol. 16 (Washington, D.C.: Carnegie Institution, 1931).

11. After Thomas Erskine Holland, Gentili's successor in Oxford, had rediscovered him (1874), Italian free-thinkers began to associate Gentili with Giordano Bruno and to celebrate him as a martyr to the freedom of thought. Around this time (1875), a voluminous literature began to develop and a committee was formed in Oxford, under the chairmanship of Sir Robert Phillimore. In 1876, an Albericus Gentilis Committee was founded in the Netherlands, under Prof. Carel Daniel Asser. It foundered on the protests of Dutch Gentili admirers, who eventually erected a statue of Grotius in Delft. A delightful victory of the Gentili myth! Only in 1908, on the tricentennial of his death, was a monument to Gentili erected in his birthplace, San Ginesio. Concerning these interesting incidents in the sociology of the study of international law, see Henry Nézard, "Albericus Gentilis (1552-1608)," in *Les fondateurs du droit international: Leurs oeuvres — Leurs doctrines* (Paris: V. Giard & R. Brère, 1904), p. 43; and Gezina Hermina Johanna van der Molen, *Albericus Gentilis and the Development of International Law: His life, Work, and Times* (Amsterdam: H. J. Paris, 1937), pp. 61ff.

important definitions agree with those of Ayala, for example, denoting the prominence of the public-legal character of war, according to which the concept of *justus hostis* was separated sharply from the question of *justa causa*, and the one denoting the equality of the belligerent *hostes* was derived from this concept of the just enemy. But Gentili's formulations were much more determined and deliberate than were Ayala's, and had far greater juridical power of form, given their convinced humanistic rationalism and their striking linguistic style. Gentili also presented these formulations in an exceedingly lively manner, with numerous examples from classical antiquity, the Old Testament, and contemporary history. Especially modern were the many juridical opinions submitted, around 1580, by the pretender to the Portuguese throne, who was not dissuaded by the actions of either Philip II of Spain or his father-confessor.

Thus, the great historical interest in Gentili is completely understandable. Henry Nézard was right in saying that Gentili was the first to designate private war as non-war, even though Ayala did so almost simultaneously. It was Gentili who succeeded in creating a new concept of war based on the sovereign state — on the *aequalitas* of the *justi hostes* — rather than on the justice or injustice of the reasons for war offered by either side. This was the decisive turning point, at least in the thinking of the intellectua vanguard at that time. Chapter 9 of Gentili's first book, *De jure belli*, titled *An bellum justum sit pro religione*? [Can Religion be the Basis of a J st War?] is a singularly bold polemic against religious wars and the doctrine of just wars propagated by theologians. Chapter 10 provides a basis for the maxim *cujus regio, ejus religio*, together with a proviso of tolerance following Bodin's example. Vitoria is cited often, but only as an argument against the theological handling of the question of war in international law. This was the first clear form of the juridical, as opposed to the theological treatment of international law. *Silete theologi in munere alieno!* exclaims Gentili, in order to remove theologians from discussion of the concept of war and to rescue a non-discriminatory concept of war.[12] The state was established as the new, rational order, as the historical agency of detheologization and rationalization. The first stage of its juridical self-consciousness was attained in the thinking of two jurists: Bodin and Gentili.

D. Grotius on the Problem of Just War

Compared to the ideas of these two jurists, let alone to the later systematic clarity and conceptual power of Hobbes, Grotius' line of argument, in all

12. Gentili, *De jure belli*, *op. cit.*, Vol. I, Ch. 12.

important respects, is unsteady and uncertain. For him, a private war was still war in the sense of international law. Nevertheless, Grotius is commonly thought to be the true founder of "modern international law." As with Vitoria and Gentili, the history of Grotius' fame is an absorbing theme.[13] But it is beyond the scope of our concerns. We must content ourselves with clarifying the often misunderstood statements about just war from Grotius to Emerich de Vattel.

The reason for the confusion, as we have seen, lies mostly in the inability to distinguish between *bellum justum* as a formal juridical concept of a concrete order and the substantive question of *justae causae*, of the just causes of war. Consequently, traditional scholastic formulations of just war continued to appear in juridical expositions from Grotius to Vattel, and in them war could be pursued only *ex justa causa*. But this was an informal assumption, since every sovereign claimed to be in the right and to have right on his side. For propagandistic reasons, he could say nothing else, since there was no established higher instance and since, despite all statements regarding the requisites of justice, every belligerent sovereign had the same right to prisoners and to plunder. As a practical matter, war was treated as just on both sides, as *bellum utrimque justum*.

In terms of international law and in this context, the claim to pursue a one-sided just war is of interest only with respect to one singular and entirely specific viewpoint: it is conceivable that a belligerent state might claim legitimately that the other side was pursuing an unjust war. This could be done if its opponent's actions tended to deny the existing interstate spatial order of European international law (in which the claims of both sides had their legitimacy) as the fundament of the *entire* European order, and, in so doing, to upset the axis of that order. That is the meaning of a doctrine deriving from the European balance, such as obtained in 18th century international law, whereby war against the disturber of this balance was considered to be permissible and, therefore, "justified"[14] in this

13. An extraordinarily interesting contribution to the history of Hugo Grotius' fame is contained in the aforementioned work by Paulo Manuel Merea, *Suarez, Grocio, Hobbes: licoes de história das doutrinas politicas feitas na Universidad de Coimbra, op. cit.*, who rightly says that Grotius (*volens, nolens*) remains within the tradition of the scholastic Middle Ages. On the fame of Alberico Gentili, see above, Part II, Ch. 3, p. 126.

14. *Commentatio iuris pvblici S. I. R. G. (i. e., a Sacri Imperii Romani Germaniae; das ist: Völlständige Sammlung der wichtigsten Grundgesetze des Römischen Reiches Deutscher Nation*, ed. with an introduction by Ludwig Martin Kahle (Göttingen: Gebr. Schmid, 1744). Gottfried Achenwall also belonged to this school. See Joachim von Elbe, "Die Wiederherstellung der Gleichgewichtsordnung in Europa," in *Zeitschrift für ausländisches öffentliches Recht*, Vol. IV (1934), pp. 226-260.

specific spatial sense. This balance was threatened during the Napoleonic wars. But the threat was overcome by a successful restoration achieved at the Congress of Vienna (1814-15). This restoration lasted until 1914. Of course, jurists who continued to speak of *justa causa* did so mostly in normative terms, and did not think of concrete spatial orders, whereas diplomats and politicians took the spatial order of European international law for granted, although without juridical considerations. However, this spatial order and its concept of balance was the essential presupposition and foundation upon which the European Great Powers based their practical policy of colonial expansion into the free spaces of the globe from the 17th to the 19th century. Their balance theories allowed them to disregard the theoretical implications of the basic problem of their global spatial structure: the relation of free and non-free land. Today, this distinction no longer would be allowed in any legal-historical consideration of this epoch.

All international law specialists from Grotius to Vattel treated unjust war as real war *jure gentium*, if it was European state war. Their own presuppositions prevented them from dividing the concept of war, i.e., from discriminating juridically between a just and an unjust side, from giving the just side a right of plunder denied the other, from allowing the just side use of certain dangerous weapons the other side was forbidden. Everything essential about a "war in form" between two *justi hostes*, whereby *justus* expresses only a formal *perfection*, as both Ayala and Gentili emphasize, is found in what Grotius says about just war. Nevertheless, he seriously confuses the concepts. Completely in line with traditional theological expressions of the Middle Ages, he argues that one can pursue war only *ex justa causa*. Moreover, he still speaks of "private wars" and considers them to be wars in the sense of international law. But simultaneously, he says that they cannot be included legitimately in the definition of war: *Justitiam in definitione (belli) non includo*.

Here, we need examine only how Gentili dealt with this matter in practical terms, as in booty and prize law. *Jus gentium* gives a belligerent state the right to spoils and, in a sea war, the right to seizures. The Book of Wisdom allowed the righteous to take booty from the ungodly.[15] The connection

15. [Tr. "Therefore the righteous plundered the ungodly; they sang hymns, O Lord, to your holy name, and praised with one accord your defending hand;" in "The Wisdom of Solomon," 10/20, The Apocryphal/Deuterocanonical Books, p. 50 in *The Holy Bible, Containing the Old and New Testaments with the Apochryphal/Deuterocanonical Books*, New Revised Standard Version (Nashville: Thomas Nelson Publishers, 1990). All further references to *The Holy Bible* will be to the aforementioned King James Version.]

between a just war and a war of plunder is obvious. In Grotius' view, does prize law presuppose a just war in the sense of *justa causa*? Does only the belligerent power, which proceeds *ex justa causa*, have a right of plunder that its opponent is denied? Both theoretically and practically, this question is more significant than is any other, because the best formulated demands of *justa causa* are meaningless if the belligerent power that pursues unjust war has the same rights of plunder and capture in international law as does its opponent who pursues a just war. This concrete question, which obviously is more interesting than are all general postulates of *justa causa*, Grotius answered with amazing certainty. Grotius says that, according to *jus gentium*, not only the power that proceeds *ex justa causa*, but every power that pursues a formal war, can reclaim everything the enemy confiscated.[16]

E. Richard Zouch

For many reasons, 1650 is conclusive for our history of concepts in international law, since that year three significant events occurred, remarkably all on English soil. First, Zouch published an especially interesting treatise. Second, there was Cromwell's dictatorship, in particular his Navigation Act of 1651. Third, the first philosophically systematic foundation of the new institution called "state" was laid in Hobbes' *Leviathan.* We will have occasion to refer often to Hobbes' book, since for more than a century it determined all modern "thinking in terms of states." Among 17th century juridical authors, Richard Zouch (1590-1660), a successor to Gentili's chair, became famous in the history of international

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16. "*Caeterum jure gentium, non tamen is, qui ex justa causa bellum gerit, sed et quivis in bello solemni et sine fine modoque dominus fit eorum quae hosti eripit.*" Grotius, *De jure belli ac pacis*, *op. cit.*, Book III, Ch. 6, §2. [Tr. "But according to the law of nations, not only the person, who makes war upon just grounds; but any one whatever, engaged in regular and formal war, becomes absolute proprietor of every thing which he takes from the enemy," in Grotius, *The Rights of War and Peace, including Law of Nature and of Nations*, note by A. C. Campbell, introduction by David J. Hill (Washington, D.C.: Walter Dunne, 1901), p. 335.] This position, together with the same reference cited by Vattel, dominated the 18th and 19th centuries. In August Wilhelm Heffter, *Das europäischen Völkerrecht der Gegenwart*, 3rd ed. (Berlin: E. H. Schroeder, 1855), p. 203, we read: "War is only just, if and to the extent self-help is allowed, although an unjust war has precisely the same effects as a just war." Commenting on this sentence, Heffter writes: "This is recognized by all, also by those who have meticulously sought to determine the grounds of a just war and have claimed a juridical responsibility to establish what constitutes an unjust war, such as, e.g., Grotius and Vattel (Book III, §183). Just how unsuccessful that proved to be for the distinction between a natural and a willful law already was recognized by Samuel de Cocceji, *De regimine usurpatoris* (Frankfurt a/M: 1702), especially the commentary on Grotius, Vol. III, Ch. 10, §3f.

law. In his "Exposition of Fecial Law and Procedure, or of Law Between Nations, and Questions Concerning the Same,"[17] he used the formula that became generally recognized as indicative of the new interstate structure of European international law: *inter gentes* [among nations].

The formula *inter gentes* certainly is old. But in Zouch's book it is systematically conceived and rooted for the first time in his "Elements of Jurisprudence."[18] Zouch presents *inter gentes* in a clear and systematic way, distinguishing relations: 1. between individuals, 2. between sovereigns and subjects, and 3. among sovereigns. This tripartite division provided a binding methodological determination that still remains valid. The crucial influence of Bodin and of Hobbes clearly is recognizable in *jus inter gentes*. In exemplary fashion, characteristic of the English jurist, Zouch systematically combines the concrete with the practical. He distinguishes various types of domination (*dominatio* [dominion], *praepotentia* [superior power], *patrocinium* [patronage]), and, on this basis, determines various types of enemies. Thereby, he legitimates corresponding types of war that are not interstate, and thus presuppose various concepts of international law. These divisions and classifications evidence the experiences of colonial wars, creedal civil wars, and the new interstate wars, all of which were common in England in Cromwell's time.

This is how the particularity of war between sovereigns came more sharply to the fore. In Section 7 of Zouch's book, he distinguishes, under the heading *De statu inter eos quibuscum bellum* [On the Status of Those Involved in War], the following types of opposition, such as would obtain in a struggle between free and equal sovereigns (those bound neither by *dominatio* nor by *praepotentia* or *beneficium* [benefaction]):

1. An *inimici* is an opponent with whom there is no friendship, no *amicitia* or legal community, no *hospitium* (hospitality), and no *foedus* (covenant), as between Greeks and barbarians, Romans and strangers. These are no *hostes*, because in wars between such *inimici* possessions are not respected. Nevertheless, Zouch maintains, with reference to Bodin, "*ob eam quae homini cum homine intercedit humanitatis rationem*" [because of this, he interposes the concept of humanity between

17. *Juris et judicii fecialis, sive juris inter gentes et quaestionum de eodem explicatio*, including a translation of the text by J. L. Brierly (Oxford: Tho. Robinson: 1650), reproduced in The Classics of International Law, Vol. I (Washington, D.C.: Carnegie Institution, 1911).

18. *Elementa jurisprudentiae, definitionibus, regelus & sententiis selectioribus juris civilis, illustrata* [1629] (Oxford: Leonardus Lichfield, 1636).

men], which no longer is true today; 2. An *adversarii* is an opponent with whom legal community (*juris communio*) exists. Such a community is destroyed only by war, as in the civil war between Caesar and Pompeii; 3. A *hostes*, in the original sense (*propie*), is an opponent one may injure and kill. But this depends upon whether or not he has the *jura belli*, i.e., whether or not he is a *justus hostis*.

Traitors and rebels who pursue war against their princes or their state, and pirates on the high sea have no *jura belli*. The term *justi hostes* refers only to opponents who must be treated according to rules of war in international law. In this respect, Zouch follows Ayala and Grotius in quoting Cicero: "*Hostis est, qui habet rempublicam, curiam, aerarium, consensum et concordiam civium et rationem aliquam, si res tulerit, et pacis et belli.*" [The enemy is one who has a commonwealth, a court, a treasury, consensus and concord among citizens, and some reason to conduct peace and war.] This is a remarkable statement, in which only the ambiguous word *ratio* must be understood properly and freed from the confusion engendered by *justa causa*, because the opponent who pursues war on "unjust grounds" should not be designated an *injustus hostis*. Decisive here is the determination of war on the basis of the type of enemy. This is precisely what gives Zouch's distinctions their great general significance, as does his typology of domination (*dominatio, praepotentia, patrocinium*) in the same chapter.

F. Pufendorf, Bynkershoek, Vattel

As with Grotius, Samuel Pufendorf is of interest here primarily with respect to his position on prize law. In a just war, in order to come into one's own again, one reclaims what was confiscated by the enemy. Moreover, one should be compensated for the costs of war. Finally, one should confiscate as much as possible from the enemy, so as to preclude his ability to do more harm. However, so the argument goes, it is customary for all peoples to "pursue war with public authority and in all forms" (*bellum publicum et solemne* [war public and serious]), to be lord of everything the enemy took without any limits, even if the booty vastly exceeds any possible legal claims.[19]

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19. Samuel Pufendorf, *De jure naturae et gentium*, *op. cit.*, Book VIII, Ch. 6, §17. The 1688 edition has been photographically reproduced, with a translation by C. H. and W. A. Oldfather ("The Law of Nature and Nations") and an introduction by Walter Simons, 2 vols., in The Classics of International Law, Vol. 17, Carnegie Endowment for International Peace (Oxford: Clarendon Press, 1964).

The work of the Dutch jurist Cornelius van Bynkershoek (1673-1743) belongs to the 18th century, i.e., to the time after the Treaty of Utrecht (1713). We will meet him again in our discussion of the spatial order of the free sea. Here, he is mentioned in connection with the clear conclusions he drew for the international law of interstate neutrality from the completely equal right — the *aequalitas* — of belligerent states in international law.[20] The neutral party, which he calls a *medius*, remains *a friend of both* belligerent parties and is obligated to *aequalitas amicitiae* with both. However, the duty to remain impartially a friend to both sides presupposes that the rules of war in international law be strictly separated from the question of substantive, material justice, i.e., from the *justa causa* of the warring parties. The non-discriminatory concept of war essential to the construction of the international law of the interstate European spatial order and to the bracketing of European war was possible only by eliminating the question of *justa causa.* Just how difficult it was to maintain this separation of *justum bellum* and *justa causa* is demonstrated by the fact that Bynkershoek gave the neutral parties who contracted with both warring parties the right — the *justiorem causam* — to determine the terms of the alliance by which they would be bound. This entailed a confusion of the clear alternative between war and perfect neutrality, and rightly has been reproached as a reversion to the conceptual world of *justa causa*.[21] Yet, let us withhold judgment about this until we get a fuller picture of Bynkershoek's conceptual clarity.

With Vattel, the classical transparency of the enlightened 18th century finally was reached.[22] The whole problem of a substantive, normative justice was displaced openly and clearly in the mere "form," i.e., in the purely state structure of war. The remnants of traditional expressions of just war now lost their last substantive meaning, because in Vattel's time, in the

20. Cornelius van Bynkershoek, "*De rebus bellicis*," Liber Primus in *Quaestionum juris publici libri duo.* The 1737 edition has been photographically reproduced, with a translation by Tenney Frank and an introduction by Jan de Louter, in The Classics of International Law, Vol. 14 in 2 vols. (Oxford: Clarendon Press, 1930).

21. Richard Kleen, *Lois et usages de la neutralité d'après le droit international conventionnel et coûtumier des états civilisés* (Paris: A. Chevalier-Marescq, 1898-1900); and Joseph Delpech, "Bynkershoek (1673-1743)," in *Les fondateurs du droit international, op. cit.*, p. 433n.

22. [Tr. Emerich de Vattel, *Le droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, photographic reproduction of the original 1758 edition, with a translation ("The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and the Affairs of Nations and of Sovereigns"), by Charles G. Fenwick, with an introduction by Albert de Lapradelle, Vol. 3 of The Classics of International Law, ed. by James Brown Scott (Washington, D.C.: Carnegie Institution, 1916).]

18th century, European states such as France and Prussia had developed their "form" in the most precise manner. The European state system — a spatial order of territorial powers on European soil — thereby had found its firm structure. This was not the precarious ties of sovereign wills "autonomously joined together," but rather membership in a balanced spatial system of benefit to all. It made possible the bracketing of European war that, strictly speaking, became the mainstay of this international legal order. The foundation of this system was the specific political order of territorial states. The kingdom of Poland had not overcome the stage of feudalism, and had not reached the organizational level of modern European states. It was no state, and thus, in the last third of the 18th century, could be divided among states. It did not have the power to launch a defensive state war to prevent the divisions and land-appropriations of Polish soil by neighboring states (1792, 1793, 1795). However, throughout the 19th century, the Polish question continued to challenge the interstate spatial order of European international law, and to keep alive the distinction between people (nation) and state. This had ramifications for international law.

Vattel retained, as did all juridical authors of his century, a few platitudes of just war in the sense of *justa causa*. But, in the 18th century, this was a hollow *topos*, a true platitude.[23] Thus, with Vattel it was a mere flourish, because this typical 18th century enlightener, without posing further questions about *justa causa*, took for granted and stressed in all his legal appeals the formal structure of state war, i.e., of war as a relation among states that mutually and similarly recognized and adhered to legal limits. He said: "*La guerre en forme, quant à ses effets, doit être regardée comme juste de part et d'autre.*" [Tr. War in form, as regards its effects, must be regarded as just on both sides.] The legal effects of war, especially the right of plunder and the validity of taking property by force of arms, in no way presuppose a just right to wage war. The legal institution of recognizing insurgents as belligerents in a civil war also is based on this foundation, and Vattel's formulation of this institution influenced future practice.[24] Practically speaking, everything essential hinged on the fact that war had become a "war in form," *une guerre en forme*.[25] If it was a war "in form," neither the belligerents nor the neutrals had a right to argue about

23. Cf. Part I, Ch. 2, p. 50n.

24. Vattel, *Le droit des gens*, *op. cit.*, Book 2, §41, p. 56.

25. *Ibid.*, Book 3, Ch. 12, §190, and "*Tout ce qui est permis à l'un, est permis à l'autre.*" [Tr. Everything permitted on one side is also permitted on the other.] §191. On the equality of nations, see further §21.

the justice of a war. All questions of "justice" were reduced to this "form." In practical-political terms, this meant that war conducted on European soil between equal and sovereign territorial states — purely state war — differed from war pursued against non-state, i.e., barbarian peoples or against pirates. As Vattel put it, a statesman who pursues a "formal" war unjustly commits no crime in international law, but "at most a sin against his own conscience."

That was the logical result of state sovereignty and the *parfaite égalité de droits entre les nations, sans regard à la justice intrinsèque de leur conduite, dont il appartient pas aux autres de juger définitivement* [perfect equality of rights among nations, without regard to the intrinsic justice of their conduct, where the one does not appear to be a definitive judge of the other.] The principle of the juridical equality of states made it impossible to discriminate between a state that pursues a just war and one that pursues an unjust war. This would make one sovereign a judge over another, and that would contradict the legal equality of sovereigns. The right to neutrality in foreign wars was based on this same equality. The superior quality of state sovereignty and its logic of neutrality was also the same in civil war. Already with Vattel, recognition of insurgents as belligerents appears as a specific legal institution in terms of international law. If rebels in a civil war succeeded in establishing their rule over a certain territory and in creating an organization similar to a state, then the government of a third party state could recognize them as a belligerent party. That was conceived of as an anticipation of *possible* statehood, as recognition of a potential state or state government. Most important, at least since Vattel, was that this recognition of belligerency should be conceived of as a declaration of neutrality by the recognizing government, whereby this third party would remain impartial with respect to both sides in the civil war, including judgment with respect to *justa causa.* The remarkable, but nevertheless logically compelling result was that the rebels were recognized as *justi hostes* by a third party state.[26]

This logic of an interstate international law was grounded in a balanced spatial structure of self-contained states, each with defined territorial limits and fixed borders. The sovereignty of every individual state in relation to all the others only was apparent. In reality, the *aequalitas* bound them together. This allowed the possibility of recognizing neutrality. It

26. We will encounter the most important case of this type of neutrality in a civil war in our discussion of the American War of Secession (Part IV, Ch. 6), and there we will deal with the wider problematic of such a legal institution.

also allowed them to conduct war in an orderly fashion, instead of as an exercise in mutual destruction, and this culminated in a new balance. Essential for the spatial foundation of the bracketing of war was that thereafter war was confined to the European territorial order and was consistent with its system of balance. Such an order of international law thus was not a lawless chaos of egoistic wills to power. All these egoistic power structures existed side-by-side in the same space of one European order, wherein they mutually recognized each other as sovereigns. Each was the equal of the other, because each constituted a component of the system of equilibrium. Consequently, every important war between or among European states concerned *all* members of the European community of states. Any state could remain neutral; but, given the power of its *jus ad bellum*, any state also could take sides and join in. Ultimately, this led to common wars and common deliberations, involving the common interests of the common spatial order of the European balance. This is how a bracketing of war on the European continent was achieved.

G. Kant's Unjust Enemy

Vattel worked Christian Wolff's philosophy into a textbook on international law. That is to his credit, and it speaks well of the intellectual level of late 18th century diplomats that so much philosophy had so much influence on them. Immanuel Kant's philosophy, which brought the 18th century to a close, had an essentially different sort of influence on areas of international law, which became evident only in the 20th century. But in this respect, Kant obviously shows a double face. On the one side, he formulates definitively the results of the epoch of development we have presented thus far. States confront each other in a state of nature as equal, moral persons with equal rights; each has the same right to war: "No war of independent states against each other can be a punitive war (*bellum punitivum*), nor can any war be a war of extermination (*bellum internecinum*) or subjugation (*bellum subjugatorium*)."[27] There is thus "the right to a balance of power among all states that are contiguous and could act on one another."[28] On the other side, however, Kant introduces, in a highly surprising way, the concept of the *unjust enemy*. Such a concept cannot exist in a natural state, "for a state of nature is itself a condition of injustice."[29] But then Kant proceeds to

27. [Tr. Kant, "Metaphysical First Principles of the Doctrine of Right," in *The Metaphysics of Morals*, *op. cit.*, "Public Right, The Right of Nations," §57, p. 117.]
28. [Tr. *Ibid.*, §56, p. 116.]
29. [Tr. *Ibid.*, §60, p. 116.]

expound, in a thoroughly perplexing manner, the old doctrine of *justus hostis*: "A just enemy would be one that I would be doing wrong by resisting, but then he would also not be my enemy."[30]

It is impossible to understand the concept of a just enemy better than did Kant. However, already in *Perpetual Peace* (1795) he demonstrates a clear feeling for the global character of an international law for people who "cannot forever be dispersed," but must "finally put up with living side-by-side."[31] Perhaps that is indicated in every failure to recognize the normative abolition of interstate, European international law,[32] but perhaps it is also a presentiment of a new *nomos* of the earth. In his doctrine of right, which appeared somewhat later (1797), Kant described an "unjust enemy" as one "whose publicly expressed will (whether by word or deed) *reveals a maxim* by which, if it were made a universal rule, any condition of peace among nations would be impossible and, instead, a state of nature would be perpetuated."[33]

Every word of this maxim deserves our closest attention, because this brings us to the core concept of the *jus publicum Europaeum*, the *justus hostis*, and to its apparent counterpart, the *hostis injustus*, that the Königsberg philosopher discovered. As Kant says, the "unjust enemy" is very dangerous, because the law has no "limits" for anyone threatened by him or who feels threatened by him. How do we recognize this frightful enemy against whom our law has no limits? It is enough to say that there is a *verbally* expressed will, and that expression of this will *reveals* a maxim that justifies common action in order to maintain the freedom of the one who feels threatened. A preventive war against such an enemy would be considered to be even more than a just war. It would be a crusade, because we would be dealing not simply with a criminal, but with an unjust *enemy*, with the perpetuator of the state of nature.

Who is this unjust enemy? Certainly not the opponent who has broken the rules of war and has violated the right to war by perpetrating crimes and atrocities. Thus, we are not concerned with Kant's conceptual determination. In his conceptual definition, he uses an example that goes

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30. [Tr. *Ibid.*]

31. [Tr. "The idea of international law presupposes the separate existence of a number of neighboring and independent states." See Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, tr. and annotated by Robert Latta (New York and London: Garland Publishing, Inc., 1972), p. 155.]

32. I deal with this question in a special section in Part IV, Ch. 2, pp. 227ff.

33. [Tr. Kant, "Metaphysical First Principles of the Doctrine of Right," *The Metaphysics of Morals*, *op. cit.*, §60, p. 119.]

back to behavior contravening peace in the state of nature: "Violation of public contracts is an expression of this sort (namely, the perpetuation of the state of nature), since this can be assumed to be a matter of concern to all nations whose freedom is threatened by it."[34] Properly speaking, this is not an example, but only an extension of a broader and more general proviso. Yet, we would like to see the unjust enemy *in concreto*, just as Kant, in another characteristic place, allowed the "inquisitor" to appear. But here the philosopher is content with his cautiously formulated generalities and general provisos. If freedom is threatened, then *by whom*, and *who* concretely will decide? All this remains open. It only means that when the freedom of the people is threatened by the unjust enemy's words or acts, *thereby* they "are called upon to unite against such misconduct in order to deprive the state of its power to do it (to threaten peace)."[35]

This sounds like the old doctrine of just war, whose primary result was to create a legal title for land-appropriation. But now Kant takes a surprising turn, in that the coalition of the just, who should take from the unjust enemy the power to pursue further "misconduct," is "not called upon to divide its territory among themselves."[36] This is further evidence of Kant's greatness and humanity. He rejects just war as legal title to land-appropriation. He refuses "to make the state, as it were, disappear from the earth, since that would be an injustice against its people, which cannot lose its original right to unite itself into a commonwealth."[37] Yet, the victor can make the vanquished people adopt "a new constitution that by its nature will be unfavorable to the inclination for war."[38]

In other respects, Kant evidences great appreciation for the logic of the idea of a just enemy. Immediately preceding the passages above, he speaks of a peace treaty and says: "The concept of a peace treaty already contains the provision that an amnesty goes along with it."[39] Even more remarkable is the mixture of recognition and rejection of the idea of a just enemy, which is found in his discussion of the unjust enemy. The intensity of a just war is increased even more, and the emphasis is shifted from the fact of the matter to the person of the unjust enemy. If St. Augustine says[40] that the idea of war would be still more depressing if filtered

34. [Tr. *Ibid.*]
35. [Tr. *Ibid.*]
36. [Tr. *Ibid.*]
37. [Tr. *Ibid.*]
38. [Tr. *Ibid.*, §58, p. 118.]
39. [Tr. *Ibid.*]
40. St. Augustine, *The City of God*, *op. cit.*, p. 683.

through the idea of a just war, then the concept of an unjust enemy can increase this depression, because it does not have the act, but rather the perpetrator in view. If it is difficult for people to distinguish between a just enemy and a felon, how can they view an unjust enemy as anything other than the most grievous criminal? And in what sense does he remain an antagonist in a war circumscribed by international law? In the final analysis, identification of enemy and criminal also must remove the limits Kant places on the just victor, since he does not allow for the disappearance of a state or for the fact that a people might be robbed of their constituent power. Ultimately, this reinforces the fact that Kant is a philosopher and an ethicist, but not a jurist. On one side, he has the *justus hostis*, and on the other, the *unjust enemy* — a concept whose discriminatory power to divide goes even deeper than does that of just war and *justa causa.*

Is it possible, on the basis of the Kantian definition of an unjust enemy, to answer the questions: Who, then, in the given world situation of 1797, was *in concreto* an unjust enemy? On which side did he stand? Was revolutionary France the unjust enemy? Or the conservative Hapsburg monarchy? Or tsarist Russia? Or maritime England? Or was there no unjust enemy? Were they all just? From the standpoint of Kant's cautious general formulas and provisos, one can find no certain answer, but only can pose new and conflicting questions. Some of his words might be interpreted as leading to the revolutionary path to freedom, others to the conservative path to security. Kant also did not leave his definition of an unjust enemy open to the modern concept of aggression or *crime de l'attaque.* This, too, indicates that, in this respect, he was not a jurist and was closer to theologians than to jurists.

Perhaps Kant also thought in terms of a war in which a state was threatening the balance of the future spatial order, a war in which other states would form alliances against the state in question, in order to restore equilibrium. Such a war, as noted above,[41] had been recognized and emphasized as a special case by the Göttingen school of international law in the 18th century. Obviously, unlike the Königsberg philosopher, 18th century jurists had not thought to deprive an opponent of his character as a *justus hostis* in such a coalition war. But, just as obviously, it was possible for Kant, as it was earlier for theologians, to use a philosophical ethic to deny the concept of a *justus hostis*, and, by introducing discriminatory war, to destroy the work of jurists of the *jus publicum Europaeum.*

41. See Part III, Ch. 2, pp. 160f.

Chapter 3

Freedom of the Sea

In the perspective of the *jus publicum Europaeum*, all *land* on the earth belonged either to European states or to those of equal standing, or it was land free to be occupied, i.e., potential state territory or potential colonies. In the 19th century, special forms of European extraterritoriality and consular jurisdiction were developed for half-civilized or exotic countries. The *sea* remained outside any specific state spatial order: it was neither state or colonial territory nor occupiable space. It was free of any type of state spatial sovereignty. The firm land was divided by clear linear borders into territorial states or areas under state domination. The sea had no borders other than coasts. It was the only territorial surface free of all states and open for trade, fishing, and the free pursuit of maritime wars and prize law, without regard to proximity or geographical borders.

A. Two Spatial Orders: Firm Land and Free Sea

Thus, land and sea were divided into *two* separate and distinct global orders within the Eurocentric world order that arose in the 16th century. For the first time in human history, the antithesis of *land* and *sea* became the universal foundation of a global international law. No longer was one concerned with such maritime areas as the Mediterranean, the Adriatic, or the Baltic seas, but now with the entire globe, including the oceans. This completely new antithesis of land and sea determined the big picture of a *jus publicum Europaeum* that sought to give its *nomos* to a world Europe had discovered geographically and had measured scientifically. Thus, two universal and global orders confronted each other without being able to assume the relation between universal and particular law. Each was universal in its own right. Each had its own concepts of enemy, war, booty, and freedom. The total decision for international law in the 16th and 17th centuries culminated in a balance of land and sea — in the

opposition of two orders that determined the *nomos* of the earth precisely in their mutual tension.

The connecting link between the different orders of land and sea became the island of *England*. This explains England's unique position *vis-à-vis* this European international law. England alone took the step from a medieval feudal and terrestrial existence to a purely maritime existence that balanced the whole terrestrial world. Spain was too terrestrial, and, despite its overseas empire, unable to remain a sea power. France became a "state" in the classical sense of the word, and opted for the specific territorial spatial form of sovereign statehood. Holland became landbound after the Treaty of Utrecht (1713). But England, unlike its rivals, was not so deeply involved in the politics and wars of the European continent. England, as John Robert Seeley said, was "the least hampered by the old world." England thus completed its transition to the maritime side of the world, and determined the *nomos* of the earth from the sea.

England thereby became the representative of the universal maritime sphere of a Eurocentric global order, the guardian of the other side of the *jus publicum Europaeum*, the sovereign of the balance of land and sea — of an equilibrium comprising the spatially ordered thinking of this international law. The English island remained a part or rather the center of this European planetary order, but simultaneously distanced herself from the European continent and assumed the world-historical, intermediary position that for more than three centuries made her "of Europe, but not in Europe." The great balance of land and sea effected an equilibrium among the continental states and hindered a simultaneous maritime equilibrium of sea powers. To this extent, there was a continental, but not a maritime equilibrium. What is to be kept in mind is the great balance of land and sea that the *nomos* of the Europe-dominated earth sustained. Hautefeuille, the historian of the international law of the sea, lamented that there was only a *continental equilibrium*: "There is no *maritime equilibrium*. The ocean, this communal possession of all nations, is the prey of a single nation."[1] But an equilibrium of sea powers divided the oceans and destroyed the balance of land and sea that had constituted the *nomos* of the earth in the *jus publicum Europaeum*.

The English of the 15th century were partly aggressive knights who

1. "*Il n'existe pas d'*équilibre maritime. *L'océan, cette possession commune, à toutes les nations, est la proie d'une seule nation.*" See Laurent Basile Hautefeuille, *Histoire des origines, des progrès et des variations du droit maritime international* (1858), 2nd ed. (Paris: Guillaumin et cie: 1869), pp. 471 f.

pursued booty in France, partly sheep herders who sold their wool to Flanders. After the middle of the 16th century, English freebooters appeared on all the world's oceans and realized the new freedoms: first, the amity lines and the great land-appropriation; then the new freedom of the sea, which for them was a singularly great *sea-appropriation*. They were pioneers of the new freedom of the sea, which essentially was a non-state freedom. They were partisans of the sea in the transitional period of the world struggle between Catholic and Protestant powers. As Gosse has said: "Piracy in wartime had always been more or less sanctioned by the state, but under Elizabeth it was connived at while England was at peace with the world. As a result of this unofficial encouragement not only was much wealth brought into a poor country but, a matter of much greater importance, a race of tough seamen was evoked which was to save England in her need, bring about the downfall of her principal enemy, and make her the proud mistress of the seas."[2] With them, the sharp distinctions between state and individual, public and private, even between war and peace, and war and piracy, disappeared. Naturally, Spain considered them to be pirates, enemies of humanity, criminals outside the law, and treated them accordingly. But also their own government, which accepted with alacrity their service and their gifts, often treated them as adversaries for political reasons and sometimes, when necessity demanded, also hanged them. They thus proceeded at their own risk (in the most dangerous sense of the word) and did not feel bound by any state. They succeeded in forging two notions of freedom from the state. Thereby, they were able to determine the maritime side of the *jus publicum Europaeum*: the freedom of the sea and the freedom of merchant traders, whose ships were essentially non-state vessels.

Both non-state spheres of freedom belonged to the *nomos* of the earth in the age of an otherwise purely state-centered international law. Of these two freedoms, we must focus more closely on the spatial freedom of the sea, which has become distorted in a polemic that has lasted four hundred years. Also, among jurists of the international law of the sea, it became common to treat the right to freedom without respect to the right to war and, vice versa, so that there was no awareness of a unified *nomos*. Unfortunately, and above all, this is true also of the last systematic presentation of the international law of the sea, i.e., the great work of Gilbert Gidel,

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2. Philip Gosse has written a substantively rich book titled *The History of Piracy* [1946] (New York: Burt Franklin, 1968). [See pp. 113-114.]

hich deals only with the law in peacetime.[3] Nevertheless, we will attempt to elucidate fully the proper juridical lines of the new freedom of the sea.

B. Is the Free Sea Res Nullius *or* Res Omnium*?*

We are concerned above all with freedoms that originally were related to a new world and to the newly opened oceans. Like theologians, jurists of the transitional period needed a biblical interpretation, a *ratio scripta* [written reason], and thus did not feel free to treat the freedom of the sea as "positive" science. They continued to abide by traditional conceptual models of Roman law. But they confused the question, by adhering to the purely terrestrial thinking of the inland sea cultures of antiquity and the Middle Ages, and by extending the civil-legal concepts of *corpus juris*, the annotations, and the later commentaries. So attempts were made to understand the new phenomenon juridically by using traditional formulas of *res nullius* [things belonging to nobody], *res omnium* [things belonging to everybody], matters of common use, and similar ideograms. Such great 17th century English jurists as Richard Zouch and John Selden also held tenaciously to the old formulas and thought completely in terrestrial terms.

In this century, it was not the traditional categories of Roman law that were groundbreaking with regard to the newly discovered oceans, but something completely different, namely the ancient, original, and elementary conviction that law and peace are oriented only to land. The concepts of Roman civil law with respect to water rights that arose in a coastal culture necessarily lost their meaning. A good historian of the struggle for the New World asserted that 16th and 17th century pirates and freebooters had "reinterpreted" the principle that the oceans belong to all, and had turned it "into a liberation from moral and legal ties."[4] That was a reduction and contraction of the great phenomenon of the amity line. We come closer to the core of the matter if we recall that all law is valid only in a certain place, and that the peoples who comprehended the enormous actuality of a new world also sought to test the new *nomos* of this new world. We have observed that originally the sea had neither law, nor freedom, nor property. In itself, this occasioned the *elemental* (in the fullest sense of the word) freedom of the sea in the newly discovered oceans of the world. Even Alciatus, a Renaissance humanist on whom Gentile relies, was

3. Cf. Gilbert Gidel, *Le droit international public de la mer* (Chateauroux: Impr. par les Établissements Mellottée, 1932-34), 3 vols.

4. Rein, "Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa," in *Ibero-Amerikanisches Archiv*, *op. cit.*, p. 536.

somewhat aware of this, and referred to the principle that *pirata minus delinquit, quia in mari delinquit, quod nulli subjicitur legi* [the pirate is less criminal, because criminality on the sea is not subject to law].[5]

What possible meaning can *res omnium* or *res nullius* have with reference to the sea? In the last systematic exposition on the law of the sea, in Gidel's work, we find a controversy between this French expert and the Englishman Sir Cecil Hurst about whether the sea should be considered *res omnium* or *res nullius*.[6] The Englishman considered the sea to be *res omnium*, whereas the Frenchman considered it to be *res nullius*. We need not deal with all the subtle arguments and counter-arguments. Gidel's argument against *res omnium* and the inherent construction of a "condominium" of all states with respect to the surfaces of the sea relates essentially to the fact that there was no organized community of states that could sustain such a condominium. That appears to be correct. Gidel did not mean that every state with a ship flying its flag on the high sea should join all other states in a totality, or should identify itself with such a totality. From his own nation's experiences on the high sea, he knew how much it meant when a strong state speaks in the name of all, and how little it meant when a weak state did the same. The argument for the original, elementary character of freedom of the sea is stronger if one does not immediately construe subjective rights of use among states, but rather a *faculté laissée aux hommes en marge des systèmes territoriaux* [faculty permitted to men on the fringes of territorial systems], as Pufendorf did in the 17th century.

The attempt to view the sea as a crossroad common and open to all and, in this sense, as *res omnium*, implies that every state has a right to pursue war with all the modern military means at its disposal — to lay mines and, even at the cost of third parties, to take prizes and booty, which one scarcely can imagine as the content of a principle of common use on land. Hobbes came nearest to the core of the matter when he said that this freedom is indicative of the state of nature in which everything belongs to everyone; however, in a critical case, the same would be true *ac si nullium omnino jus existerit* [as if there had been no right at all],[7] when the strongest deals with all in the name of the law, as is true of the freedom of the

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5. Albericus Gentilis, *Hispanicae Advocationis libro duo*, ed. by Frank A. Abbot, Classics of International Law, No. 9 (1921), I/I, Ch. 23, p. 109.

6. Gidel, *Le droit international public de la mer*, *op. cit.*, Vol. I, *Le temps de paix*, Introduction, *La haute mer* (1932), *op. cit.*, p. 214.

7. Thomas Hobbes, *De Cive*, the first edition of *Philosophical Rudiments Concerning Government and Society*, in *The English Works of Thomas Hobbes*, *op. cit.*, Vol. II, Ch. 1, §11, p. 11.

state of nature. In peacetime, one can forget this. But in war, the freedom of the sea means that the entire surface of the world's oceans remains free and open to any warring power as a theater of war, as well as of prize law.

C. England's Transition to a Maritime Existence

One cannot say that 16th and 17th century English kings, statesmen, and jurists had a distinctive maritime consciousness. Official English politics during these two centuries wavered for a long time among various sides. In no sense did English politics give the impression of a rapid and conscious turn toward the world of the free sea. Only toward the end of the 17th century did England make a definitive decision against royal absolutism and in favor of wide-ranging religious tolerance, and only then did she slowly, and without any preconceived plan, take the maritime side in the great conflicts between terrestrial and maritime worldviews. Queen Elizabeth's government continued to follow the politics of the Catholicized Stuarts. The religious fanaticism of the masses that promoted the decision only came to the fore in the Puritan revolution. Medieval institutions were even more conservative than were those on the Continent. An important part of the colonial conquest of America was pursued on the basis of an investiture of land by the king or queen, as conceived in terms of feudal law. After many deviations, a parliament deriving from the Middle Ages finally asserted power. The decisionism of a juridical stamp, the spirit of the French legists, and the specific state thinking so characteristic of both failed completely. But this did not change the fact that the greatest of all decisionist thinkers, Thomas Hobbes, came from the island of England.

In the long controversy over freedom of the sea, English governmental practice and official reports lacked both a new principle and the clarity of new, carefully considered concepts. With good conscience, Tudors, as well as Stuarts and the people as a whole, enriched themselves with the plundered treasures of their buccaneers. But the stock phrases of official language with respect to Spain and Portugal remained the same. They did not transcend the formulas of scholastic natural law and Roman civil law, such as had been used by Vitoria and others more than a century before. If the English Queen said, as reputed in an often cited declaration of 1580 to the Spanish envoy, that the sea and the air are free for the common use of all people, this is completely in line with the argumentation and linguistic style of many similar expressions by 16th century French kings. Nor did English authors intellectually set the course for the new freedom with respect to freedom of the sea in the "hundred-year book

Nevertheless, the English decision for the sea was greater and deeper than was the conceptually clear decisionism of continental statehood. The English isle became the agency of the spatial turn to a new *nomos* of the earth, and, potentially, even the operational base for the later leap into the total rootlessness of modern technology. This was proclaimed in a new word, which, I believe, could have arisen only then, and only on the island of England — a word that thereafter became the signature of a whole epoch. The new word was *Utopia*, the title of Thomas More's famous book.

Published in 1516, this singularly English book had appeared almost two generations before the great controversy over freedom of the sea occurred. In no sense did More's book refer to questions of international law with respect to this new freedom. But manifest in this book, and in the profound and productive formulation of the word *Utopia*, was the possibility of an enormous destruction of all orientations based on the old *nomos* of the earth. Such a word would have been unthinkable in the mouth of anyone in antiquity. Utopia did not mean any simple and general nowhere (or erewhon), but a U-*topos*, which, by comparison even with its negation, A-*topos*, has a stronger negation in relation to *topos*.[8] The step taken later, in the 19th century, that destroyed a maritime existence and effected an industrial-technical existence, was foreshadowed in such a word. As for the reputation of Saint Thomas More, one need only say that the content of his book was a eutopia rather than a utopia. But the fateful shadow had fallen, and, behind the image of a new world ordered from the sea, the wider future of the industrial age was dawning. This age had begun on the island of England in the 18th century.

D. The Hundred-Year Book War

Strictly speaking, the problem of the freedom of the sea concerned the freedom to pursue sea wars and how this freedom collided with the freedom of neutrals to pursue trade, which was the case when the same waters became simultaneously a theater of war and a scene of peace. However, this difficult question was not consciously considered in 16th and 17th century juridical discussions. What Ernest Nys called the "hundred-year book war" over the freedom of the sea began only in the latter half of the 16th century. Publication of Vitoria's *Las relectiones de "Indis y de jure belli"*[9] can be called the opening shot in this war of books. However, one should not allow

8. On the significance of the word "topos," cf. Part I, Ch. 2, p. 50.
9. Cf. Part II, Ch. 1, p. 91n.

the concrete significance of the publications to be submerged in the plethora of titles with such catchwords as "freedom" or "exclusiveness" of the sea. Vitoria had in mind the freedom of overseas missions and propagation of the Catholic faith; others thought only in terms of breaking the Spanish and Portuguese monopolies on overseas trade; still others thought in terms of regional or local disputes about European ports or the question of fisheries; and most thought not in terms of the horizon of great whaling ships crossing the oceans of the world, but rather in terms of English, Dutch, Scottish, Biscayan, etc. fishing rights on coastal and adjacent waters. Until almost the end of the 17th century, English authors in this book war were interested primarily in the so-called narrow seas, i.e., those closest to England, such as the North Sea (*Oceanus Germanicus*), the English Channel, the Gulf of Biscay, etc. One of their major controversies was the English claim to the navy salute — the honorary tribute that ships of other nations were required to give to English ships in English waters. Fisheries disputes dominate a great part of this literature, not with respect to the great whales of the world's oceans, but rather to herring and similar catches.

Hugo Grotius' broadly conceived and anonymously published book, *Mare liberum* (1609),[10] was trail-blazing in regard to the new freedom of the sea. Directed against English claims to a monopoly, it is a chapter of a larger work written in 1605 against Portuguese and Spanish claims. But only in the 19th century (1868) was it published in full *de jure praedae* [on the law of plunder]. In this century, it has been observed often how strongly Grotius was influenced by Gentili, and how he simply repeats the arguments of Spanish scholastics concerning *liberum commercium* and *libera mercatura* [free trade].[11] He does not comment on the spatial collision of war and peace ushered in with the new freedom of the sea. One should not expect that from him. But he often reveals the original, elemental significance of the freedom of the sea, as when he says that in every war the enemy should be killed, not only on one's own territory or on enemy or unclaimed territory, but also on the open sea.[12] This perspective,

10. Grotius, *Mare liberum*, *op. cit.*

11. William Stanley Macbean Knight, *The Life and Works of Hugo Grotius* (London: Sweet & Maxwell, 1925), pp. 92f. Cf. Gidel, *Le droit international public de la mer*, *op. cit.*, Vol. I, pp. 138f., and Mtr. Fr. Luis G. Alonso Getino in the introduction to Vol. III of his edition of *Relectiones teologicas des Maestro des Fray Francisco de Vitoria* (Madrid: 1935), pp. XI ff.

12. Grotius, *De jure belli ac pacis*, *op. cit*, Vol III, Ch. IV, §8, 2: "*Interfici possunt impune in solo proprio, in solo hostili, in solo nullius, in mari.*" According to the medieval doctrine of Baldus, the enemy could be killed anywhere: "*hostis bene interficitur ubique.*" Grotius excluded the soil of a neutral land.

which signaled a balance between the international legal order of the free sea and the state-based spatial order on firm land that was recognized as a practical result of global political developments since the Treaty of Utrecht, obviously remained impossible for Grotius to comprehend.

Nevertheless, Grotius' book and its title, *Mare liberum*, signaled the development of a new stage of the freedom of the sea. By comparison, the famous English refutation by John Selden, *Mare clausum* (written in 1617-18, published in 1635), despite all its erudition, remained completely within the framework of old ideas and questions. It still focused on England's adjacent waters, the narrow seas, mentioned whaling only incidentally, and viewed the British island as the center of a specifically maritime and global empire. This basically traditional refutation found the approval of Englishmen — of the Stuarts, as well as of the Cromwells. Thomas Hobbes also had great respect for it.

Sir Philip Meadows appears to have been the first author to treat England's exclusive claims to the sea as long outdated, and to see that "freedom of the sea" was portending a new dominion over the world's oceans.[13] The German philosopher Samuel Pufendorf, whose great work appeared in 1672,[14] was one of the first systematic thinkers to have a juridical concept of the world's oceans as something other than "the rivers and streams" of traditional jurisprudence, with their models based on civil law. The Dutchman Cornelius van Bynkershoek elaborated the argument that territorial state sovereignty extended only so far into the sea as the coastal batteries could shoot. While Bynkershoek's viewpoint on the *vis armorum* [strength of arms], on the *ubi finitur armorum vis* [limited range of arms] was not new, he had the right perspective. Thus, his viewpoint found general acceptance.[15] A new period of the *jus publicum Europaeum* began in 1713 with the Treaty of Utrecht, when the consciousness and even self-consciousness of the approaching global equilibrium of

13. Sir Philip Meadows, *Observations Concerning the Dominion and Sovereignty of the Seas, being an Abstract of the Marine Affairs of England* (London: E. Jones, 1689). I was unable to locate the observations of Sir Philip in any continental European library. Statements in this book are based on the already much cited work by Gidel, Vol. I, p. 197.

14. Pufendorf, *De jure et gentium*, *op. cit.*, Book IV, Ch. 5, §9.

15. Cornelius van Bynkershoek, *De dominio maris dissertatio* (1703), photographic reproduction of the 2nd ed. (1744), Carnegie Endowment for International Peace, Division of International Law, The Classics of International Law, ed. by James Brown Scott, Vol. 11 (New York: Oxford University Press, 1923). On Bynkershoek, see Delpech, in *Les fondateurs du droit international*, *op. cit.*, pp. 385-446. Ferdinando Galiani, *De' doveri de' principi neutrali verso i principi guerregianti* (Milan: Libri due, 1782) appeared anonymously.

land and sea developed. But the precise figure of the three-mile limit of coastal waters, which has continued until the present day, began only in 1782 with a work by Abbé Galiani.[16]

E. From Elemental to Systematic Freedom of the Sea

Thus, the juridical lines of the new freedom of the sea became known and accepted. Two different concepts of this freedom can be identified, corresponding to two distinct chronological periods separated by the *caesura* of the Treaty of Utrecht. During the first period, the ancient, original, and elemental view emerged, namely that the sea is impervious to human law and human order, that it is a realm free for tests of strength. That is the meaning of the delimitation of amity lines and of the establishment of zones free for the right of the stronger. During the second period, this freedom was limited by the fact that state control over the pirate ships of its own subjects became stronger, while the old style freebooters sank to the level of criminal pirates. Nevertheless, the high sea remained free of the spatial order of firm land organized by states. This is how the great equilibrium of land and sea originated. On this basis, the *nomos* of the earth was able to last for more than two centuries.

During the first period, the juridical argument of scholastic natural law and forms of civil law held sway. But these never constituted a true ideology. A certain group of advisors to political leaders succeeded in reaching intellectual agreement. For the most part, it was concerned

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16. On Galiani, see Ernest Nys, "Les devoirs et les droits des neutres, par Galiani," in *Revue de droit international et de législation comparée*, Vol. XXI, pp. 382-385. On the history of the theory of the freedom of the sea, see Gidel, *Le droit international de la mer, op. cit.*, Vol. I (1939), Introduction, "La haute mer," pp. 123f.; Pitman Benjamin Potter, *The Freedom of the Sea in History, Law and Politics* (New York: Longmans, Green & Co., 1924); Fulton, *The Sovereignty of the Sea: An Historical Account of the Claims of England to the Dominion of the British Seas, and of the Evolution of Territorial Waters, with Special Reference to the Rights of Fishing and the Naval Salute, op. cit.* On the transition from theological to juridical (i.e., from church to state) thinking, see Nys, *Origines du droit international* (1904), *op. cit.* The classical passage, which contains Bynkershoek's much cited turn away from the *vis armorum*, is an example of how he typically projects his gaze from the land to the sea. It deserves to be quoted word for word: "*Quare omnino videtur rectius, eo potestatem terrae (!) extendi quousque tormenta exploduntur (!), eatenus quippe cum imperare tum possidere videmur. Loquor autum de his temporibus, quibus illis machinis utimur (!): alioquin generaliter dicendum esset, potestatem terrae finiri, ubi finitur armorum vis, etenim haec, ut diximus, posessionem tuetur.*" [Tr. Why does everyone rightly see, that where dominion of the land (!) is to be extended, there, too, troubles erupt (!), whereby we see that *with rule comes possession*. I speak, however, about *these times*, in which we use certain machines (!): otherwise, it must be said generally that dominion of the land ends where the strength of arms ends, because such, as we have said, preserves possession.]

with derivations (in the sense of Pareto's sociology[17]), and consisted of an artificial language created by a stratum of humanistically educated intellectuals seeking to make the transition from ecclesiastical to political thinking. Its demand for freedom of the sea was directed polemically against the monopoly of neighbors, and did not yet conceive of a new *nomos* of the earth. It was characterized by a manner of thinking and speaking reminiscent of the disorientation of many purely juridical apologists during the last world war. In such times of disorientation, the essential juridical task becomes that of properly ascertaining the reality of a fading and a rising *nomos*, and of disclosing the derivation of each. Taking the example of the three-mile limit, I will clarify the relation between and among positivistic norms, juridical arguments, and spatial realities.

It is astounding how the coastal limit of *three* sea miles became embedded so deeply in the general consciousness, so much so that it was considered to be the "seasoned measure" in attempts to arrive at codification even after World War I (1920-1930). The figure of three miles has been divorced completely from its original perspective and customary arguments, which were concerned with the significance of coastal defense, and has remained firm regardless of the development and advance of *vis armorum*. In other cases, e.g., with respect to the question of the authorization of currency allocations for the practice of prize law, the dominant opinion is that the change in technical means should be legally recognized in the shortest time and with the greatest expediency. By contrast, it is thought that neither submarines, airplanes, nor other more powerful long-distance weapons should be able to change this three-mile limit. This appears to be a blatant case of the independence of a norm from the normal situation. How did it come about that in the Middle Ages, when there were only cannons that could not even shoot further than half a sea mile, a figure of 70 to 100 sea miles was recognized as the area of territorial jurisdiction? Bodin still held to the 70 mile limit. If the range of

17. [Tr. Pareto writes that derivations "account for the production and acceptance of certain theories," that we "find them wherever we center our attention on the ways in which people try to dissemble, change, explain, the real character of this or that mode of conduct." Moreover, "derivations derive the force they have, not, or at least not exclusively, from logico-experiment considerations, but from sentiments. The principal nucleus in a derivative (a non-logico-experimental theory) is a residue, or a number of residues, and around it other secondary residues cluster. That group is produced, and once produced is consolidated by a powerful force: the need that the human being feels for logical or pseudo-logical developments. . . ." See Vilfredo Pareto, *The Mind and Society: A Treatise on General Sociology* (1935), Vol. III: "Theory of Derivations" (New York: Dover Publications, 1963), Ch. IX, pp. 885f.]

coastal defenses in the 18th century, with their limit of three miles, was the true reason for this limit, which would have been the ultimate ratio of the separation of the spheres of land and sea, then this figure should have changed together with this reason.

In reality, the argument of *vis armorum* is typically terrestrial. It is a land-bound perspective of the sea. The fact that a Dutchman, Bynkershoek, was the first to formulate this is indicative of how much 18th century Holland was already terrestrial. But seen from a maritime perspective, it already had reference to the sphere of the free sea and, consequently, to a sphere of concepts determined by the sea. The three-mile limit brought the free sea closer to firm land. In fact, this three-mile limit had to become a matter of principle for the guardians of the freedom of the sea. This was true especially of the freedom to conduct wars at sea and to pursue prize law, because every recognition of the transformation of technology directly concerned the spatial foundation of the *jus publicum Europaeum* — the proximity of a maritime and a terrestrial order. In the meantime, this technical transformation, created by new weapons technology, became so great and so obvious that the quantity of its dimensions reached the quality of a structural transformation. With an ever more rigorous positivism, one now held fast to the three-mile limit in order not to encroach upon the world of the free sea (meaning the essential concepts of enemy, war, and plunder peculiar to the maritime side of European international law). The former dominion of the sea would have capitulated to the transformation of technology had it acknowledged the argument of altered weapons. The three-mile limit thus was the last straw, which had to be defended, because the spatial principle of its world order depended on it.

The separation of firm land and free sea was the basic principle of the *jus publicum Europaeum.* This spatial order did not derive essentially from internal European land-appropriations and territorial changes, but rather from the European land-appropriation of a non-European new world in conjunction with England's sea-appropriation of the free sea. Vast, seemingly endless free spaces made possible and viable the internal law of an interstate European order. Further divisions of a spatial type proceeded apace for the firm land of the earth, until European international law dissolved into a general "international law" at the end of the 19th and beginning of the 20th century.[18] In this epoch, the following distinctions and divisions were characteristic of the *nomos* of the earth:

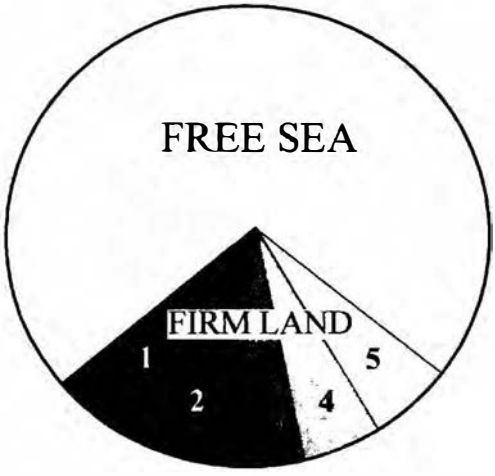
18. See below, Part IV, Ch. 2, pp. 227ff.

1. The distinction between the surfaces of firm land and free sea, which was important for the distinction between land war and sea war. Each had its own concepts of enemy, war, and plunder; and

2. The distinction between the surface areas of firm land, the soil of European states, i.e., state areas in the specific sense, and the soil of overseas possessions, i.e., colonial lands. This was important for the definition of colonial war. The bracketing of war pertained only to European land wars among states, pursued on European soil or on soil having the same status.

If one takes into consideration the peculiarity of Asiatic and African lands with European privileges (consular jurisdiction, extraterritoriality, and exemptions of various types), then the following diagram presents the developed global picture of the spatial order and various soil statuses of the *jus publicum Europaeum* (1713-1914):

Global Diagram of the *Jus Publicum Europaeum*



Five Soil Statuses of Firm Land:

1. State Territory
2. Colonies
3. Protectorates
4. Exotic Countries with European Extraterritoriality
5. Free Occupiable Land

Chapter 4

Territorial Changes

Every spatial order contains a bracketing for all its agents and participants — a spatial guarantee of its soil. This raises the core question of international law. On the one hand, changes of territorial possessions are unavoidable; on the other, territorial changes can become dangerous for the continuance of the common spatial order.

A. Territorial Changes Outside and Inside a Spatial Order of International Law

This theoretical and practical, legal-philosophical and political problem is old. It has been raised in every independent power structure belonging to an order of international law. The procedures for territorial changes in European international law were developed by the Great Powers at the major peace conferences in the 18th and 19th centuries. In the last years of the League of Nations, especially between 1936 and 1939, territorial changes often were discussed in terms of "peaceful change." But whether changes are accomplished peacefully or through war, the problem remains essentially a territorial matter, because it derives from a comprehensive spatial order in which a territorial — spatial — change should be achieved without endangering this spatial order.

Of course, the problem of peaceful change does not concern all the various and sundry contractual and technical changes that are part and parcel of peoples living together. In reality, it concerns only the question of how new land- and sea-appropriations or new divisions can be settled without jeopardizing the existence of the recognized members or the whole structure of the existing order of international law. Accordingly, every order of international law (as long as it has existed) has given prominence to more or less elastic principles and perspectives, such as territorial equilibrium, natural borders, national or popular rights of self-determination, delimitation of

spheres of influence and interest, and affirmation and recognition of great spheres of special interests. In addition, every order of international law, precisely because it is essentially a spatial order, must establish more or less elastic methods and procedures, such as for recognition of new Great Powers and new states, notification of new acquisitions, conference resolutions, and, often, even true territorial allotments and adjudications. By legitimizing territorial changes and new divisions, these methods and procedures serve to preserve and to develop the existing order as a whole, the essential structural core of which always remains a bracketing, a spatial order.

Every order of international law must guarantee, if it does not disavow itself, not the given territorial *status quo* of a particular historical moment, with all its many details and more or less contingent circumstances, but rather its fundamental *nomos* — its spatial structure, the unity of order and orientation. Thereby, it is not only possible, but often even necessary to recognize wars, feuds, reprisals, and applications of force of various kinds as a means of effecting changes. However, these methods and procedures are bracketed; they do not jeopardize the comprehensive spatial order as a whole. War does not disturb this order. But certain damaging and destructive methods and goals of pursuing war disturb the traditional bracketing of war.

To speak of the anarchy of the Middle Ages is a widespread error, because institutions and methods for the affirmation and protection of law were recognized in medieval feuds and rights of resistance.[1] On other grounds, it also is incorrect to characterize the order of interstate international law from the 17th to the 20th century as anarchy, because it permitted wars. Interstate European wars from 1815 to 1914 in reality were regulated; they were bracketed by the neutral Great Powers and were completely legal procedures, in comparison with the modern and gratuitous police actions against violators of peace, which can be dreadful acts of annihilation. Hans Wehberg of Geneva, a teacher of international law and one of the protagonists of the pacifist movement, speaks about anarchy in general, without distinguishing between concepts of peace and war, as if wars are pursued only as a matter of course.[2] Certainly, there were such wars, which jeopardized and destroyed earlier orders. But the essential juridical question is concerned not with the moral or philosophical problem of war and the application of force in general, but with something entirely

1. Cf. Brunner, *Land und Herrschaft*, *op. cit.*

2. For example, see Hans Wehberg, "Universales oder Europäisches Völkerrecht? Eine Auseinandersetzung mit Professor Carl Schmitt," in *Die Friedenswarte*, Vol. 41 (1941), No. 4, pp. 157-166.

different, namely with changes in the territorial *status quo* and its effect on the given spatial order of an epoch.

Wars between such Great Powers, between the guardians of a particular spatial order, easily can rupture the spatial order if they do not function around and within a free space. Such wars then become total, in the sense that they must precipitate the constitution of a new spatial order. However, just as there are land-appropriations and territorial changes that remain within the framework of a given spatial order and are even a means of its preservation, and other land-appropriations that jeopardize and destroy this spatial order, for this very reason there are wars that remain within the framework of an order of international law. The essence of European international law was the bracketing of war. The essence of such wars was a regulated contest of forces gauged by witnesses in a bracketed space. Such wars are the opposite of disorder. They represent the highest form of order within the scope of human power. They are the only protection against a circle of increasing reprisals, i.e., against nihilistic hatreds and reactions whose meaningless goal lies in mutual destruction. The removal and avoidance of wars of destruction is possible only when a form for the gauging of forces is found. This is possible only when the opponent is recognized as an enemy on equal grounds — as a *justus hostis*. This is the given foundation for a bracketing of war.

Thus, it is improper to designate every belligerent application of force as anarchy, and to maintain that this designation is the last word on the question of war in international law. Till now, the singular achievement of international law was not the elimination, but the bracketing of war. Moreover, use of the word "anarchy" is typical of a perspective not yet advanced enough to distinguish between anarchy and nihilism. For this reason, it should be stressed that, by comparison with nihilism, anarchy is not the worst scenario. Anarchy and law are not mutually exclusive. The right of resistance and self-defense can be good law, whereas a series of statutes shattering every notion of resistance and self-defense or a system of norms and sanctions suppressing anyone who opposes resistance and self-defense can presage a dreadful nihilistic destruction of all law. The great problems of international law cannot be disposed of as easily as can the pacifism of the League of Nations and its anarchy slogan would have it. The system the League adopted in 1920 was less and worse than anarchy, whereas the anarchistic methods of the Middle Ages were not nihilistic. As can be demonstrated easily, they recognized and safeguarded true law, which consisted of secure orientations and orders. That alone was

decisive, because it provided the possibility of distinguishing between meaningful and destructive wars, and, in contrast to the *tabula rasa* of nihilistic legalizations, of salvaging the possibilities of concrete orders.

The particularly difficult questions are raised with respect to definitive land-appropriations that occur on designated soil between members of a common spatial order of international law. The land-appropriation in such cases is internal to international law. It does *not* concern *free* soil outside the common spatial order, but rather the right of a hitherto *recognized* participant in international law. Thus, the territorial change is accomplished within a common spatial order and is concerned with soil that cannot be occupied freely. If the common spatial order, despite such a territorial change, is not to be destroyed, then this change must remain within the total spatial order, must proceed in a certain manner, and must be recognized accordingly. It must neither destroy nor disavow the spatial structure as a whole. The question of whether a territorial change would rupture the structure of an existing spatial order or whether it would be consistent with it can be decided only in common, i.e., by the order as a whole, which is not to say that the common decision of a formal and express act must issue from a centralized location. Without a common opinion and a common recognition, the community is destroyed on the spatial question.

The problem is not simple if, in fact, a free and voluntary unity exists between a member relinquishing territory and the member acquiring territory of a common spatial order, and if the territorial change is regulated explicitly by treaties between the participants directly involved. Then, the question arises as to *who* is a *participant*? With respect to the structure of the common and comprehensive spatial order, all states are participants. One then must distinguish between the merely territorial participants, concerned only with the immediate territorial change, i.e., the respective gain or loss of land, and those participants involved with division of the spatial order as a whole. The interest of participants indirectly concerned need not be less intense than of those who have gained directly or have lost land. The argument that this deals with a treaty concluded *inter alios* [among others] contains a *petitio principii* [begging the question]. In terms of the common space and the comprehensive spatial order, neither is *alius* [separate].

The binding character of a comprehensive spatial order immediately is recognizable if the spatial order is conceived of as a *balance*. The concept of a political balance is significant only in the sense that it provides a picture of a comprehensive spatial order of European states. Not only the contractual parties directly concerned, but all participants are affected by a

change in, or threat to the balance. From the Peace of Utrecht until the end of the 19th century, the balance of the European Powers constituted the foundation and the guarantee of European international law. Every power had an interest in any important territorial change within the European state system, while enormous territorial acquisitions outside Europe, such as the Russian conquest of Siberia, proceeded almost unnoticed. The commonly recognized spatial order of European soil found its formulation in the concept of a European balance. Whoever began a European war knew that all the European powers would be interested in the result. The diplomatic skill of a Bismarck was that a *Blitzfrieden* [lightening peace] would be achieved before further complications ensued, as was the case in 1864, 1866, and even in 1871. The pervasive commonality of the spatial order is more important than everything usually associated with sovereignty and non-intervention. In this case, the concern is not with a political-propagandistic evaluation of this equilibrium policy, but rather with the realization that the concept of an equilibrium expresses spatial viewpoints in a specific sense, and illuminates the idea of a comprehensive spatial order inherent in this balance.[3] Therein, despite all criticism and political misuse, lies the great practical superiority of the concept of balance, because therein lies its capacity to achieve a bracketing of war.

In many respects, the term and the concept of balance signify an *équilibre*, and, for many today, that still means a balanced order of forces and counter-forces that have achieved an equilibrium. Consequently, the picture of a balance of power can be employed also where strictly spatial concepts are excluded, and there need not be an order with mutually equal forces in equilibrium. It may be that the hegemony of a greater power holds the order of many medium and smaller powers in check. In Konstantin Frantz's theory of federalism, only a purely federal equilibrium is possible, whereas he denies that a hegemonic system can have the equilibrium character of a true federalism. Yet, in political reality,[4] there is a

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3. "Every arrangement of the map of Europe is regarded of general interest to all members of the European political system, and any of them may claim to have a voice in it." John Westlake expressly stated this as the "general legal thinking of natural growth," in his *Collected Papers on Public International Law*, ed. by Lassa Oppenheim (Cambridge: Cambridge University Press, 1914), p. 122.

4. This has been demonstrated often by the leading authority on federal constitutional law, Karl Bilfinger, e.g., in his report to the Union of German Constitutional Teachers in Jena in 1924. See *Der Deutsche Föderalismus. Die Diktatur des Reichspräsidenten. Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Jena am 14. und 15. April 1924* (Berlin and Leipzig: de Gruyter, 1924), reprint (1965).

hegemonic balance and a hegemonic federalism, a good example of which is Bismarck's construction of the German Reich. Prussia was the recognized hegemonic power. Nevertheless, the question was if and how the area of Alsace and Lorraine, acquired in 1871, could be divided among the contiguous states (*Länder*) of Prussia, Bavaria, and Baden. This also was an ongoing territorial problem for the other member states, Württemberg in particular. Of course, all states participate in important spatial problems. The creation of an imperial [federal] state of Alsace-Lorraine supported the reality of this settlement and, in this respect, signified a neutral solution. Bismarck brushed aside the plan for Prussia's voluntary annexation of such a small state as Waldeck, in order not to stir up this spatial problem within the federation. In 1909, when the Schwarzburg-Sonderhausen line became extinct, this small [federal] state remained separate from the principality of Schwarzburg-Rudolstadt, whose prince, through personal union, became the ruler of both states.

B. Territorial Changes within the Jus Publicum Europaeum

All great territorial changes, new formations of states, and declarations of independence and neutrality in the history of European interstate international law were achieved as collective agreements at European conferences or at least were sanctioned by them. Lasting neutralizations of states — Switzerland in 1815 and Belgium in 1831-39 — were primarily matters of collective agreements among the European Great Powers, because thereby particular state areas acquired a specific status in international law, in that they ceased to be theaters of war. The collective agreements of the great European peace conferences — 1648, 1713, 1814-15, 1856, 1878, 1885 (the Congo Conference) — define the individual stages in the development of this international law as a spatial order. By comparison, the deliberations and stipulations of the Paris Peace Conferences of 1918-19, which led to the treaties of Versailles, Saint-Germain, Trianon, and Neuilly, only apparently adhered to this tradition. In reality, they lacked the concept of a concrete spatial structure. The earlier European conferences demonstrated that the interstate international law of Europe was grounded in a comprehensive Eurocentric spatial order, which, in common consultations and resolutions, had developed its methods and forms for all significant territorial changes and had given the concept of an equilibrium a beneficial meaning.

The Great Powers were in the forefront, because they were the strongest participants in the common spatial order. Therein lay the essence of a "Great Power," if this is understood not only in a general, but also in a more precise

sense as designating a primary position within an existing order in which several *Great Powers as such* are recognized. Recognition as a Great Power by another Great Power is the highest form of recognition in international law. This recognition is mutual at the highest level. Thus, Russia and Prussia in the 18th century, and Italy in the 19th century (1867) were recognized as Great Powers by the traditional Great Powers. Such recognition of the United States of America, which textbooks date to 1865, was a singular and special problem in the 19th century, because the principles of American foreign policy, expressed in the Monroe Doctrine of 1823, constituted a fundamental rejection of recognition as conceived by the European powers. The line of a Western Hemisphere already contained a polemical challenge to the specific European concept of a global spatial order. Recognition of Japan as a Great Power is dated to 1894 [the Sino-Japanese War], as well as to 1904-05, following the Russo-Japanese War. Thereafter, both wars, which Japan won, were seen by the European Great Powers as reception parties for Japan's entrance into the narrow circle of the Great Powers that sustained international law, whereas in the Japanese view the pivotal event was their participation in the punitive expedition of the Great Powers against China (1900). The transition to a new, no longer Eurocentric world order began from Asia with the inclusion of an East Asian Great Power.

These historical dates indicate that *recognition as a Great Power* first and foremost concerned the spatial order, and that the procedure had an important effect on the spatial structure of the order of international law. This was true not only because recognition of the *jus belli* and the *justus hostis* obtained their prime significance in the recognition of a Great Power, but also for a reason concerning the spatial order: that recognition as a Great Power was the most important legal institution of international law with respect to land-appropriation. It signified the right to participate in European conferences and negotiations, which was fundamental for the reality of European interstate international law. In the 19th century, this meant that Germany and Italy had the right to acquire colonies in Africa and the southern Pacific. In this respect, the Congo Conference of 1885, as we will see below, is an instructive example. Recognition as a Great Power became and remained a legal institution of international law, as important as recognition of a new state or government. After 1890, whenever anyone spoke of recognition as a legal institution in international law, this is what he had in mind.

The Great Powers, in their capacity as agents and guarantors of the spatial order they led, were in a position to recognize all important territorial

changes. Of course, strictly speaking, every recognition of a new state had a spatial character. Given that any territorial change had to be in accord with the spatial order as a whole, such recognition was indicative of the commonality of the existing structure. As regards the recognized state, in individual cases, especially with smaller states (e.g., the Balkan states that arose in 1856 and 1878), this actually could signify a true allocation in international law: an *adjudicatio* [adjudication]. Nowhere was this demonstrated more clearly than in the fact that the comprehensive unity the interstate order of sovereign powers granted its legal force was based not on the reputed sovereign will of any one member, but on belonging to a common space and soil. The division of this common space and soil was indicative of the comprehensive *nomos* of this order.

If a peace treaty contained significant territorial changes, it, too, would become a matter common to the whole concrete order, and if a war between members of the international law community resulted in a peace treaty, in all significant cases it already would have engaged the interest of non-belligerent states during hostilities. All wars between European states on European soil were followed with extraordinary interest by the European Great Powers, even when they were neutral, because the outcome affected everyone. Nobody considered this interest to be an intervention; every European statesman took such interest for granted, and justifiably so. The free right to war, the sovereign *jus ad bellum*, allowed every member of this order to intervene formally at any time and, if need be, to insist upon participating in the common deliberations and decisions. However, even without this type of control, the international law pursued by the European Great Powers developed relatively elastic and endurable forms for the great common conferences, and these were applied conscientiously to the existing spatial adaptations until the old spatial order was destroyed, i.e., when the specifically European order dissolved into a spaceless universalism, and no new order took its place. As previously demonstrated, this already was evident in the Paris Peace Conferences of 1919-20, but it became increasingly obvious thereafter, i.e., in League of Nations conferences from 1920 to 1938, which produced no true adjudications, because they had neither the content of the old, specifically European spatial order nor the content of a new global spatial order.

C. State Succession in the Jus Publicum Europaeum*: Definitive Land-Appropriation*

Within the former interstate order of international law that obtained among members of the international law community, jurisprudence had

developed a doctrine of *state succession* for definitive land-appropriation. As had other doctrines of this system, by the end of the 19th century this one had achieved a classical determination for this epoch. Max Huber's 1898 treatise on state succession is a good example. The problem is easy to solve for positivistic jurists concerned with contract law. They adhered to what is positively stated in the contract. But the rights of third party states were not disposed of thereby, and there were questions intentionally not addressed in treaties. Furthermore, there were contractual regulations that could be the expression of an *opinio necessitatis* — a convinced legal opinion — and then there were cases of a non-contractual nature concerning state succession, above all, the destruction of an opposing state in war (the *debellatio*) and the creation of a new state from part of another state.

There is general theoretical agreement that a change in territorial sovereignty occurs with so-called state succession, whereby the sovereignty of one state over a particular piece of land is replaced by the sovereignty of another. On this basis, what is called state succession in the 19th and 20th centuries developed as a typical legal institution for land-appropriation within an existing spatial order. The change of state sovereignty over a particular area that is conceived of as a *succession* means that claims and duties with respect to the new territorial sovereign are grounded in international law. Of course, the new territorial sovereign has a variety of matters to consider. He must deal more or less carefully with legal relations obtaining in the acquired area, such as continuing to pay wages and pensions of former officials, and, often, assuming the state debts of former territorial sovereigns. It also is possible that the new sovereign, when not hindered for political reasons, might leave untouched so-called compulsory services in the acquired area. However, the precedents for such practices are contradictory and in no sense conclusive.

The methods of empty normative generalizations are indicative in their deceptive abstractness, because they fundamentally disregard all concrete spatial viewpoints when considering a typical spatial problem such as territorial change. For example, this was the case with respect to an overseas colony for which existing concepts were far removed, a colony that assumed no state debts when it became independent, namely the United States of America in 1781. The same was true with respect to an internal European, even internal German land-appropriation, namely Prussia's refusal to assume the state debts of Hanover after its defeat in 1866, and again with respect to a differently constituted internal European case, namely Germany's refusal to assume the French state debts of Alsace-Lorraine in 1871, and

yet again, after the annexation of the Transvaal in 1902. Practically speaking, precisely this vague and contradictory normativism characteristic of this age of dissolution meant that all contradictory interests had a ready argument that could be applied without prejudice to all situations. But at least there was agreement that a new territorial sovereign must respect private, vested interests and rights. The International Court of Justice in the Hague had asserted its authority (in a legal opinion dated September 10, 1923 and in judgment No. 7 of June 25, 1926, in a matter regarding Upper Silesia contested by Germany and Poland), so that here one could speak of a recognized legal principle. We will seek to discern the core of an actual, concrete order in the muddle of contradictory opinions and precedents.

The important questions are: In which sense can we speak of a *succession* with respect to a definitive land-appropriation that today is called state succession? Are the rights that the new territorial sovereign assumes identical, at least in part, with the obligations shouldered by the earlier sovereign? Or is there no legal connection between them — to the extent that they are not established by the sovereign will of the new ruler? If one views the process only from the standpoint of isolated, sovereign, territorial states, then the facts of the matter are clear: the territory of the state is the theater of sovereignty; with a territorial change, the agent of sovereignty relinquishes the theater and another sovereign agent appears on this stage. The projection of sovereignty by the new territorial sovereign over the acquired land — the land-appropriation — can lead us to think only that the earlier sovereignty over the area had ended and that the new sovereignty had been established. Among the individual sovereign states, one cannot speak of a *reversion* in the sense of a diversion of rights, of a derivation or succession in terms of the earlier legal situation. What comes to mind is the similarity with old Roman law formulas regarding the acquisition of goods, namely that there can be no derivative acquisition of goods. In interstate international law, where everything should hinge on the effectiveness of sovereign state power, it appears that there can be none other than an *intentional* succession.

Now, however, and despite the claims and obligations of international law, the relation to third party states enters the picture. The territorial change should proceed within the framework of an existing spatial order. In other words, the land-appropriation must be institutionalized in international law. This is a different problem for a definitive land-appropriation than for a provisional, only temporary land-appropriation, which finds its order in the legal institution of military occupation. In a definitive

land-appropriation, the former ruler is definitively *retired*; he has *surrendered*. For thinking oriented to isolated state sovereignty, this *retreat* from the land, this *withdrawal*, this *cedere* that the retreating appropriator opens up, allows the new territorial sovereign to appear as the original appropriator. Continental jurists of international law, such French and German authors as Gilbert Gidel, Franz von Liszt, and Walther Schoenborn, in general are inclined to deny a legal succession. Original appropriation then means in practice sovereign freedom of action in the occupied area — action without prejudice from any quarter. For the *appropriator*, this is advantageous as a juridical position, which is why he claims it in a dispute.

Nevertheless, at least with respect to the appropriation of European soil, we are concerned with a succession, if not always with a state succession, because the territorial change proceeds within the framework of a comprehensive spatial order, and is conceived of as such by both the former and the new territorial sovereign. Thereby, a continuity was established that could not be explained outside the special and isolated relations between the earlier and later appropriator of territorial sovereignty, but only by the fact that both — now as before — belonged to the *same space* and its order. Such Anglo-Saxon authors as Thomas Joseph Lawrence, John Westlake, Lassa Oppenheim, Henry Wager Halleck, and J. Basset Moore speak often of a legal succession in the sense of a derivative appropriation. In this general sense, this was a beneficial construction for third party states *vis-à-vis* the appropriator. Thus, to gain a free hand, legal succession was claimed as often against the appropriator as the opposite construction was claimed against the original appropriation. For example, after ending hostilities in the Transvaal (1902), the English government rejected any obligation based on legal succession.[5] The appropriation of South African soil still was able to be considered as a procedure occurring outside European international law. In other respects, the rejection or denial of a legal succession still was able to be made on the basis of other arguments, e.g., customary law or presumption of the will of the state, legal concepts from civil or even more general law (such as enrichment, incrimination, property acquisition), and legal obligations construed in various ways, which either approached or approximated the practical result of a legal succession. In most cases, moral considerations were

5. Arthur Berriedale Keith also represents this standpoint juridically in *The Theory of State Succession, with Special Reference to English and Colonial Law* (London: Waterlow and Sons, Ltd., 1907). Unfortunately, despite the subtitle, he does so without reference to the spatial viewpoint that alone can shed light on the matter.

effective enough, and, in the case of the Transvaal, England actually assumed the debts while officially rejecting any legal obligation.

Leaving aside the facades of such controversies, we will focus on two essential standpoints that occasionally also appeared to be decisive in the argumentation. The first is the spatial standpoint. In a specific case, namely the question of the non-fortification of the Aaland Islands, it was accepted in a surprisingly clear manner, and it displaced civil legal analogies of contractual obligations. As far as the League of Nations Council (under the authority of Art. 11 of the agreement dealing with the matter of the Aaland Islands) was concerned, and as the juridical commission empowered to give a legal opinion concluded in its report of September 5, 1920, the appropriating state (Finland) had to abide by the contractual obligations regarding non-fortification of the Aaland Islands entered into by the earlier territorial sovereign (Russia) in the Paris Peace Treaty of 1856. The reason was that the obligations were a constituent part of the *droit commun européen* [common European law]. The Paris Peace Treaty, which established non-fortification of the Aaland Islands, stipulated the obligations Russia had agreed to with England and France. Endorsed by these three powers, these obligations were designated as integral to a general collective agreement in the Paris Peace Treaty: "*pour consolider par là les bienfaits de la paix générale.*" [Tr. to consolidate this way the benefits of a general peace.] Such a reference to the *droit commun européen* was possible for any obligation duly constituted in such collective agreements of the European Great Powers. But, in this case, regarding the demilitarization of islands important to the maritime domination of the Baltic Sea, it was meaningful to speak of European law. Moreover, it was the decisive standpoint, because here not just any particular interest, but the collective interest was paramount: it was a question concerning the comprehensive European spatial order created by the European Great Powers. As long as there was a specifically European spatial order, this standpoint authorized and compelled legal opinion, and all juridical constructions had reference to a compulsory obligation or to a legal succession. Within the framework of the League of Nations, of course, the argument was displaced; the reference to a *droit commun européen* became posthumous and apocryphal, because no agreement was to contain any reference to a spatial order, least of all to any European spatial order.

The second viewpoint that throws some light on the contradictory doctrine of state succession can be obtained from the economic side of the spatial problem. It accounts for the unanimity on the principle of respect for vested private rights mentioned earlier. For it concerns the unmentioned

presupposition of the totality of the *classical* doctrine of state succession, namely that all states interested in a given territorial change in principle recognized the same economic order, even when they were at different stages of development. The universally recognized economic constitution had created a common economic space. In the 19th century, this was an order of free and independent economies. Protectionism at that time did not suspend the fundamental fact of a common and free economy. This economy constituted its own space of international law: a common free market transcending the political borders of sovereign states. In terms of constitutional law, all states belonging to this order of international law had in common a certain relation of public and private law, of state and state-free society.

This standard, as it appears in the guidelines of international law regarding military occupation in land war to be discussed below, was unmentioned in the traditional theory and practice of state succession. But obviously this standard was presupposed, and is the basis of all arguments and constructions in international law. Given that state domination (*imperium* or *jurisdictio*) based on public law, on the one hand, and private property (*dominium*) based on private law, on the other, were separated sharply, it was possible to isolate from juridical discussions the most difficult question, namely that of a total constitutional change tied to territorial change. Behind the foreground of recognized state sovereignty, the private sphere, which in this particular case means the sphere of private economy and private property, largely remained undisturbed by the territorial change. With a territorial change, the international economic order — the liberal market sustained by private entrepreneurs and businessmen, which was free in the same sense as free world trade, and the free movement of capital and labor — retained all the international safeguards that it needed to function. All civilized states subscribed to the distinction between public and private law, as well as to the common standard of liberal constitutionalism; for all, property, and thus trade, economy, and industry belonged to the sphere of constitutionally protected private property. This constitutional standard was recognized as fundamental by all states party to the territorial change.

This, then, is the decisive viewpoint for our question: a territorial change was *no constitutional change* in the sense of the social order and of property. Property was a part of the order of international law. For the practice of interstate life, this was as important as any individual question; in fact, it determined the true legal character of a territorial change more than did either the seemingly absolute formulations of state sovereignty or the seemingly rigid

separations of domestic and foreign, public and private. The comprehensive standard of constitutionalism as a part of the spatial order was stronger than were all the dualistic constructions based on the fictitious separation of domestic and foreign.[6] In the 19th century, a territorial change in interstate law was a change only in the public legal sphere — not a change in the order of economy and property. At that time, any state territorial change that simultaneously led to a radical change in the order of property would have been considered to be communistic. As long as land-appropriations of state areas in international law remained confined to the public legal sphere, they did not affect the more fundamental internal currency of private legal property. That is what was most fundamental for this epoch. The Paris administrative treaties of 1919 contained strong infringements on German private property. Nevertheless, on the whole, they sought to adhere to the constitutional standard. Thus, the legal advocates of German interests could argue with good effect on this basis. The idea that one state, by virtue of its sovereignty, could interfere legally in the free economy of another state had not been envisaged yet by these international law constructions. The maxim *cujus regio, ejus economia* [whose is the territory, his is the economy] was not threatened by the generally recognized and completely equal economic systems of the free economy, because all states in the international law community remained within the framework of one and the same economic system.

A completely different problem from land-appropriation, which proceeded inside Europe in the form of changes in the political sphere regarding a state area with a common legal order of property and economy, was land-appropriation of free colonial soil outside Europe. This soil was free to be occupied, as long as it did not belong to a state in the sense of internal European interstate law. The power of indigenous chieftains over completely uncivilized peoples was not considered to be in the public sphere; native use of the soil was not considered to be private property. One could not speak logically of a legal succession in an *imperium*, not even when a European land-appropriator had concluded treaties with indigenous princes or chieftains and, for whatever motives, considered them to be binding. The land-appropriating state did not need to respect any rights to the soil existing within the appropriated land, unless these

6. Concerning the relation of both dualisms — on the one hand, the dualism of interstate/intrastate, on the other, of public/private — see my contribution to the *Festschrift* for Georgios Streit (Athens), "Über die zwei großen 'Dualismen' des heutigen Rechtssystems" (1939), reproduced in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar — Genf — Versailles 1923-1939* [1940] (Berlin: Duncker & Humblott, 1988), pp. 261-271.

rights somehow were connected with the private property of a member of a civilized state belonging to the order of interstate, international law. Whether or not the natives' existing relations to the soil — in agriculture, herding, or hunting — were understood by them as *property* was an issue to be decided by the land-appropriating state. International law considerations benefiting the property rights of natives, such as those recognized in questions of state succession in the liberal age favoring property rights to land and acquired wealth, did not exist on colonial soil.

Just as in international law the land-appropriating state could treat the public property (*imperium*) of appropriated colonial territory as leaderless, so it could treat private property (*dominium*) as leaderless. It could ignore native property rights and declare itself to be the sole owner of the land; it could appropriate indigenous chieftains' rights and could do so whether or not that was a true legal succession; it could create private government property, while continuing to recognize certain native use rights; it could initiate public trustee-ownership of the state; and it also could allow native use rights to remain unchanged, and could rule over indigenous peoples through a kind of *dominium eminens* [eminent domain]. All these various possibilities were undertaken in the praxis of 19th and 20th century colonial land-appropriations.[7] They were neither international interstate nor international private law matters, but even so they were not purely intrastate matters. The special *territorial status of colonies* thus was as clear as was the division of the earth between state territory and colonial territory. This division was characteristic of the structure of international law in this epoch and was inherent in its spatial structure. Clearly, to the extent that overseas colonial territory became indistinguishable from state territory, in the sense of European soil, the structure of international law also changed, and when they became equivalent, traditional, specifically European international law came to an end. Thus, the concept of colonies contained an ideological burden that affected, above all, European colonial powers.

D. Occupatio Bellica *in the* Jus Publicum Europaeum: *Provisional Occupation*

The logic of the concrete order of European international law was based primarily on sovereign, territorially defined states ruled by central

7. Cf. Wilhelm Wengler, "Vergleichende Betrachtungen über die Rechtsformen des Grundbesitzes der Eingeborenen," in *Beiträge zur Kolonialforschung*, Vol. III (Berlin, 1942), pp. 88ff.

governments. This fact provides the answer to a related practical question: what was the effect on international law of the military occupation of areas foreign to, but included within the framework of the common spatial order? This question concerns the land-appropriation of soil *not free to be occupied*. Thus, it is important for our discussion.

As long as war was pursued according to legal claims in the sense of feudal law or the dynastic right of kings, in international law it was considered to be the realization and the execution of law in the sense of self-defense. For this reason, the formal clarity and the decisionist character of public order implied in the concept of the state was obscured, because the feudal lord, who himself realized his right through wars and feuds, in general lacked the legal capacity for a specific legal institution of *occupatio bellica*. His war was purely a dispute. What he took from his opponent he considered to be his good right or as security for such. This type of justified self-defense cannot be recognized as a provisional execution of law, because the military occupation of an area rightfully claimed is not only a provisional, but already and intrinsically the definitive realization of law.

However, the problem is difficult in the case of a non-discriminatory concept of war among sovereign states in interstate international law. Logically, there is no inherent legal institution of military occupation, but obviously for completely different and even opposite reasons from the medieval concept. One had to believe that political sovereignty, which belonged effectively to the organized power of the state in a limited space, could exercise its authority within its effective sphere of power. Thus, it was characteristic of the logic of an international law among sovereign states that an *immediate change of sovereignty* occurred with every effective, state-military occupation of an area, unless the occupying state, by its sovereign will, chose not to substitute its sovereign will for that of another. In fact, since the construction of the modern sovereign state in the 17th and 18th centuries, the accepted practice was that military occupation signaled an immediate change of sovereignty, the *déplacement immédiat de souveraineté*. Nevertheless, it was occluded by many residues of medieval, feudal, and dynastic concepts and also, within the German empire, by its non-state character. European wars of the 17th and 18th centuries were pursued largely as dynastic wars of succession. In the literature, the technical expression "usurper" is applied to the occupier, who immediately (i.e., without waiting for the peace treaty or the end of hostilities) took the place of the former sovereign. In wars fought in alliance with other powers, it often was unclear which of the occupying armies

had occupied the area.[8] But the question was not as urgent as it became in the 20th century, because the 18th century occupier largely left intact the former law, in particular private law; private property and well-established rights, i.e., the social structure as a whole, largely remained untouched. As a result of the religious tolerance of enlightened absolutism, after the 18th century church relations also largely remained undisturbed by a change in sovereignty.

Thus, with occupation, the problem of land-appropriation was not always sharply defined in practice. The immediate change in sovereignty as a result of military occupation did not have the practical effect of a complete land-appropriation. It did not concern the constitution, in the complete social and economic sense of the word, but only the person of the ruler and his entourage, as well as state administration and justice. Yet, here, too, it was only the purely formal character of the modern concept of the state that created the concrete order, at least to the extent that it dealt with continental European states. The centralized European state transformed medieval legal concepts and legal powers, permeated with personal ties of loyalty, into the closed territoriality of a sovereign state with substantive and calculable norms.

A French legal historian, Irénée Lameire, has collected an enormous amount of material from local sources, including many examples of the practice of the *déplacement immédiat de souveraineté* in French, Spanish, and Italian wars of the 17th and 18th centuries. His presentation is broadly inclusive and lacks any conceptual framework, but his core idea is clear. Its significance for the concept of the state in terms of the history of international law is more important than are many theoretical generalizations of natural law expounded by Grotius, Pufendorf, Wolff, and Vattel, as well as many pseudo-juridical arguments construed from Roman civil law and expounded by positivistic jurists at any time. Both directions of international law, which are otherwise so different from each other, equally are helpless with respect to our question. Lameire, on the contrary, demonstrates how the practice of state sovereignty eliminated the ambiguities of the medieval legal situation. The calls for legal protection and legal realization, in the sense of the feuds and wars of feudal law or of

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8. Cf. Samuel de Cocceji, *De regimine usurpatoris*, *op. cit.*, and also his commentary on Grotius, Vol. I, Ch. 4, §15, and Vol. III, Ch. 6, §9. It was significant that the treatment of the problem of *jus postliminii* in Roman law could be censured under Title 15, 14 of the Theodosian Codex, which has the inscription: *De infirmandis his quae sub tyrannis aut barbaris gesta sunt.* [Tr. Such invalidations are done under tyrants or barbarians.]

German imperial law, appeared to be as disturbing and confusing *prekaritäten* [risks]. Everything that was not related to the state became unclear and precarious, and disappeared as soon as the closed and independent territorial state appeared with its clear-cut sovereignty. The state extended its centralizing power over all territory its armies occupied. The fact of *conquest* in the sense of effective occupation was sufficient, without the need to wait for a peace treaty. If the occupying power wanted to bring about an immediate change of sovereignty, the administrative occupation was sufficient to subject the inhabitants and authorities of the occupied area to the new sovereign and, thereafter, to draw all sovereign power in the occupied area from him.

Lameire demonstrates this both with respect to the administration of justice in the occupied areas and to administrative bodies of all types in the 17th and 18th centuries. An apparently small, but graphic example, which he rightly considers to be noteworthy, was the prompt change in the notary's stamp. Inhabitants of occupied areas forthwith were treated as subjects. The new sovereign was the lawgiver. It was taken for granted that he would remain within the framework of the *jus publicum Europaeum*, that he would leave former laws and institutions essentially intact, and that he would respect vested interests and property rights.[9] A certain exception to this only apparently radical change in sovereignty lay in a very unclear *jus postliminii*, as well as in the hostile state as such, and also in the private sphere and private legal relations.[10] But when

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9. Irénée Lameire, *Théorie et pratique de la conquête dans l'ancien droit. Etude de droit international ancien*, 5 vols. (Paris: A. Rousseau, 1902-1911). The author lays out his voluminous archival material and foregoes a "synthesis," which he leaves to the reader. This makes reading the work more difficult. Nevertheless, I understand Maurice Hauriou's special interest in this work. (Cf. Maurice Hauriou, i.e., Jean-Claude Eugène Maurice, *Précis de droit administratif et de public, à l'usage des étudiants en licence (2e et 3e années) et en doctorat des sciences politiques*, 2nd ed. [Paris: L. Larose & L. Tenin, 1916], p. 339n.) It is more important for the history of peoples and of constitutional law than are many theoretical constructions, and allows us to discern the structure of state constitutional law, as well as its incompatibility with medieval constitutional law. All concrete order of state constitutional law lies in the specific organizational form of the territorial *state*, not in any *law* divorced from it. Given the example of military *conquest*, it is obvious that interstate relations are completely different from international law relations within a feudal system or an empire.

10. Cf. Grotius, *De jure belli ac pacis*, *op. cit.*, Book 2, Ch. 3, §9; Vattel, *Le droit des gens*, *op. cit.*, Book III, §14; see also Heffter, *Das europäische Völkerrecht der Gegenwart*, *op. cit.*, pp. 324ff. After actual liberation from the hostile power, "all the former authority of previous" legal relations disturbed by war receded. Heffter distinguishes between the *postliminium* [restoration of the previous condition] of "peoples and state authority" and that of private persons and private relations.

European wars became tied to a political and social revolution, at least for a few years it became clear what it could mean if a military occupation engendered an immediate change of sovereignty that did not remain within the framework of a comprehensive, homogeneous spatial order. The armies of the French Revolution, which after 1792 marched into Belgium, Germany, Italy, and Switzerland, immediately proclaimed the *freedom* of the people and the end of feudal privileges. Military occupation thus effected a *constitutional change* in the fullest political, economic, and social sense, but, of course, after the victory of the legitimate restoration of 1815, this procedure was considered to be inimical to international law. The legitimate restoration succeeded in restoring some privileges, but was unable to check the comprehensive victory of the bourgeois-liberal constitution in Europe. Basic respect for private property remained; it expressed the principles of constitutionalism and therewith basic respect for the new type of constitution.

Even Talleyrand, the successful representative of principles of dynastic legitimacy at the Congress of Vienna, also represented the purely state character of war. With an eye to the reciprocity of *justi hostes*, he not only justified war between continental states, but counterposed this type of European land war to English sea war, and sought to make it the only concept of war acceptable in international law. However, this purely state war in no way was based on medieval feudal or noble principles, but on thoroughly modern principles. Consequently, restoration of purely military state wars was much more important than was all dynastic legitimacy and all restored noble privileges, because this type of bracketing of war was decisive for international law. When war becomes a struggle between purely state entities, then everything that is non-state — in particular, the economy, trade, and the whole sphere of civil society — is left undisturbed. Military occupation then need not disturb the *constitution*, i.e., the principles of the bourgeois-constitutional system. The occupying power need not change the economic and social structure of the occupied area. The agent of the occupying administration, despite distrust of the military in other respects, is not presumed to be a civil commissar, but rather a military commander.

As a consequence of the Napoleonic wars, numerous legal questions arose from the decrees of hostile occupiers and changing administrators. Above all, they were concerned with state commerce and with the collection of state claims. Contemporary jurists of individual German states had developed further and concretely the idea of state sovereignty, and

had distinguished the state as such from the holders of state power at any given time. With changing power holders, the continuity of this *state as such*, of the *state as a juridical person*, had been refined and defined sharply. The state had become independent with respect to the question of whether the given state authority was legitimate or illegitimate. Just as state wars became independent of the question of the justice or injustice of the grounds of war in international law, so, too, did the question of *justa causa* become independent *in international law.* | All law came to reside in the existential form of the state. When the regime and the constitution changed in 1918-19, the German Supreme Court made a remark that reflected great self-understanding: "The legality of the founding [of the republic] is not an essential characteristic of state power." Now, the independent legal subject "state" -- distinguished both externally and internally by a defined territory, by subjects, and by organized rule — entered upon the scene with all juridical clarity, and as distinctly independent from the given legitimate or illegitimate, legal or illegal holder of state power.

Especially in the Electorate of Hesse, many legal disputes, trials, and opinions erupted when the legitimate Elector returned and sought to declare the ordinances and decrees of the King of Westphalia (1806-1812) to be null and void, and to treat them as legally invalid. In practical terms, the question mostly concerned ordinances of the transitional ruler with respect to state powers and to the legal situation of the debtor of state claims and demands, in particular, settlement of such demands through payments and exemptions. Thereafter, despite the Elector's contrary ordinances, the Elector's courts and jurists proceeded on the basis that the Elector's land was continuous with that same *state* ruled by the King of Westphalia, and that, as a legal subject, it was identical with the state that earlier had been ruled by the Elector and now by the Elector who had returned. The idea of the identity and continuity of the state was stronger than was any legitimacy and even any legality. The change of government and regime did not signal any change of state sovereignty — it was *not a case of state succession.* However, by contrast, a mere military occupation still was *not a change of government.* Between 1806 and 1812, the King of Westphalia was no mere military occupier (as, for example, was Napoleon in the short time he occupied Hanau); he was more than that: he was the agent of an actual state sovereignty. By comparison with legitimate princes, he was still only a transitional ruler; but by comparison with mere military occupiers, he was nevertheless an *actual state ruler.* His

decrees issued from state sovereignty; they could not be considered to be invalid, since they were legal acts of state.[11]

Thus, military occupation, *occupatio bellica*, arose as a conceptual *antithesis* both to a *change of sovereignty* and a *change of regime*. It was no longer a land-appropriation, and it effected no territorial change. It was merely a provisional and factual occupation of soil, which determined what transpired thereon, such as an equally provisional and factual subjugation of the respective population, and the administration of their affairs and their system of justice. It proceeded under the proviso of *jus postliminii*, i.e., the actual restoration of former conditions, and it upheld this reservation against making any real changes in the law. Thus, military occupation no more abrogated the identity and continuity of the state to which the occupied area belonged, than it liquidated the state sovereignty over the area in question. In no sense was it similar to a regime change, let alone to a constitutional change. Its provisional and merely factual character determined both its constitutional nature and its standing in international law. With the aid of such distinctions, during the 19th century *occupatio bellica* — effective military occupation — became an increasingly sharper and more defined legal institution in international law, which, for the occupied area, meant neither a territorial, nor a constitutional, nor even a regime change, but rather a legal institution distinct from all three of these changes in status.

It is remarkable and instructive to see just how precisely the emphasis on the *merely provisional* and *merely factual* character of military occupation affected the construction of a legal concept. For a jurist schooled in civil law, it was not so unfamiliar to work with and to speak of the distinction between property and possession, change of property and change of possession, and the fact that, until the war's end, the military occupier was not the owner, but only the occupier of the land. But that did not answer completely the core question of the missing analogies, because it dealt with a territorial demarcation of laws, i.e., with a genuine

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11. Burckhard Wilhelm Pfeiffer, *Inwiefern sind Regierungshandlungen eines Zwischenherrschers für den rechtsmäßigen Regenten nach dessen Rückkehr verbindlich? Zur Berichtigung des Versuchs einer wissenschaftlichen Prüfung der Gründe des von dem kurhessischen Oberappellationsgerichte am 27. Juni 1818 ergangenen Auspruchs* (1819), republished in Kassel in 1823; Burckhard Wilhelm Pfeiffer, *Das Recht der Kriegseroberung in Beziehung auf Staatskapitalien* (Hannover: Hannschen Buchhandlung, 1823). I was unable to obtain a copy of Ferdinand Karl Schweikart, ed., *Napoleon und die churhessischen Capitalschuldner ertheilen Quittung: Ein Erkenntniss über den Rechtsbestand der in Napoleons Aufträge einem churhessischen Capitalschuldner ertheilen Quittung* (Königsberg: A. W. Unzer, 1823).

problem of spatial order, which was a particularly difficult question for an international law of sovereign territorial states operating in the same spatial order. How was it possible to construe effective state power over a foreign state area and against the will of the foreign sovereign without a change of sovereignty? One sovereign state was counterposed to another sovereign state, but sovereign state power is effective power, first and foremost. The occupying state extended its effective power over its opponent's territory; its opponent no longer had effective power over the area. Nevertheless, the effective extension of power did not cause any change of sovereignty, change of regime, or change of constitution. How was that possible, theoretically and practically? With respect to the sovereign will of the occupier, the occupation was a mere fiction — theoretically, completely empty, and practically, a very precarious founding — because the occupier voluntarily disclaimed any change of sovereignty.

Despite this difficulty of legal construction, it cannot be denied that after 1815 *occupatio bellica* developed into a recognized principle of international law. It was spelled out in the Brussels Conference of 1874 and in the agreements of the First and (essentially corresponding) Second Hague Conventions on land war of 1899 and 1907, respectively (Art. 42ff.). The foundation of *occupatio bellica* was the sharp distinction between a change of sovereignty, i.e., a territorial change, and the provisional change of a military occupation. An expanded doctrine sought to explain the difficult distinction with the aid of an equally difficult construction: the occupying state exercised state power in the occupied enemy territory; however, it did not exercise its own power, but rather that of the state of the occupied territory, and this exercise of foreign state power was based not on empowerment of the enemy state's authority, but rather on its own original legal title in international law. The title in international law appears here to have an independent legal basis, and not to be derived from the existing state's sovereignty. Renunciation of power by the occupied did not hinder the direct change of sovereignty, and empowerment by the occupied did not grant the occupiers the right to exercise foreign state power.

The real objective was to establish a direct relation between the occupying power's military commandant and the population of the occupied territory. A "provisional legal community develops between the enemy and the inhabitants of the occupied area."[12] That is the indisputable

12. Edgar Loening, *Die Verwaltung des General-Gouvernements Elsaß-Lothringen: Ein Beitrag zur Geschichte des Völkerrechts* (Strasbourg: K. J. Trübner, 1874), p. 35. This book is still the most thorough treatment of the problem in the German language.

reality. But it is incompatible with the dogmatic exclusiveness of the so-called dualistic theory of the relation between internal and external, because it is neither a purely intrastate nor a purely interstate law. The population of the occupied territory is not considered to be the legal subject. Isolated attempts to consider it as such, like that of the Italian jurist Carlo Francesco Gabba (1838-1920), were unsuccessful. Thus, jurists of the legal institution of *military occupation* in international law also did not comment on the striking parallels between the authority of the military commander in the occupied area and the constitutional authority of the holder of executive power in the space that originates as a result of war, occupation, or exception. Consequently, there was no juridical answer to any of the important practical questions consistent with the real circumstances. That was especially true for the difficult, but unavoidable situations and measures which, for example, had to be treated under the term "hostages." The positivistic jurisprudence of continental constitutional law was helpless with respect to the problem of a state of exception. That is consistent with the nature of the positivistic method, which, due to its dependence on state legal statutes, refuses to consider the difficult questions of both international law and constitutional law. In most cases, it simply shuns them and declares them to be *not juridical*, but political.

This explains the artificial constructions that were found for the legal institution of military occupation of enemy territory in the 19th century, which sought to circumvent the actual spatial problem: foreign state power in the territory of a continuing sovereign state. But these confused, thoroughly navigable constructions are nevertheless typical of 19th century European international law. They led to the last achievement of the international law of the *jus publicum Europaeum*, to a legal institution of classical consistency, to a legalization and, thereby, to a bracketing of war. As a result of this raising of the concept of *occupatio bellica* to a legal institution of international law, five diverse trains of thought coalesced and substantiated the partly formal-juridical and partly historical-political ideas of the 19th century:

1. The concept of *justus hostis*, i.e., non-discrimination of the enemy in war.

2. The concept of continental land war as purely a war of combatants, as essentially a struggle between mutually state-organized armies, which sought to circumscribe a purely military sphere separate from all others — the economy, culture, intellectual life, church, and society. In this case, the occupying army's authority must be executed consistently by a military

commander. For despite the residual distrust of the military, a civil commisar would provoke misgivings, because he would embody a joining of the separated spheres.

3. Effects of the *old* principle of legitimacy, which was recognized at the Congress of Vienna. This principle became significant insofar as the general thinking about the antithesis of law and effective power had promoted and, thereby, had contributed to the practice that an effective occupation rules out an immediate change or displacement of sovereignty.

4. Effects of the *new* principle of legitimacy, of the democratic self-determination of peoples. This new principle is the exact opposite of the old, monarchic-dynastic principle of legitimacy. But every such principle leaves open the distinction between legitimate right and effective power, between true law and mere fact. In addition, a democractic principle of legitimacy distinguishes between the people and the given state power. To the extent that democracy is conceived of as "liberal democracy," it also distinguishes between the state and free, individualistic society. All these distinctions contributed to the idea that effective occupation of a territory could not be considered to be definitive; it had to be a statutory act, such as a peace treaty or a plebiscite.

5. The 19th century European constitutional standard raised the distinction of private and public law to a normal status of internal state life. At the end of the 19th century, until the Hague land war conventions were established, liberal constitutionalism was synonymous with "constitution" and "civilization" in the European sense. The economy, in particular, belonged to the non-state private sphere. On both sides of hostilities, this constitutional standard was unspoken but presupposed, and also often spoken of as a general principle of international law.

The effect of liberal constitutionalism was that an *occupatio bellica* excluded any idea of a change of sovereignty either in deed or in word. A constitutional system of government was presupposed by both states, the occupiers and the occupied. Thus, the Hague land war conventions were a completely understandable outcome. In particular, respect for the principle of a constitutional system of government (which was equated with the concept of a constitution) excluded intrusions into private property by either the military commander or the occupying state. For example, 19th century thinking never even considered the possibility that the occupying state might incorporate the occupied state's economy into its own, although both sides had liberal economic systems. Even the authors of the Hague land-war conventions never conceived of such a scenario.

The constitutional standard of liberal constitutionalism presupposed by both sides was the decisive factor in the development of *occupatio bellica*, as it found its classic formulations in the Brussels Conference of 1874 and the Hague land-war conventions of 1899 and 1907. We already have become acquainted with the connection between the structure of international law and the constitutional standard in the legal institution of definitive land-appropriation: state succession. We now conclude our investigation of *occupatio bellica* with yet another word about the remarkable and essential relation between enemy occupation and state of siege or state of exception within a constitutional state. In both cases, a situation that demands extraordinary measures and, thus, breaches the constitution should obtain, yet with the goal of maintaining the validity of this same constitution. Also, in both cases, the attempt is made to answer the difficult question by emphasizing the merely provisional character of this situation and its measures.

The dualistic separation of international law and constitutional law is here, as in other cases, only a matter of facade. In reality, a common constitutional standard overcame the division between internal and external that appeared to be so sharp throughout the 19th century and up until the Great War (1914-1918). This common constitutional standard allowed the dualism to appear only as a formal-juridical question of secondary importance. Where the common constitutional standard of European constitutionalism was lacking, the legal institution of *occupatio bellica* was ineffective in practice. When Russia occupied Ottoman territory in 1877, the area's old Islamic institutions were eliminated, and none other than Fedor Fedorovich Martens, the protagonist of the legal institution of *occupatio bellica* at the 1874 Brussels Conference, justified the immediate introduction of a new and modern social and legal order. He said that it was senseless for Russian military power to maintain the antiquated rules and conditions, whose elimination was a major goal of the Russo-Turkish war.[13]

13. Evgenii Aleksandrovich Korowin, *Das Völkerrecht der Übergangszeit: Grundlagen der völkerrechtlichen Beziehungen der Union der Sowjetrepubliken*, tr. from the Russian with additional notes for German readers by I. Robinson-Kaunus, ed. with an introduction by Herbert Kraus (Berlin-Grünewald: W. Rothschild Verlag, 1929), p. 135.

Chapter 5

Reference to Possibilities and Elements of International Law Unrelated to the State

The interstate international law of the *jus publicum Europaeum* is but one of many legal-historical possibilities of international law. In its essential reality it also contained strong *non*-state elements. Interstate in no sense means the isolation of any subject in the international law of this type of order. On the contrary, the interstate character can be understood only within a comprehensive spatial order sustained by states.

After 1900, it became customary to distinguish sharply between *internal* and *external*. The result was that its significance for the reality of interstate international law became muddled. In particular, not enough attention was paid to the fact that the classic form of the state in European international law contained a dualism *within itself*, namely between *public* and *private* law. Neither of these dualisms can be isolated.[1] Unfortunately, their isolation is almost taken for granted in the over-specialized discipline of contemporary jurisprudence. Moreover, English common law rejects both the dualism of public and private law and the concept of "state" that defines continental Europe. However, we stand by what the master of our discipline, Maurice Hauriou, always has maintained: that every state regime, in the specific and historical sense of the word "state," is based on a separation of public centralization and private economy.[2]

The sharper the public sphere became, the more the dualism of internal and external closed the door. This made it even more important for the private sphere to keep the door open, in order to ensure the universality of the private sphere, in particular the economic sphere. The spatial

1. Schmitt, "Über die zwei großen Dualismen des heutigen Rechtssystems," in *Positionen und Begriffe*, *op. cit.*, p. 261.

2. Cf. Maurice Hauriou, *Principes de droit public*, *op. cit.*, pp. 303ff.

order of the *jus publicum Europaeum* depended on it. Thus, an understanding of the reality of interstate international law requires more distinctions, which also reveal the non-state possibilities and elements of an otherwise interstate international law.

The following synopsis should illustrate a few developmental forms of international law that lie outside the state-related concept and belong to the great sphere of non-interstate international law. Unfortunately, the word "state" has become a general concept lacking any distinction, a misuse that has caused general confusion. In particular, spatial concepts specific to the epoch of the state from the 16th to the 20th century are applied to other orders of international law. Thus, it is necessary to remember that interstate international law is limited to historical forms of political unity and the spatial order of the earth that obtained during a particular epoch of history, and that, in this interstate epoch, other non-interstate relations, rules, and institutions developed and became decisive.

I. International law, *jus gentium* in the sense of *jus inter gentes*, is dependent, of course, on the organizational forms of this *gentes* and can mean:

1. inter-*populist* law (among families, tribes, clans, races, ethnic groups, nations);

2. inter-*urban* law (between independent *poleis* and *civitates*; intermunicipal law);

3. inter-*state* law (between the centralized order of sovereign territorial entities);

4. law valid between *spiritual* authorities and secular powers (Pope, Caliph, Buddha, Dalai Lama in their relations with other powers, in particular as an agency of holy wars); and

5. inter-*imperial* law, *jus inter imperia* (between Great Powers with spatial supremacy over other state territories), as distinguished from that *within* an empire or a *Großraum* prevailing over inter-populist, interstate, and other international law.

II. Together with *jus gentium* in the sense of a *jus inter gentes* (as distinguished from the structural forms of various *gentes*), there can be *general common law* extending beyond the borders of the self-contained *gentes* (peoples, states, empires). It can obtain in a common constitutional standard or in a minimum of presupposed internal organizations, in common religious, civil, and economic concepts and institutions. The most important case is a generally recognized right of free men to property and due process of law extending beyond the borders of states and peoples.

Thus, in the 19th century, together with an essentially interstate law

respecting the distinction between internal and external, there arose in European international law a common *economic law*, an international private law. Its common constitutional standard (the constitutional constitution) was more important than was the political sovereignty of the individual (political, but not economic), self-contained, and territorial continental states. Only when political sovereignty started to become economic autarky did the presupposed common constitutional standard, as well as the common spatial order, collapse.

Lorenz von Stein had in mind these two different laws — the interstate and the commonly recognized — when he distinguished between *Völkerrecht* as interstate law and *Internationales Recht* as common economic and alien law. In the 19th century, this international law of free trade and free economy became synonymous with the British Empire's interpretation of freedom of the sea. England, which had not developed the continental state dualism of public and private law, was able to establish a direct relation with the private, state-free part of any European state. The joining of both freedoms, which was far stronger than the interstate order of equally sovereign states, determined the reality of European international law in the 19th century. To England belongs both of the great freedoms of this epoch: freedom of the sea and freedom of world trade.

Part IV

The Question of a New *Nomos* of The Earth

Chapter 1

The Last Pan-European Land-Appropriation (The Congo Conference of 1885)

The years 1870-1890 were for Europe a time of great optimism. The warnings of the years 1815-1848 had faded. The prognoses of such important men as Berthold Georg von Niebuhr, Alexis de Tocqueville, and Donoso Cortés had been forgotten, and it was all too obvious that the voice of a poor Hegelian like Bruno Bauer had to be fainter. After the victorious Crimean War against Russia (1854-56) and the terrible Civil War in the United States (1861-65), Europe's self-deception regarding its true situation between East and West was at its worst. Bismarck's successes (1864-71), as well as the national unification of Italy (1870), only increased the general delusion. The growing belief in European civilization and progress was expressed in many plans for a pan-European organization, a European confederation of states, and even a federal state. Famous jurists of public law, such as James Lorimer and Johann Caspar Bluntschli, published descriptions of such projects in 1877 and 1878, respectively. The most astounding document of this all-European optimism is the proposal made in 1885 by Lorenz von Stein, a famous German scholar of constitutional law, for the protection of all European railroad transport (passing through hostile countries) during times of war. "In the name of the integrity of the great European transport organism and the constitutional unity of Europe," Stein promoted the neutralization of the great railroad lines of Europe. After the experiences of the following period, one reads such pre-1890 plans only with the deepest sympathy.[1]

The last common land-appropriation of non-European soil by the European powers, the last great act of a common European international law, also occurred during these years of the last bloom of the *jus publicum*

1. "Le droit international des chemins de fer en cas de guerre," in *Revue de droit international et de législation comparée*, Vol. XVII (1885), pp. 332-361.

Europaeum. It concerned African soil. Simultaneously, between 1870 and 1900, Asiatic countries, Japan most prominently, entered step-by-step upon the scene, first in treaty relations, then in administrative associations such as the Postal Union, and, finally, as equal participants in the total order of European international law. On African soil, however, European nations competed in sending research expeditions and founding colonial societies.

A. Acquisition of Colonial Lands

In addition to discoveries and scientific explorations, this race for colonies also was concerned with more or less symbolic appropriations, and with treaties concluded with indigenous tribes and their chieftains. There always have been treaties with non-state sovereign entities; they are typical of that part of international law that is not specifically interstate international law. By contrast, for a purely interstate international law, for European international law at that time, of course there were no legal titles. But here, at least according to a very influential English opinion, these treaties had great practical value as a preparatory or contributory method for the recognized legal title of effective occupation. In 19th century interstate international law, discoveries, explorations, and symbolic forms of appropriation had practical significance as initial steps toward an occupation, as inchoate title.[2] They were intended to give the discoverer and first explorer a reasonable time, a priority, to occupy effectively the appropriated land. Obviously, those rivals who were less successful or arrived later disputed this initial title and the occupation, even an effective occupation, as constituting the only legal title.

Old forms of colonial acquisition by private colonial societies, such as had flourished in the 17th century and appear to have been superseded eventually by state development, experienced a surprising revival for a few decades. Numerous new colonial societies developed in all the great European powers. Germany and Italy participated in the great land-appropriations. They followed the forms of traditional international law, in particular by founding colonial societies. Simultaneously, as members of the family of European nations, European colonial powers — England, France, Germany, Italy, and Portugal — concluded among themselves numerous treaties concerning the division of spheres of influence and interest.

The result was a complete muddle of international legal titles: scientific discoveries and explorations; cartographic surveys; symbolic and factual, if also still scarcely effective occupations; and thousands of treaties of

2. See Part II, Ch. 2, p. 106n.

often obscure types that the private and colonial societies concluded with indigenous chieftains. The confusion was overarched by interstate agreements among the European governments participating in the African land-appropriation. The interstate treaties were agreements on mutual recognition of rights to land-appropriations, in particular delimiting zones of land-appropriation among the European partners directly concerned. These treaties geographically determined spheres of interest and influence, with the express concurrence of the European partners or with the unexpressed consent of third-party powers.

The culmination of this race for legal rights, legal titles, and occupation was a great international land-appropriation congress — the Congo Conference in Berlin (1884-85). Participants were: Germany, Austria-Hungary, Belgium, Denmark, Spain, the United States, France, Great Britain, Italy, the Netherlands, Luxemburg, Portugal, Russia, Sweden, Norway, and the Ottoman Empire. The chairman was Bismarck, the German chancellor, who proved to be the last statesman of European international law. The result was the Congo Act — a remarkable final document of the continuing belief in civilization, progress, and free trade, and of the fundamental European claim based thereon to the free, i.e., non-state soil of the African continent open for European land-appropriation.

The civilizing worldview of these years of rapid expansion was a late relic from another time, when Europe still was the sacral center of the earth. But it already had become a caricature of a debased secularization. Indicative of its spirit and its language are the words of Belgian King Leopold, founder of the International Congo Society, who then said: "Civilization opens up the only part of the globe it has not yet reached, piercing the darkness, enveloping the entire population. That is, I wager to say, a crusade worthy of this century of progress."[3] The upshot of the conference occasionally was called African international law, *droit international africain*, whose content was to remain under the watchful eyes of

3. These words were uttered in a speech before the Geographical Society in Brussels on September 12, 1876. They are so characteristic of the epoch's style of speaking and thinking that they must be repeated in the original language: "*Ouvrir à la civilisation la seule partie de notre globe qu'elle n'a point encore pénetrée, percer les ténèbres qui enveloppent des populations entières, c'est, j'ose le dire, une* croisade *digne de ce siècle de progrès.*" [Tr. To open to civilization the only part of our globe that has not yet been penetrated, to pierce the darkness that still envelops whole populations, this, I dare say, is a dignified *crusade* of this century of progress.] And the crusader of progress added: "*Je serais heureux que Bruxelles devint en quelque sorte le quartier-général de ce mouvement civilisateur.*" [Tr. I would be happy if Brussels would become the headquarters, of a sort, of this civilizational movement.]

Europe, under the *haute surveillance de l'Europe.*[4]

B. The Relativization of Europe

Yet, the conference no longer was purely European. The United States participated in a thoroughly effective manner. It gained a kind of foothold in the Republic of Liberia, which had been recognized since 1848. Moreover, the United States assumed a decisive position when, on April 22, 1884, it recognized the flag of the International Congo Society, which was not a state. This opened the door to the confusion, whereby an international colony was treated as an independent state. The core concept of the traditional interstate European international law thus was thrown into disorder. Also, at the conference the United States' influence was significant, especially regarding the question of neutralization of the Congo Basin. But the United States did not ratify the Congo Act, and later, in World War I (1914), when neutralization of the Congo Basin became a practical issue, the United States rejected any participation. Thus, at the Congo Conference, the United States demonstrated a mixture of absence in principle and presence in practice — a remarkable contradiction which, after World War I, would become even more pronounced in Europe.

At that time, the relativization of Europe from the West (America) had not been matched by an equally recognizable challenge from the East. In the 19th century, Russia was considered to be a conservative Great Power, even the most conservative *European* Great Power. Nobody thought in terms of Japan's participation or even of an independent East Asian political sphere (*Großraum*). The Ottoman Empire was represented at the conference, which only was natural considering its great African possessions. At the 1856 Paris Conference, the "Sublime Porte," as it was called, was allowed to participate in all forms "in the advantages of public law and of European concert." Thus, liquidation of the Ottoman Empire in Africa and in Asia was suspended for a few decades. The Congo Conference's European character was confirmed by the presence of an Ottoman representative, and, in any case, in no sense was it overshadowed from the East, as it was from the West by American participation.

This Congo Conference formulated the rules of a European land-appropriation of African soil in line with the prudent standard of the sovereignty of any state. Stipulated in Art. 34 of the Congo Act was requirement of a notification: "Any Power that may hereafter take possession of

4. So said Gabriel Hanotaux in the French Chamber of Deputies on June 7, 1894, with reference to the discussion of the treaty of May 12, 1894.

any territory on the coasts of the African Continent outside of its present possessions, or that, having had none up to that time, shall acquire any, and, likewise, any Power that may assume a protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own."[5] Thus, the notification requirement in Art. 34 established that the other powers could make valid *réclamations*, if they had objections. Then, in Art. 35 followed a formulation of the requisite of occupation that was in accord with the historical and spiritual situation at the time. It recognized certain obligations that should accompany an occupation. This formulation requires closer examination. It is of greater significance, because it is the authentic text of a solemn agreement about occupation that is part of the history of a basic legal title that has been used to justify land-appropriations of free territory over the centuries: self-righteous European civilization and the belief in a global, liberal economic system, combined with the juridical concept of occupation to justify land-appropriations of non-European soil. It should be emphasized that Europe and Africa still were considered to be essentially different spaces in international law. It was not a matter of the complete suspension of any specific territorial distinction, as in the logic of global economic thinking regarding markets and trade, but more that they had a different status in international law: on the one hand, the area of the European state, i.e., the soil of the metropolis; on the other, colonial soil. Nevertheless, already at this conference certain governments asserted the territorial parity of states and colonies in international law.

"The Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, the case arising, freedom of trade and of transit on the conditions that may have been agreed upon."[6] This statement does nothing more than equate the status of colonial soil with that of the state territory of the motherland. It does not constitute what later was called "effective occupation." That far the Congo Conference did not go. The interests and convictions shared by the land-appropriating European powers were still too

5. [Tr. "General Act of the Berlin Conference," Annex to Protocol No. 10, Part I. "Correspondence Concerning the Berlin Congo Conference, Together with the Protocols and the General Act," in *The Executive Documents of the Senate of the United States for the First Session of the Forty-Ninth Congress*, in 8 vols., Vol. 8, p. 305. Hereafter, all of Schmitt's quotations from the Congo Act will refer to this source.]

6. *Ibid.*

strong. They saw in a liberal interpretation of property and economy a guarantee of progress, civilization, and freedom. Therein, the Europe of that time had hit upon an ultimate, universal, and common standard, which found expression in the turn from *vested rights* and in the safeguarding of free trade. Art. 1 of the Congo Act granted complete freedom of trade in the Congo Basin to all nations, and Art. 6 granted freedom of belief, religious tolerance, and cultural freedom. There was still no thought of effective occupation in the sense that, in view of supremacy, African soil should be equal to European state territory, even if conditions at that time did not yet allow for such equality.

C. The Search for an Amity Line

With this procedure, the Congo Act attempted to bind international freedom with neutralization of the Congo Basin. The type and means of the realization of this endeavor were of great symptomatic significance. Thus, neutralization was meant both to guarantee free trade and to prevent Europeans from engaging in war with each other on the soil of Central Africa with the Africans' consent and complicity. In his presidential address at the Congo Conference on February 26, 1885, Bismarck said that there would be grave consequences if natives became involved in disputes between the civilized powers. The idea of a kind of updated amity line was unmistakable. But, whereas the amity lines of the 16th and 17th centuries had turned non-European space into a theater of ruthless struggle among Europeans, the amity line of the Congo Act sought to limit a European war to European soil and to keep colonial space free of the vexations of a struggle among Europeans. By comparison with the 16th and 17th centuries, that was a sign of the intensified solidarity among and stronger feeling for the common race of Europeans. Certainly, this was not some fine agreement for the whole of Africa, but only for the Congo Basin and its inhabitants. Furthermore, this amity line suffered from many internal contradictions. Thus, when a European war between land-appropriating powers broke out in 1914, it had no practical value; it only exposed the internal brittleness of this civilized solidarity and the spatial order that had been constructed thereon.

First of all, the Congo Act contained in Art. 10 a "Declaration Relative to the Neutrality of the Territories Comprised in the Conventional Basin of the Congo."[7] A few years later, the content and wording of this declaration

7. *Ibid.*, p. 300.

must have made the dominant juridical interpretation unintelligible. However, both the content and the wording are all the more revealing for the change that ensued after 1890, as well as for a consideration of the spatial structure of European international law in general. Art. 10 says that the Signatory Powers "bind themselves to respect the neutrality of the territories or portions of territories, belonging to the said countries . . . so long as the Powers which exercise or shall exercise the rights of sovereignty or protectorate over those territories, using their option of proclaiming themselves neutral, shall fulfill the duties which neutrality requires."[8] Taken abstractly, that sounds remarkable, and, in view of today's dominant understanding, is incomprehensible. Since the end of the 19th century, European international law increasingly had tended to consider all areas under state sovereignty — motherland as well as colonies — as *state territory*. However, the spatial structure of traditional and specifically European international law was based on the distinction between European state territory and non-European soil. But if the status of state territory in the sense of European international law — European soil — no longer was distinguishable from overseas, colonial — non-European — soil, then the whole spatial structure of European international law had to be abandoned, because the bracketing of internal, interstate European wars had an essentially different content than did the pursuit of colonial wars outside Europe.

During negotiations at the Congo Conference, the representatives of France (Alph. de Courcel) and Portugal (A. de Serpa Pimentel) had asserted the indistinguishable equality of territorial status; they presented colonial and overseas soil as sovereign territory indistinguishable from the soil of the "state territory" of the European motherland. Yet, at that time, such positing of parity still was artificial, and gave more the impression of a theoretical negotiating thesis — a tactical maneuver. Nevertheless, after 1890, the onset of a jurisprudence of purely positivistic, i.e., purely intrastate laws and interstate contractual norms, turned the concrete order of a truly European international law into a collection of somehow valid norms. Thereby, European international law lost any sense of the spatial structure of a concrete order and of the essential and specific distinctions in soil statuses in international law. Legally speaking, European international law continued to recognize only state territory and state-free land, thereby eliminating the spatial sense of colonies.

Much more interesting is a closer examination of the content and

8. *Ibid.*

wording of Art. 10 of the Congo Act from the perspective of this spatial viewpoint. Seeking to provide a new guarantee for trade and industry, maintenance of peace, and development of civilization, the signatories agreed that the neutrality of Congo Basin colonial possessions would be respected, as long as the European powers remained neutral. According to the later interpretation, which recognized only one type of soil status, namely the state territory of a sovereign state, it was obvious that, geographically, a European state's colonial soil must become a theater of war or remain neutral to the same degree as the soil of the European motherland. If one expressly and solemnly agreed to such an interpretation, it could only cause confusion, whereas formerly it was taken for granted that the whole spatial structure of the earth in European international law was based on the distinctive territorial status of colonial and overseas lands. We need only recall the amity lines of the 16th and 17th centuries to recognize the fundamental character of this issue. Considered in light of such spatial divisions, Art. 10 of the Congo Act is an illuminating verification of the fact that the consciousness of different soil statuses still was viable, and was lost only after 1890, when the collapse of European international law was imminent.

D. Neutrality of the Colonies

Similar or dissimilar soil statuses became a practical matter for the Belgian part of the Congo Basin after the International Congo Colony, recognized as an *independent state* in 1885, was appropriated by Belgium, a consistently neutral European state, and became a Belgian colony. After years of deliberation and discussion, the appropriation occurred in 1907. The soil status of Belgium, guaranteed by the European Great Powers since 1839, was determined by neutralization, and this appeared, according to the abstract wording of Art. 10, also to hold for the neutralization of the Belgian Congo colony. But the significance of the distinction between European and African soil statuses was not lost completely. After Belgium's initial plans to annex the Congo Free State in 1895, the fundamental question was raised as to whether a consistently neutral European state should be allowed to acquire possessions and colonies outside Europe. Of course, such a question could be raised only by the old European international law, which presupposed a distinction between the soil statuses of motherland and colony. Conversely, in principle, the question was meaningless if, in a situation lacking any distinctions or spatial consciousness, all land dominated by a state was considered to be "state territory."

Confronted with an abstract soil parity, it is impossible to understand why acquisition of colonies by a neutral state should be forbidden and why any state in any other not-so-distant part of the world should not be allowed to rule over any parcel of land as a state territory. In fact, Belgium's neutrality belonged to the spatial structure of European international law until 1914. Such a soil status, occasioned by the neutralization of the state and its constituted significance in the bracketing of European war, could not be transferred to African colonial soil and to colonial war.

The question whether a neutral state could acquire colonies, which had been debated for more than ten years, thus had great significance for the problem of spatial order in international law.[9] It concerned the core question of any order of international law: the bracketing of war. Equally revealing was the practical method found for its solution. According to the Belgian interpretation, the soil status of the Belgian Congo colony was determined by the Congo Act alone, i.e., the neutrality of this African soil only was "optional" and, different from the neutrality of Belgium, was not guaranteed by the Great Powers. Regarding the distinction between *respecter* and *faire respecter*, the contractual powers never had assumed the direct obligation "to respect," much less "to build respect," as they had for the soil of European Belgium, nor did they assume any direct obligation to help prevent violations of Congo neutrality. Into this legal situation, which had been created by the Great Powers when they recognized the Congo Free State in 1885, stepped the Belgian state in 1907, when it appropriated the territory. In 1885, Belgian jurists obviously had agreed with the general understanding that the Congo Basin was an "international colony" and that the Congo Free State had arisen as a result of recognition by the European Great Powers. Moreover, the legal advisor to King Leopold, Rolin Jacquemyns, had seen in this general understanding nothing less than a triumph of European solidarity and European international law. Now, however, with the onset of the 20th century, Belgian jurists changed their constructions of international law and became committed to "effective occupation" as the only legal title for land acquisition. This position, in the view of Paul Ferrera, a noted Brussels jurist who handled the matter, is instructive for our discussion. He said: "It is clear that the origin of the sovereignty of the independent (Congo) state derives neither

9. Paul Fauchille, "L'annexation du Congo à la Belgique et le droit international," in *Revue générale de droit international public*, Vol. II (1895), pp. 400-439; Frantz Clément René Despagnet, *Essai sur les protectorats; étude de droit international* (Paris: Librairie de la Société du recueil général des lois et des arrêts, 1896).

from the 400 treaties of Stanley with the African chieftains nor from the recognition of the Great Powers, but rather from the fact of occupation itself, and that the inhabitants of this area were until now not organized as a state in our sense of the word."[10]

E. Collapse of the European Spatial Order

This statement makes clear what the claim to the legal title of "effective occupation" really meant: the rejection of the legal title of "recognition," grounded in the community and solidarity of international law, and the shattering of the comprehensive spatial order that such a legal title embraced. By claiming "effective occupation" in order to acquire the Congo area as a colony, Belgium, a small European state that owed its existence and its protected status to recognition accorded by the Great Powers, opted out of the spatial order of European international law. We should not forget that only by using an "international" tactic was King Leopold able to persuade the Great Powers to recognize the Congo Free State and to defuse their deliberations. Now, a few years later, Belgium asserted its right to the Congo, with the help of the legal title of "effective occupation." Certainly, this sheds an illuminating light on the concrete circumstances of such an occupation, given that the same Belgian jurist, in the same position, had estimated the number of inhabitants in the occupied area to be between 14 and 30 million in 1909, i.e., 25 years after the founding of the Congo Free State. This was a curious type of organization, and was so effective that, after a quarter century, it still was uncertain whether the area had 14 or 30 million inhabitants.

In any case, now the Belgian state was considered to be the legal successor of the Congo Free State, through effective occupation rather than through recognition in international law. The important and fundamental question — whether a consistently neutral state could acquire colonies on non-European soil — simply had been bypassed. The Belgian government had obtained the consent of those individual European powers that had guaranteed Belgium's neutralization in 1839. In this way, what once had been an essentially common matter, namely the truly European problem of spatial order and the great question of the bracketing of war in Europe, was turned into a positivistic question of treaties, into an individual question of Belgian foreign rights. From the standpoint of Belgium, that was a completely practical matter. However, no less symptomatic for the

10. Paul Ferrera, *Das Staatsrecht des Königreichs Belgien* (Tübingen: J.C.B. Mohr, 1909), p. 418.

ensuing collapse of the old European spatial order after 1890 was the fact that the European guarantor powers individually had consented to this procedure, instead of collectively and fundamentally answering the question as they had sought to do at the Congo Conference. Toward the end of the 19th century, European powers and jurists of European international law not only had ceased to be conscious of the spatial presuppositions of their own international law, but had lost any political instinct, any common power to maintain their own spatial structure and the bracketing of war.

An equally symptomatic determination of the Congo Act of February 26, 1885 was appended to Art. 10. It sought yet another, equally remarkable and characteristic means of neutralizing the Congo Basin. In Art. 11, the intended neutralization of the soil of Central Africa was not agreed upon directly. Instead, it only was said that: "In case a Power exercising rights of sovereignty or protectorate in the countries mentioned in Art. 1, and placed under the free trade system, shall be involved in a war, the High Signatory Parties to the present Act, and those which shall hereafter adopt it, bind themselves to lend their good offices in order that the territories belonging to this Power, and comprised in the Conventional zone of commercial freedom may, by the common consent of this Power and of the other belligerent or belligerents, be placed during the war under the regime of neutrality, and be considered as belonging to a non-belligerent State, the belligerents thenceforth abstaining from extending hostilities to the territories thus neutralized, and from using them as a base for warlike operations."[11] More simply stated: in case of a war, i.e., only after the outbreak of war, the non-belligerents only were obligated to offer good offices or to attempt to get the belligerents to agree to the neutralization of the zone in Central Africa. Nevertheless, the belligerents would not directly be required to respect the neutrality of colonial soil.

This sounds very confused, complicated, and indirect. Cautious restrictions now were attached to duties, in the style of the international law of sovereign states. Nevertheless, given the situation, it was possible for such restrictions to be far better and more effective than other, still very direct assurances, oaths, and solemn guarantees. Consequently, it was foolish for anyone to criticize and to disparage any indirect attempt at neutralization. We must bear in mind that the binding power of an obligation of sovereign states in international law cannot depend on the problematic acquiescence of otherwise free sovereigns, but rather must be

11. Congo Act, *op. cit.*, p. 300.

determined by common membership in a defined space, i.e., must be based on the comprehensive effect of a spatial order. This is true as well of all the reservations and intentional obscurities of meticulously stylized formal compromises. Therefore, not just any complicated and indirect method of seeking a neutralization can demonstrate, in and of itself, the collapse of traditional European international law as a concrete order. The internal brittleness of such an order already was evident, in that the unmentioned presupposition of Art. 10, namely that the soil of colonies outside Europe has a distinctive and characteristic status in international law, was omitted without a word in Art. 11. This was an internal contradiction that directly called into question not only the spatial order of European international law, but the concrete reality of that law.

After 1890, the dissolution proceeded rapidly and unmistakably. Charles Dupuis, an expert observer and chronicler of a history of the international law of the concert of European Great Powers, reported on the bankruptcy already evident in 1908.[12] As for the fate of the neutralized Congo Basin, that was confirmed at the beginning of the World War. On August 7, 1914, the Belgian government directed the attention of the European powers to Art. 11 of the Congo Act. France asked Spain about representations in Berlin. The United States rejected any participation and refused to be party to the realization of neutralization. England rejected participation, arguing that a German colony could not be treated as neutral, as long as there were radio stations on German soil in Zanzibar and ships like the Emden were not rendered harmless. France agreed, which calmed the fears of Belgium and Portugal.[13] In view of the obvious results, further details were not at issue. We will see later how the idea of a Eurocentric spatial order was abandoned completely in the land-divisions of the 1919 Paris administrative conferences of the League of Nations.

In 1885, European international law at least still was capable of a gesture of solidarity with respect to the soil of Central Africa. But European unity no longer could be maintained when it came to the immediately following question of European land-appropriations of the soil of North Africa — in Egypt, Morocco, Liberia, and Abyssinia. The world-political

12. *Les Grands Systèmes du Politique International*, Conférences d. M. le Professeur Charles Dupuis, November 1928-January 1929 (Paris: Centre Européen de la Dotation Carnegie, 1930).

13. R. C. Hawkin, "The Belgian Proposal to Neutralize Central Africa during the European War," in *The Grotius Society*, Vol. I, "Problems of the War: Papers Read Before the Society in the Year 1915" (London: Sweet & Maxwell, 1916), pp. 67-85.

development of the Congo Conference until World War I had demonstrated that the European belief in civilization and progress no longer could be used to form institutions of international law. The triumph symbolized by the word "Congo" was short-lived. Of course, European civilization remained confident enough to find within itself the legal title for the great land-appropriation of non-European soil, but not for this secularized form of a worldview, because Europe was no longer the sacral center of the earth. Ultimately, occupation became only a naked tactic, and that meant "effective occupation" was now the only recognized legal title for a land-appropriation. From a historical perspective, this late 19th century land-appropriation of Central Africa appears only as an epilogue to the heroic epochs of the 16th and 17th centuries. The belief in civilization and progress had become nothing more than an ideological facade. At best, the renaissance of 17th century trading companies that emerged in 19th century colonial societies evidenced a posthumous romantic glimmer. Essentially, the whole enterprise already was a helpless confusion of lines dividing spheres of interest and influence, as well as of failed amity lines simultaneously overarched and undermined by a Eurocentrically conceived, free, global economy ignoring all territorial borders. In this confusion, the old *nomos* of the earth determined by Europe dissolved.

Chapter 2

Dissolution of the Jus Publicum Europaeum *(1890-1918)*

A. From European to International Law

At the time of the Congo Conference in 1885, one fact already must have appeared to be a disturbing anomaly to a self-conscious, Eurocentric international law: the flag of the Congo Society had been recognized first by the United States Government (on April 22, 1884). It set a precedent with respect to recognition of a new state on African soil that had significant consequences, although at the time it was perceived to be a peripheral matter. Nevertheless, it was a symptom that traditional, specifically European international law was dissolving gradually, but nobody seemed to notice. The decline of the *jus publicum Europaeum* into a universal world law lacking distinctions no longer could be stopped. The dissolution into general universality simultaneously spelled the destruction of the traditional global order of the earth. It was replaced by an empty normativism of allegedly recognized rules, which, for a few decades, obscured consciousness of the fact that a concrete order of previously recognized powers had been destroyed and that a new one had not yet been found.

The first long shadow that fell upon the *jus publicum Europaeum* came from the West. The first characteristic indications became visible with the growing power of the United States, which could not decide between *isolation* behind a line separating itself from Europe and a global, universalist-humanitarian *intervention.* This development reached its fateful acme in the Paris Peace Conference of 1919, and found symbolic expression in the fate of President Woodrow Wilson. It is characteristic of the period of international law to which we now turn, dating from 1890 to 1939. Its final result was the same from all sides, namely the end of that spatial

order of the earth that had supported traditional, specifically European international law and the bracketing of war it had achieved.

The concepts and formulations of international law textbooks are a reflection of this development from 1890 to 1939. Until about 1890, the predominant view was that the concept of *the* international law was a specific *European* international law. That was self-evident on the European continent, especially in Germany. This also was true of such worldwide, universalist concepts as *humanity*, *civilization*, and *progress*, which determined the general concepts of the theory and vocabulary of diplomats. However, the whole picture thereby was understood to be Eurocentric to the core, since by "humanity" one understood, above all, *European* humanity. "Civilization" was self-evidently only *European* civilization, and "progress" was the linear development of *European* civilization. August Wilhelm Heffter's textbook on European international law was the most authoritative in Germany, and is typical in this respect.[1] Robert Mohl expressed the general opinion when he said: "From a juridical standpoint, Heffter's textbook is the best in any language." Franz von Holtzendorff still spoke of "European international law."[2] The great English[3] and French works of this epoch all have a Eurocentric concept of civilization, and distinguish among civilized, semi-civilized, and barbarian peoples. But they left this problem in the background and, without closer scrutiny, generally followed Jeremy Bentham's lead in titling their books *International Law* or *Law of Nations*. Even more than in German and Italian textbooks on international law, this view was pronounced in the Central and South American states of the Western Hemisphere.

Considering the European-American relation as a whole, expansion into the American sphere was manifested differently. The American jurist James Kent treated international law in the context of his *Commentaries on American Law*.[4] The famous Henry Wheaton called his comprehensive work, which first appeared in 1836 and then in numerous new editions and printings, simply *Elements of International*

1. August Wilhelm Heffter, *Das europäisches Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1844), 8th ed., ed. by F. H. Geffcken (Berlin: H. W. Müller, 1888).

2. Franz von Holtzendorff, ed., *Enzyklopädie der Rechtswissenschaft in systematischer und alphabetischer Bearbeitung* (Leipzig: Duncker & Humblot, 1885).

3. [Tr. Schmitt mentions the names, but not the works, of: Sir Travers Twiss (1809-1897); John George Phillimore (1808-1865); Sir Henry James Sumner Maine (1822-1888); William Edgar Hall (1835-1894); James Lorimer (1818-1890); and Sir James Fitzjames Stephen (1829-1894).]

4. [Tr. James Kent, *Commentaries on American Law* (New York: O. Halstead, 1826-1830), 4 vols.]

Law.[5] Francis Wharton used *Digest of the International Law of the United States*.[6] By contrast, in 1868, the South American Carlos Calvo titled his work *Derecho internacional teórico y práctico de Europa y América*.[7] An imposing work by the Frenchman Paul Pradier-Fodéré was called *Traité de droit international européen et américain*.[8]

But also in such cases in which European and American international law were expressly mentioned together, a deeply perceived differentiation of the spatial order or a true spatial problem was not intended, at least not initially. Both Europe and America were united regarding a common concept of a unified European civilization. At the Second and Third Panama Conferences (1901-02 and 1906, respectively), all the contradictions with respect to arbitration between the United States and Latin American states were evident, and had to be resolved by a proscription at the awaited Hague Convention of 1907. The famous pacifist and protagonist of international arbitration, Alfred Fried, called this a "genial way out." In reality, it was only a short-term and purely technical prolongation of the great continental problem that had arisen a century before. Regarding the question of codification of American international law, at the Second Panama Conference the Haitian delegate maintained that there could be no generally recognized codification without participation by European jurists. Only in 1910 did a pioneering book by Alejandro Alvarez appear that opposed the universalistic international law and outlined the characteristics of an American international law.[9] Yet, the universalistic habits of thought were too strong. After World War I, they acquired a new lease on life in the League of Nations. Immediately following publication of Alvarez's book, containing his doctrine of a specifically American international law, he was opposed by the argument that there can be no international law specific to individual continents, because the norms of international law are

5. [Tr. Henry Wheaton, *Elements of International Law* (1848), reproduction of the 1866 edition, The Classics of International Law, ed. by James Brown Scott, Vol. 19, The Carnegie Endowment for International Peace (Oxford: The Clarendon Press, 1936).]

6. [Tr. Francis Wharton, ed., *A Digest of International Law of the United States, taken from Documents issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorneys-General* (Washington, D.C.: Government Printing Office, 1886), 3 vols.]

7. [Tr. (Paris: Amyot, 1868), 2 vols.]

8. [Tr. Paul Louis Ernest Pradier-Fodéré, *Traité de droit public européen et américain: suivant les progrès de la science et de la pratique contemporaines* (Paris: G. Pedone-Lauriel, 1885-1906), 8 vols.]

9. Alejandro Alvarez, *Le droit international américain: son fondement, sa nature; d'après l'histoire diplomatique des états du nouveau monde et leur vie politique et économique* (Paris: A Pedron, 1910).

general, and only situations — not norms — can be different. Still, in 1912, in a treatise concerning the *non-existence of an American international law*, it could be said with respect to this question that: "Today, since the Second Hague Peace Convention, it appears to South American states that there is still only one international law."[10]

The expansion and distention of international law from a specifically European order to the spacelessness of a general universalism was evident in the fact that, toward the end of the 19th century, European authors also ceased to write textbooks on *European* international law and began customarily to speak only of international law.[11] Jurists no longer observed the great distinction between *jus inter gentes* and *jus gentium*, which presupposed the linguistic distinction between *droit des gens* and international law. It had been supplanted by a strong emphasis on the purely interstate character of international law. As a result, awareness of the great problem of a spatial order of the earth disappeared. To the extent that a certain recollection of it remained, one spoke of the international law of "civilized states," and thereby still held to the notion that European soil or soil equivalent to it had a different status in international law from that of uncivilized or non-European peoples. Colonial or protectorate soil was not considered to be the same as state territory in international law. The argumentation of the English jurist John Westlake, for example, continued in this tradition until the outbreak of World War I.[12]

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10. Manuel Alvaro de Souza Sa. Vianna, *De la non-existence d'un droit international américain; dissertation présentée au Congrès scientifique latino-américain (premier Pan-Américain)* (Rio de Janeiro: L Figuierdo, 1912), p. 241. The author emphasized that there is no Asiatic international law and, consequently, that one should not speak about an American international law. He disagreed with Calvo Amancio Alcorta (*Cours de droit international public* [Paris: L. Larose et forcel, 1887]), and with Alvarez. He asked: "*Comment un Droit International prétendant régir les rapports entre les nations pourrait-il varier de Continent à Continent et d'Etat à Etat?*" [Tr. How could an international law which pretends to govern the relations among nations vary from continent to continent and from state to state?], p. 241. With a certain vehemence, he railed against the hegemony of the United States, which Alvarez recognized, and insisted that the Monroe Doctrine is not a legal rule, but only a political principle.

11. Thus, August von Bulmerincq, Karl Gareis, Hermann Schulze, Emanuel Ritter von Ullmann, Paul Heilborn, and Franz von Liszt all employed either *Völkerrecht* or *Internationales Recht*. Italian and Spanish writers spoke mostly of *Diritto internazionale* or *Derecho Internacional*; Slavic writers spoke of *Mezhdunarodnoe pravo* (law among peoples).

12. Typical of the thinking oriented to the concept of civilization was the title of Johann Caspar Bluntschli's highly regarded codification in *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch* (Nördlichen: C. H. Bech'sche Buchhandlung, 1868). Fedor Fedorovich Martens' Russian work on international law was translated into German by Carl Bergbohm in 1883, under the title *Völkerrecht: das internationale Recht der zivilisierten Nationen*, Vol. I (Berlin: Weidmann, 1883-1886). The Italian Francesco Paolo Contuzzi even published *Il diritto delle genti dell'umanità* (Naples: N. Jovene, 1880).

The core of the new problem lay in the fact that, instead of a generalized international law lacking any spatial concept, several different spheres (*Großräume*) of international law appeared on the scene, at the same time that the great problem of a new spatial order of the earth from the West — from America — became evident. But, at the beginning of this development, around 1890, this did not seem to be a difficult problem. One had in view, as we have said, only an unproblematic and common European civilization. An African international law existed only in the sense that African soil was the object of a common land-appropriation by European powers. An Asiatic international law was not considered to be a possibility. Certainly, Asiatic states also had become part of the community of international law in the 1880s and 1890s. But, whereas the idea of an international law specific to a *Großraum* or a continent at least had been broached in Latin America, and in 1910 had led to Alvarez's American international law, it is remarkable that no Asiatic state had any inkling of the problem in what still appeared to be a completely Eurocentric international law. However, this all changed into a universal international law lacking any distinctions.

Psychologically speaking, this strange process can be explained by the worldview of contemporary European diplomats and jurists. Non-European and non-Christian countries, at first Turkey in 1856, initially were included in the order of Eurocentric international law only in treaties of capitulation and similar, thoroughly European provisos. The entry of Japan, Siam, and China into the Postal Union was considered to be an unpolitical and technically neutral matter. Thus, the problem of the transformation of the spatial order of European consciousness at first remained occluded. Later, however, the question no longer appeared to exist. In its war with China in 1894 and in its victorious war with a European Great Power (Russia) in 1904, Japan had demonstrated that it would abide by European laws of war. Thereby, it had beaten its "reception parties" to the punch. Moreover, in 1900, Japan had participated on an equal footing with the European Great Powers in quashing the Boxer Rebellion. Thus, an Asiatic "Great Power" had arisen and was recognized as such. By comparison with the Second Hague Convention of 1907, the atmosphere, the *ambiance* of the First Hague Peace Convention of 1899 still was purely European. At the Second Hague Convention, given the number and role of American and Asiatic participants, it was clear that in less than ten years a great step had been taken from a *jus publicum Europaeum* to an international law no longer European in the former sense. At the First Hague Convention, European diplomats and jurists, as if intoxicated, still believed in and celebrated the victory and

triumph of their European international law. But the feet of those whom they should have been showing out the door already were standing before it.

B. The Situation of International Law in 1890

The worldview of international law scholars during this transitional period between 1880 and 1900 found its best expression in Alphonse Rivier's *Lehrbuch des Völkerrechts*. This small textbook appeared in 1889 in Arthur von Kirchenheim's *Handbibliothek des öffentlichen Rechts*,[13] and is dedicated to the memory of Franz von Holtzendorff. Its greatest value lies in its scholarly approach, in its historical-literary expertise,[14] and in the construction of its system. Above all, however, it is a document which, in the style of its presentation, demonstrates the transition from European international law to an apparently universal international law. The transition now was recognized, if only for a moment. Although difficult to grasp, Rivier's book sheds the brightest light on the consciousness of a transitional period, which is why it is both a document and a symptom.

Rivier expressly emphasizes the European origin and character of the "international law of civilized states," and pointedly states that "European international law . . . is still today a correct designation, insofar as Europe is, in fact, the continent of origin of our international law."[15] "However," he says, "our community of nations is not a closed community. Just as we opened the door to Turkey, so it is open to still other states, if they have reached a level of civilization analogous to ours. Through treaties, which grow in frequency and significance, gradually the states of Asia as well as of Africa and Polynesia will be drawn into a partially legal community."

What was the outlook of the European international law jurist around

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13. Vol. IV, 2nd ed. (Stuttgart: F. Enke, 1899); [original publication] Alphonse Rivier, *Principes du droit des gens*, 2 vols. (Paris: A. Rousseau, 1896).

14. Rivier is also the author of "Literarhistorische Übersicht der Systeme und Theorien des Völkerrechts seit Grotius," in Franz von Holtzendorff, ed., *Handbuch des Völkerrechts: Auf Grundlage europäisches Staatspraxis* (Berlin: Verlag von Carl Habel, 1885-89), Vol. I, pp. 393-523.

15. The expression Europe as "Ursprungskontinent" [continent of origin] evidently is taken from Holtzendorff's introduction to his *Handbuch* (1885, Vol. I, p. 14); Westlake used the word "nucleus." Especially instructive with respect to the significance of the concept *humanité* are the remarks made in Tokyo by the Italian jurist Paternostro, advisor to the Japanese Minister of Justice: "Das Völkerrecht erstreckt sich nicht nur auf Europa sondern das ganze Menschheit und die ganze Welt," in *Revue de Droit International*, Vol. XXIII (1891), p. 67. In the first edition of Franz von Liszt's *Das Völkerrecht* (Berlin: O. Haering, 1898), p. 3, we read: "Today already Japan must be included in the international law community. Its culture is in general on the same level as that of Christian European states. In war with China it observed the rules of international law more rigorously than many European states."

1890? Surrounded on all sides by the opening up of the European community of nations, how did he initiate inclusion of non-European and non-American peoples in it? Rivier's overview of "current sovereign states, which presently constitute the true persons of the international community,"[16] offers a thoroughly characteristic answer. First, 25 states of Europe are enumerated, then 19 states of the Americas, then "states in Africa": the Congo Free State, the Free State of Liberia, the Orange Free State, the Sultanate of Morocco, and the Sultanate of Zanzibar.

They were called "states," but the word "sovereign" was avoided. With reference to Morocco and Zanzibar, it also was said: "that obviously the last two do not belong to the community of international law." A relevant question would have been: Why were they even included in the enumeration? Joined to "states in Africa" and on the same level is an overview of those "in Asia." But for Asia, the word "state" is avoided altogether. Literally, it reads: "Likewise still outside the community of states, but frequently linked with many members of it by treaties are: Persia, China, Japan, Korea, Siam. Gradually and under various terms, the other Asiatic states are being annexed by England and France; Malaysia belongs to the Netherlands, with the exception of a part of Borneo (British Borneo, Sarawak, Brunei)." At the end finally appears: "In Polynesia: Hawaii, Samoa." At another place in the overview, it is said that Austria-Hungary has only a single ambassador for China, Japan, and Siam together. This, then, was the total picture, which was as much a symptom as a document that clearly manifested the moment of transition from a European to a no-longer European international law.

Since we are focusing on 1890 in this history of international law, I would like to draw attention to one important fact. Without being aware of it, toward the end of the 19th century European international law had lost the consciousness of the spatial structure of its former order. Instead, it had adopted an increasingly more superficial notion of a universalizing process that it naïvely saw as a victory of European international law. It mistook the removal of Europe from the center of the earth in international law for Europe's rise to the center. The *recognition* of new states in international law, which in every true order is an affiliation or an admission, was reduced to a mere "certification of trust of the other states in the consolidation and stability of newly created relations" (Rivier). Jurists believed that Europe was being complimented by the reception of non-Europeans, and did not notice that, in fact, they were loosening all the foundations of a reception, because the former order — good or bad, but in any case conceived of as a

16. Rivier, *Lehrbuch des Völkerrechts*, *op. cit.*, pp. 92ff.

concrete order, above all as a spatial order, by a true community of European princely houses, states, and nations — had disappeared. What appeared in its place was no "system" of states, but a collection of states randomly joined together by factual relations — a disorganized mass of more than 50 heterogeneous states, lacking any spatial or spiritual consciousness of what they once had had in common, a chaos of reputedly equal and equally sovereign states and their dispersed possessions, in which a common bracketing of war no longer was feasible, and for which not even the concept of "civilization" could provide any concrete homogeneity.

C. The Disorientation of Juridical Thinking

In the course of this dissolution, the remnant of the recognition of states and governments in international law had to lose not only its substantive significance, but also any reference to a homogeneity among the recognizing and the recognized states. This was so because the distinction between civilized, half-civilized (barbaric), and wild peoples (savages), so significant for traditional European international law, had become *juridically insignificant*, as had the fact of continental spatial relations and the distinction between the soil status of the European motherland and that of overseas colonies. Colonial soil had become as much *state territory* as was the soil of European nations. Precedent in international law now lacked any spatial determination, and what had transpired in Europe between Sweden and Norway immediately had become a precedent for relations between Japan and Mexico. Contemporary jurists did not recognize the new global problem, whereas, around 1900, German political economists[17]

17. In the controversy at that time concerning agricultural and industrial development, Gustav von Schmoller said that the contemporary world empires — the British Empire, the United States of America, and Russia — had a tendency to become three autarchic global empires. Cf. Schmoller, "Die Theorie von den drei Weltreichen," in *Schmoller's Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* (1900), pp. 373f. By contrast, Dietzel diagnosed a neo-Smithianism. Adolph Wagner also participated in the controversy, as did Sering and others. Cf. the reference of Erwin von Beckerath in his Bonn lecture, *Heinrich Dietzel als Nationalökonom und Soziologe*, Kriegsvorträge der Rheinischen Friedrich-Wilhelms-Universität (Bonn: Gebr. Scheuer Verlag, 1944), p. 26n. At the turn of the century, Werner Sombart had discovered "the law of the decreasing importance of foreign trade." See his article, "Entwickeln wir uns zum Exportindustriestaat?," in *Soziale Praxis: Centralblatt für Sozialpolitik* (Leipzig), Vol. 8, No. 24 (March 16, 1899), pp. 633-637. In this connection, see the article by Max Victor, "Das sogenannte Gesetz der abnehmenden Außenhandelsbedeutung," in *Weltwirtschaftliches Archiv* 36 (1932), pp. 59ff. On Hauriou, see the following chapter. The word *Großraum* appeared only later, after World War I; it was translated into such concepts as "continental blocs," "spheres of influence," "spheres of interest," etc.

had formulated the question with great clarity: universalism or pluralism of the world economy? Juridically, there now appeared to be only one, although no longer decisive *international* community of international law, the *communauté internationale*, with several still not effectively occupied state areas in the Arctic, and some areas inhabited by Bedouin tribes.

The prevailing concept of a global universalism lacking any spatial sense certainly expressed a reality in the economy distinct from the state — an economy of free world trade and a free world market, with the free movement of money, capital, and labor. Liberal economic thinking and global commercialism had become hallmarks of European thinking since the Cobden Treaty of 1860, and were now the common currency of thought. We have observed that the deliberations and consequences of the Congo Conference were dominated by a belief in a free world economy. The numerous and obvious obstructions and restrictions of the liberal economy, protective tariffs, and protectionism of all sorts were perceived to be mere exceptions that did not call into question eternal progress and its end result. A strong guarantee for such a worldview lay in the dominant position of England and in the English interest in global free trade and freedom of the sea. The most favored clause in consular, trade, and colonial treaties seemed to be a choice vehicle for this economic progress toward a single market. In short: over, under, and beside the state-political borders of what appeared to be a purely political international law between states spread a free, i.e., non-state sphere of economy permeating everything: a *global* economy. In the idea of a free global economy lay not only the overcoming of state-political borders, but also, as an essential precondition, a standard for the internal constitutions of individual member states of this order of international law; it presupposed that every member state would establish a minimum of *constitutional* order. This minimum standard consisted of the freedom — the separation — of the state-public sphere from the private sphere, above all, from the non-state sphere of property, trade, and economy.

At this point, we must remember that a concrete order of international law mostly consists of uniting and blending several diverse orders. Thus, the international law of the Christian Middle Ages consisted of uniting and blending spiritual and feudal law. The European order of the 17th and 18th centuries bound a dynamic law among families with a law among states. The interstate law of the 19th century consisted of joining free economy and free sea with interstate sovereignty. This dualism of public and private law expressed the dualism of a purely interstate international law and of an

international free economy. In the background was the community of an international *liberum commercium*; in the foreground, the territory of sharply divided sovereign states. That was not a territorial line, but rather a line delimiting spheres of human participation. It was a line certified by the standard of liberal constitutionalism — a line of free economy passing through the states. One can consider it to be a modern type of amity line.

D. Political Division/Economic Unity

At that time, a sharp division between internal and external — between international law, i.e., interstate law, and national law, i.e., intrastate law — became prominent and customary in juridical thinking. Heinrich Triepel's 1899 book elaborated on the fundamentals of this dualism in legal circles and legal sources.[18] The sharp division of internal and external expressed the state-centered thinking of an essentially state-oriented bureaucracy whose thinking dominated public law, whereas the free businessman considered the world to be his field of operations. But Triepel's book did not mention this strong commonality — the common standard of liberal constitutionalism — behind the division of domestic and foreign that was so plausible to state bureaucrats, because the reality of two orders of international law had been lost completely in jurisprudential consciousness. However, Lorenz von Stein still distinguished both clearly: a *true* international law of a valid order of territorially distinct sovereign states; and another international law, i.e., an order penetrating the market, the economy, and foreign law with *the world as its field of operations*.

Since the middle of the 19th century, the science of so-called international private law had sought to free itself completely from the concepts of international law. It appeared to go its own way and to become a juridical speciality isolated from international law. In the final analysis, it did nothing more than seek to become positivistic, and to place itself on a purely national legal foundation. We need not elaborate on the many disputed questions of this complex problem. But all conceptual formulations characteristic of this stage of development had the same result: the state-centered legal positivism dominating the thinking of contemporary jurists no longer was able to supply the conceptual tools to form institutions capable of illuminating the reality of such a confusion of intrastate sovereignty and suprastate free economy. The proviso of the *ordre public*, which every sovereign state made *vis-à-vis* international private law, now had the same destructive

18. Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: C. L. Hirschfeld Verlag, 1899).

consequences as it did in so-called public international contract law.

The rational relation of norm and exception thereby was reversed. The problem of the so-called qualification of concepts, in particular concepts such as property and marriage, disclosed the fact that both common concepts and the common order had become questionable. Savigny, the great founder of the modern juridical discipline of "international private law," had established this law on the basis of a still completely and indisputably European community.[19] Just what deep changes had occurred in the second half of the 19th century were evident in the fact that in a few decades the domicile principle that Savigny still took for granted had been displaced, at first by the Italians in favor of the principle of nationality and citizenship. That change manifested the rapid transition to freedom of movement and a new relation to the soil. With reference to this transition from the principle of domicile to the principle of state membership, a great English jurist, John Westlake, made a crucial observation by saying that it had ushered in the greatest change in legal history since the 13th century. The general movement to *freedom*, a termination of traditional orientations and, in this sense, a total mobility of the most intensive sort — a general disorientation — set the European world on a new axis, and hurled it into other currents of power in which state-centered legal positivism proved to be completely helpless internally. Externally, the positivism of international treaties failed to have any historical consciousness of its own situation. This explains why the dualism of international law and national law, i.e., the dualism of domestic and foreign, was considered to be the central problem and was discussed in detail, whereas the dualism of interstate-political and international-economic law remained unnoticed. Precisely here — in the economy — the old spatial order of the earth lost its structure. What essentially did it mean when other, non-European states and nations from all sides now took their place in the family or house of European nations and states?

E. No Global Equilibrium

That a *family* or *community* of European states and nations suddenly opened the doors of its house to the whole world was no mere quantitative expansion and enlargement, but rather a transition to a new plane. At first, of course, it was a headlong leap into the nothingness of a universality lacking any grounding in space or on land. Not even the specter of a new,

19. Friedrich Carl von Savigny, *System des heutigen römischen Rechts*, Vol. VII (Berlin: Veit und Comp., 1849).

concrete spatial order of international law replaced the concrete order of the former *jus publicum Europaeum.* Already in 1823, declaration of the Monroe Doctrine had removed the sphere of the Western Hemisphere from further European land-appropriations. The system of European balance, which had found expression in the order of the 18th and 19th centuries, could not be converted easily into a global balance. Nevertheless, at one point England claimed to be the center of the earth, to have ceased being the administrator of the former European balance, and to have become the representative of a new *global equilibrium* balancing *Großräume.* On December 12, 1826, in the English House of Commons, Prime Minister George Canning said the following about the renewal of balance: "I am looking somewhere else! I seek the means of balance in another hemisphere. . . . I call upon the New World as presently constituted to restore the old equilibrium." Canning directed this speech not only against any *confederacy* (the Holy Alliance), but also against any *resolution* (the Monroe Doctrine) or any *combination* thereof (Bolivar's memorandums from 1819-26).[20] But the island of England was unable to achieve its goal of global equilibrium. England became the traditional power for certain areas of the Mediterranean and the passage to India. Here, she played the role of a *katechon.* But the small European island apparently was still too weak for this great, global exercise of power. However, she was strong enough to usher in a new balance, which impeded sea powers, and thereby allowed her alone to dominate the great expanses of the world's oceans. The concert of European Great Powers ceased to exist in 1908. For a time, it only apparently became a concert of imperialistic world powers detached from and continued by the allied and associated *puissances principales* [leading powers] of Versailles that endeavored to create a spatial order.

What now was considered to be international law — "international law" as treated in jurisprudence — was no longer a concrete spatial order. From the standpoint of special technical materials, it was nothing more than a series of generalizations of doubtful precedent, most based on transitory or heterogeneous situations, combined with more or less generally recognized norms, which, the more generally and more spiritedly they were "recognized," the more contested was their application in a concretely disputed

20. Cf. on this matter Adolf Rein's article, also important for international law, "Über die Bedeutung der überseeischen Ausdehnung für das europäische Staatensystem," in *Historische Zeitschrift*, Vol. 137 (1928), p. 79. For Hautefeuilles' position on the problem of global equilibrium, see Part III, Ch. 3, p. 173n.

case. These generally recognized norms floated over an impenetrable net of contractual agreements with fundamental provisos of various sorts. While the agreements of the First Hague Convention (1899) still were ratified with a minimum of provisos, the relation between agreement and proviso at the ratification of the Second Hague Convention (1907) had been reversed. The provisos turned the beautifully worded agreements into a mere facade. The maxim *pacta sunt servanda* waved like a juridical flag over a completely nihilistic inflation of numberless, contradictory pacts emptied of any content by stated or unstated provisos. There was no shortage of problems, the true answers to which could have initiated concrete conceptual constructions, such as the distinction between universal and particular international law, elaboration of the concrete political meaning of the state-centered, continental concept of war *vis-à-vis* the state-free and sea-centered Anglo-Saxon concept of war, or a rethinking of spatial problems, such as those raised by the Monroe Doctrine, the line of the Western Hemisphere, and the new relation between politics and economics. But international law jurists declared the substantive discussion of such questions to be *unjuridical* and, ultimately, even characterized their refusal to discuss them as *positivism.* All true problems — all political, economic, and spatial questions — were treated as *unjuridical*, i.e., they were excluded from the scholarly consciousness of jurists.

Silete theologi in munere alieno! So said humanistic jurists to theologians at the end of the 16th century, in order to establish an independent jurisprudence of *jus gentium*. Three hundred years later, at the end of the 19th century, jurisprudence, in the name of legal positivism, chose to remain silent with respect to all the great contemporaneous legal issues. *Sileamus in munere alieno* [We must remain silent within foreign walls.] With this rejection of international law, Europe stumbled into a world war that dethroned the old world from the center of the earth and destroyed the bracketing of war it had created.

Chapter 3

The League of Nations and the Problem of the Spatial Order of the Earth

The Paris Peace Conference in the winter of 1918-19 was supposed to end a world war and to bring about world peace. Different from the peace conferences of European international law (1648, 1713, 1814-15, 1856, 1878, and 1885), it was not a European conference. States from around the world participated, and the leading powers, the allied and associated major powers — Great Britain, France, Italy, Japan, and the United States — unlike the leading Great Powers of European international law, no longer were bound together by a common spatial order. The major associate power, the United States, stood by the proviso of the Monroe Doctrine, i.e., a spatial order determined by the global line of the Western Hemisphere. The major allied power, Japan, had given notice of its special interests in East Asia. The European-Asiatic Great Power, the Soviet Union, was absent.

The non-European areas of the earth were mentioned only occasionally at the conferences in Paris in 1918-19. Except for the peace, nothing was said about the order outside Europe. There also was no treatment of the problem of freedom of the sea, of the spatial order of the earth beyond firm land, as if nothing essentially had changed in the spatial order of the earth since the Treaty of Utrecht (1713) and the Congress of Vienna (1814-15).

By contrast, the vanquished enemies, whose territory was made the main object of a new land-division, were two purely European, even Central European Great Powers, which, until then, had been representatives of European international law: Germany and Austria-Hungary. Thus, one should not characterize the Paris peace negotiations as a *European* conference in terms of its representatives and subjects, but only in terms of its object and theme. New borders were drawn in Central and Eastern Europe; the colonial possessions of Imperial Germany were put under mandate; important

Turkish possessions in Asia were assigned new sovereigns. In other words, this world conference in no sense created a new world order. It left the world in its earlier disorder, eliminated only two European Great Powers — two pillars of the former spatial order — and undertook a redivision of European territory. Whereas European conferences in preceding centuries had determined the spatial order of the earth, at the Paris Peace Conference, for the first time, the reverse was the case: the world determined the spatial order of Europe. This means that a completely disorganized world attempted to create a new order in Europe. The redivision of European soil, imposed on the European continent by a world conference, was to be safeguarded by a *Völkerbund*, a *Société des Nations*, a League of Nations.

The League of Nations had its headquarters in Geneva, an orientation no doubt chosen by the American President, Woodrow Wilson.[1] That had a certain symbolic significance and to that extent constituted a spiritual orientation.[2] States from all parts of the world belonged to the League, among them 18 from the Western Hemisphere, which made up one-third of the members. It was not a federal structure in the sense of a true federation or a confederation of states. Formulated cautiously, it was characterized only as a *Société* or *League* of Nations, full of provisos stipulating that relations among states should be subject to alteration and should be honored by the governments of fifty heterogeneous states scattered over the planet. Above all, such a League was a procedural means of holding international conferences, in which the duly instructed diplomatic representatives of European and non-European governments conferred under such designations as

1. [Tr. Since it is unknown what sources Schmitt used for his discussion of Wilson, the reader may consult: Lyman P. Powell, *America and the League of Nations: Addresses in Europe, Woodrow Wilson* (Chicago and New York: Rand, McNally and Company, 1919); Woodrow Wilson, *Addresses of President Wilson* (Washington, D.C.: Government Printing Office, 1919); and John Randolph Bolling, *Chronology of Woodrow Wilson, Together with his Most Notable Addresses, A Brief Description of the League of Nations, and the League of Nations Covenant*, compiled for Mary Vanderpool Pennington (New York: Frederick A. Stokes Company, 1927).]

2. Later, I will have something to say about the practical consequences of this. "In the April 11, 1919 meeting of the League of Nations Commission, 12 of the 18 votes raised for the headquarters of the League were for Geneva, the city of Calvin, Rousseau, and the International Red Cross, whose spiritual fate in the past was so closely tied to the world of the Anglo-Saxon democracies. Belgium's wish that its capital, Brussels, be the preference for the headquarters of the League was frustrated by Wilson's endeavor to have the new organization of states be located in surroundings less weighed down with memories of past wars." See Paul Guggenheim, *Die Völkerbund: Systematische Darstellung seiner Gestaltung in der politischen und rechtlichen Wirklichkeit* (Leipzig: Teubner, 1932), p. 21. However, from our earlier discussion, it should be clear that Brussels was not an adequate spiritual orientation (Part IV, Ch. 1, pp. 222f.).

General Assembly and Council. This system of conferences was combined with several international Administrative Bureaus and a Secretariat.

A. The Case of Ethiopia

The political significance of such a combination was a certain means of control and management that two leading European Great Powers, England and France, exercised over smaller and medium-size European states. This permitted the possibility of common action among the leading powers, which, on propitious occasions, amounted to an alliance. We often have had occasion to say that the meaning of all international law is not the abolition, but rather the limitation and bracketing of war, i.e., the avoidance of wars of annihilation. In this respect, the League of Nations was totally helpless. The concept of sanctions jeopardized the non-discriminatory interstate wars of traditional European international law, but in no sense either dissolved or openly rejected them. Consequently, the League refused to address not only the most prominent problem of disarmament, but also the task of a bracketing of war in general. The first and only great test case — the application of economic sanctions in 1935-36 — was not directed against Germany, as France had expected, but against Italy. With these sanctions, all questions of military law remained unanswered. The result was that the state that had been attacked, Ethiopia, a League member, was defeated, subjugated, and annexed by the aggressor, Italy, also a League member. On July 4, 1936, the sanctions were lifted by a League resolution. Several League members recognized the annexation in all forms.

England signed a treaty with Italy on April 16, 1938, not only to recognize the annexation, but also to use her influence at the next Council meeting to clear the way for other members to do so. This meeting occurred on May 12, 1938. The English Foreign Minister, Lord Halifax, made it clear that every member had to decide whether or not to recognize the annexation. He emphasized that peace and tranquility were more important than clinging to the abstract principle of non-recognition of annexations by force. Only widely dispersed members — China, Bolivia, the Soviet Union, and New Zealand — opposed him. The majority accepted the English proposal. The Council reached no formal conclusion, but the League president asserted that the great majority of members had left the decision about recognizing the annexation to the League's individual members. Yet, Ethiopia remained in the League. The true decision was made only during World War II, but not by the League of Nations, which had ceased to exist.

An extraordinary league! Perhaps, in the case of Ethiopia, subconsciously the distinction of traditional European international law was at work, i.e., in the fact that war on non-European soil fell outside its order and that Africa was considered to be colonial territory. Nevertheless, all the many internal impossibilities of a contradictory structure of this kind had their roots in international legal disorder, which is unavoidable when the structure of a spatial order becomes unclear and the concept of war is destroyed. Instead of bracketing war, a net of intentionally vague, formal compromises and cautiously worded stylized norms was assembled, and, in turn, was subjected to an ostensibly purely juridical interpretation. Whereas the *respublica Christiana* of the European Middle Ages had comprised a true spatial order, the League of Nations from 1919 to 1939 was a typical example of the fact that no comprehensive order of international law can be founded without a clear concept of a spatial *nomos*. No system of norms so laboriously conceived and interpreted can replace this need. The failures of the League's institutions and methods cannot be explained by the inadequacy of jurists, although this served to intensify the dominant normative industry and to produce an illusory science of international law. But, given their concept of jurisprudence, which was called positivism, in general jurists could be only auxiliary agents of secondary importance, and the well-known lament "that one only calls upon jurists for opinions that affirm the thinking of those in political power" was not surprising. The essential cause of the failure of the League was that it lacked any decision with respect to, or even any idea of a spatial order. It wanted to be simultaneously a European order and a universal and global order. It was specifically European, insofar as the defeated countries of World War I — two European, even Central European Great Powers — had to pay the price of the new land-division. It was specifically universal and global, insofar as the originators and inaugurators of the idea behind it were the American President and, in a completely different sense, the British Empire with its worldwide dominions and maritime interests. Owing to this thoroughly multilateral universalism, the most important and decisive question of contemporary international law remained unanswered.

B. The Lack of Any Spatial Order

The development of the planet finally had reached a clear dilemma between universalism and pluralism, monopoly and polypoly. The question was whether the planet was mature enough for a global monopoly of a single power or whether a pluralism of coexisting *Großräume*, spheres of

interest, and cultural spheres would determine the new international law of the earth. Political economists had discussed the question since the turn of the century.[3] Among the great jurists, it was Maurice Hauriou who, in 1910, clearly and wisely had broached the idea of a federally united *Großraum.*[4] But the dominant idea in Geneva was the ideological call for an uncritical universalism of public opinion, which determined the structure of the League when it began and which ultimately destroyed it. From all sides, the spatial structure of Europe was the center of attention: politically, as the *Balkanization* of Europe; economically, as the question of war debts, reparations, protective tariffs, and the currency problem; and philosophically, as the question of pluralism. But the powers that determined the mood in Geneva allowed at most a cautiously worded discussion, rather than a serious debate of ideas. Universalism remained the Geneva dogma and the Geneva creed. To be sure, Briand's plan for a "European Union" was discussed in 1929-30. However, it was observed with envy that the discussion had occurred within the framework of League conference matters; and it was the delegates of Paraguay and Uruguay, as well as an Indian Maharajah, who advised Europe on the unity of the earth. Precisely this position of non-European states demonstrated that, together with the external framework of the League and its commitment to universal ideas, there also were internal limits to the handling of this question.[5]

Given this lack of decision with respect to the basic question of spatial

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3. See Part IV, Ch. 2, p. 234n.

4. Hauriou showed that political institutions tended to become a "state" when they integrated a market, and that city-states developed into territorial states with the enlargement of the market. The question of the further development, which we now are experiencing, he answers this way: "L'idéal du commerce serait qu'il n'y eût qu'une seule institution politique et un seul marché; alors toutes les barrières artificielles seraient supprimées, tout serait simplifié, parce que tout serait unifié. A défaut de l'Etat universel qui est une chimère l'Etat fédéral est déjà une réalisation satisfaisante, parce qu'à l'intérieur de ses frontières, dans un espace généralement vaste, le commerce s'ébat en liberté." [Tr. "The ideal of commerce would be a situation where there is only one political institution and only one market; then all artificial barriers would be deleted and everything would be simplified because everything would be unified. In the absence of the universal state, which is a chimera, the federal state is already a satisfying solution, because within its borders, in a generally vast space, commerce flourishes."] See the reference to Léon Clément Colson, *Cours d'économie politique, professé l'Ecole polytechnique et l'Ecole nationale des ponts et chaussées*, Edition définitive revue et considérablement augmentée (Paris: Gauthier-Villars, 1910-1933), in Maurice Hauriou, i.e., Jean Claude Eugène Maurice, *Principes de droit public à l'usage des étudiants en licence (3e année) et en doctorat des sciences politiques* (Paris: L. Larose & L. Tenin, 1910), 2nd ed. (1916).

5. Especially *Actes de l'Assemblée* (supplement to the official journal) 1930, Séances Plénières.

order, the League was unable to develop an internally consistent and unifying principle of the territorial *status quo*. Juridically speaking, it did not once presuppose a clear *interdictum uti possidetis* [prohibition of change of possession], i.e., in principle it did not adopt a provisional guarantee of property. Every legal system, every unity of order and orientation requires some concept of property guarantees, of *status quo* and *uti possidetis*. The Geneva institution also appeared to guarantee the territorial integrity of each member — a guarantee specified in Art. 10 of the League Covenant.[6] Yet other, not formally recognized, but nevertheless very effective principles, such as the right of free self-determination of peoples, stood in the way of the legitimacy of this territorial *status quo*, and essentially jeopardized its unproblematic and unequivocal nature. Moreover, a procedure for investigating international situations endangering the peace was foreseen in Art. 19 of the Covenant. It was formulated very cautiously, but contained no concrete principle of allocation. The essential difficulty, however, lay still deeper, and concerned the question of what the *status quo* should be.

The League of Nations was unable to be a universal world order, because both modern spatial powers — the Soviet Union and the United States — were absent. The first fundamental contradiction in the League's formal concept of space lay in the fact that the two leading European powers — England and France — had completely different concepts of the *status quo* of Europe and of the world. Moreover, these concepts were so radically contradictory that neither the factual situation in 1919 nor the new state borders of Europe ever were guaranteed. Consequently, the League Covenant contained no true property guarantees, or even harbingers thereof. The *status quo* that England envisioned was an empire upon which the sun never set. It presupposed English domination of the world's oceans — the freedom of the sea, as interpreted by the English — and, above all, security of the seaways crucial to such a maritime global empire. This worldwide, sea-oriented concept of the *status quo* of the earth allowed for considerable latitude with respect to state borders and property relations on the European continent. Thus, in retrospect, European territorial questions could be interpreted very elastically, and wide-ranging attempts at territorial revisions could be tolerated. By sharp contrast, France's concept of the *status quo* was directed precisely at the stipulation of continental-European territorial

6. [Tr. "The Covenant of the League of Nations, with a Commentary Thereon," in *The League of Nations Starts: An Outline by its Organisers* (London: MacMillan and Co. Ltd., 1920), p. 217.]

divisions and at the territorial borders established in 1919.[7] In comparison with the worldwide, essentially maritime orientation of the other leading power, France's horizon was spatially narrow. It was not elastic with respect to territorial aspirations in Europe. Basically, it had a different spatial structure. The juridical logic of France's typically terrestrial and continental concept of the European *status quo* signified something completely different from and antithetical to the practical views and conclusions that must have appeared to be thoroughly legitimate from England's global and maritime perspective.

C. No Bracketing of War

The ambiguous and internally irreconcilable nature of this peculiar League's basic concept of space was evident also in its concept of war. On the one hand, the League remained committed to the interstate, military war of traditional European international law; on the other, it sought, by means of economic and financial pressures, to introduce new means of compulsion and sanction, whereby the non-discriminatory war of interstate international law, and with it the former right of neutrality, would be destroyed.

At this point, two facts should be remembered: first, international law sought to prevent wars of annihilation, i.e., to the extent that war is inevitable, to bracket it; and second, any abolition of war without true bracketing resulted only in new, perhaps even worse types of war, such as reversions to civil war and other types of wars of annihilation. In Geneva, however, there was much talk about the proscription and abolition of war, but none about a spatial bracketing of war. On the contrary, the destruction of neutrality led to the spatial chaos of a global world war and to the dissolution of "peace" into ideological demands for intervention lacking any spatial concreteness or structure. All efforts to bring about a reliable pact for general and mutual assistance, for *assistance mutuelle*, were ineffectual, and even when such a pact had been agreed upon and ratified, it was unable to redress the fundamental lack of a concrete spatial order and a clear concept of war. In like manner, the vigorous attempt to make aggression a crime in international law, to make it a *crime international*, came to naught.[8] The particularities by which juridical acumen sought to determine the specific

7. This already was clear in 1925. See my article titled "Der status quo und der Friede," in *Hochland* (October, 1925), republished in Schmitt, *Positionen und Begriffe*, *op. cit.*, pp. 33-42.

8. I already have discussed the spiritual origin of this idea in another context. See the section on Vitoria in Part II, Ch. 2, pp. 117ff.

facts of the case of aggression were unable to alter the hopelessness of the endeavor. The transformation of the meaning of war will be examined more closely in the following chapter.

D. Peaceful Change/Neutralizations

We need not dwell on all the great problems that have been treated at length. But it serves our purpose to demonstrate a few practical results of the lack of a spatial order with respect to three questions essential to the League of Nations: the problem of territorial changes, the question of the continuation or non-continuation of permanent neutralizations, and the relation of Europe to the global line of the Western Hemisphere. These three, specifically European questions are worthy of at least a few remarks. Our purpose is neither to rummage through the refuse of past history, nor to take cheap shots at some other unsuccessful attempts, but rather to provide a proper perspective for understanding the consequences for international law of a type of normative thinking lacking any concept of order or space.

1. As we have seen, owing to the lack of a new spatial order, the inescapable viewpoint of the contemporary property situation, of the territorial *status quo*, did not even contain a legal principle. One was compelled to abide by the mere fact of the given *status quo*. This led to endless internal discussions of the method of territorial changes, but never to a decision. Thus, territorial changes proceeded under the rubric of "peaceful change." In this respect, the 10th meeting of the Permanent Conference of Advanced International Studies in Paris (1937) produced an enormous amount of material.[9] But, in reality, not much came of the almost 700 published pages of reports and discussions. A tug of war ensued between a pliable revisionism, espoused as cautiously as it was superficially by the English, and a rigid anti-revisionism, which strongly buttressed French security needs. The core question of the spatial structure of international law — the alternative of a plurality of *Großräume* or the global spatial unity of one world order, the great antithesis of world politics, namely the antithesis of a centrally ruled world and a balanced spatial order, of universalism and pluralism, monopoly or polypoly — was outside the purview of any peaceful change discussions. Only the American participant, Quincy Wright, made a few allusions to transformations and redivisions, which were consistent

9. Cf. *Le Problème des changements pacifiques dans les relations internationales. Xème Session de la Conférence Permanente des Hautes Etudes Internationales* (Paris: L'Institut International de Coopération Intellectuelle, Société des Nations, 1938), with an especially instructive methodological introductory report by Maurice Bourquin.

with a modern global claim. As Wright cogently observed, economic fluctuations and transfers of gold or of industries and manpower are far more interesting than are transfers of territory. By contrast, the zealous participants in the discussion — the European states, above all, Rumania and Hungary — obstinately remained committed, on the one hand, to the slogan of a naïvely supposed *status quo*, and, on the other, to the counter-slogan of a revision of this *status quo*, whereby the pseudo-juridical word "revision" revealed the incompleteness of all these arguments.

The sterility of such a discussion is obvious. It finds its simple explanation in the fact that the League as a whole did not contain any concept of a spatial order or even of a unifying principle of the territorial *status quo*; it had no common concept of what the League sanctioned as the *status quo*. Ultimately, it simply sacrificed a League member to the internally fictitious act of the Munich Agreement of September 1938, and in such a way that, by comparison, the division of Poland in the 18th century could have been considered to have been an orderly procedure.[10] In connection with this Munich procedure, one year later, in September 1939, World War II broke out without the League being asked. Nevertheless, in its declaration of September 3, 1939, England referred to its obligations under the Kellogg Pact.

2. This incompleteness, which can be explained by the same lack of a spatial order, brought to the fore the question of permanent *neutralizations* of individual European states. Such neutralizations, which excluded certain areas from becoming possible theaters of war, are characteristic means of bracketing war within a spatial order of international law. Therefore, as long as they do not sink to the level of meaningless fossils, they are a significant expression of the total structure of this international law, which is their guarantee. They are in no sense "abnormal" or "unique." The unusual influence of Swiss and Belgian jurists in the international law of this epoch reflects much more a true reality. The permanent neutrality of Switzerland, guaranteed by the European powers in Art. 74 of the concluding act of the Congress of Vienna on November 20, 1815 and by the Swiss expressions of thanks, constituted an essential

10. In its note of August 5, 1942, the British government, with reference to earlier explanations according to which Germany had torn to shreds the Munich Agreement, said that the legal position of the president and government of the Czechoslovak Republic was identical to that of other allied heads of state and government. That is a symptomatic return to a *status quo ante* (namely before Munich 1938); all the more remarkable is that, precisely for the territorial side of the matter, a proviso was made that kept changes open. As a result of lines that were drawn during the Second World War in Yalta and Moscow, Czechoslovakia fell to the eastern *Großraum*.

component of European international law for the entire 19th century. The fact that the permanent neutrality of Switzerland (not, however, the often guaranteed neutrality of the papal church-state) endured is part and parcel of the character and fate of the *jus publicum Europaeum.* In the second half of the 19th century, two new nation-states — Italy and Germany — arose as new European Great Powers on the borders of Switzerland. The structural significance of Swiss neutrality was strengthened thereby, because it became an expression of international recognition that the territorial change that had occurred with the origin of both new Great Powers had not destroyed the spatial structure of European international law.

E. The Neutrality of Switzerland

The Paris Peace Conference of 1918-19 expressly confirmed the agreements of 1815 and permanent Swiss neutrality (in Art. 435 of the Versailles Treaty). Thereby, it simultaneously confirmed the very spatial order of Europe that it had destroyed. The contradiction was obvious, but, given the mood of that time, it was not perceived. To be sure, the same contradiction became even more obvious as a result of the dominant pacifistic ideologies and in view of the transformation of the concept of war. The League of Nations law to prevent war claimed to distinguish between the qualifications for allowing or disallowing war and the justice or injustice of war among warring states in international law. The concept of neutrality of traditional interstate international law, based on the complete *aequalitas* of both sides as *justi hostes*, was negated thereby. Nevertheless, permanently neutralized Switzerland was allowed to remain a full League member and even was allowed, as was every other member, to participate in decisive considerations and resolutions aimed at disqualifying and discriminating against other League members.

An attempt was made to reconcile this internal contradiction when the League Council, in the London Declaration of February 13, 1920, recognized the "unique and peculiar situation," the *situation unique,* of Switzerland. Repeating the formulation of Art. 435, guarantees established in favor of Switzerland in the treaties of 1815 were said to constitute "international agreements to the maintenance of peace." In this instance, *peace* was not an abstract concept, but had a concrete meaning in the European spatial order. However, that was ignored. On the contrary, more in line with ideology, it was said that Switzerland's permanent neutrality was incompatible with the League's universal system of war prevention. To solve this contradiction, it was decided that Switzerland would not participate in

military, but only in economic sanctions (Art. 16 of the League Covenant).[11] It is not difficult to recognize that the unique and extraordinary situation of permanent Swiss neutrality was not the presupposition, but rather the consequence of this London declaration, since this abnormal situation had been created by the Versailles Peace Treaty of 1919 and by the League. Had the League succeeded in its economic sanctions, and had it been ready to replace interstate military wars with economic pressures, then participants in such measures would have become as incapable of neutrality as would participants in military actions in a purely military war. Obviously, a true test of this problem never arose; instead, something different occurred. To the same degree that the political powerlessness of the League, i.e., its inability to create a new spatial order and therewith a bracketing of war, became apparent, a remarkable and isolated attempt to restore the traditional neutrality of Switzerland succeeded. On April 29, 1938, the Federal Council of Switzerland presented the League Council with a memorandum stating that, according to an intermediate stage of subtle "differentiations" of neutrality, Switzerland had concluded that, given its perpetual neutrality, it could not participate in any League sanctions, including those to which it was obligated by the declaration of 1920. In so doing, Switzerland returned to *integral* neutrality or, simply put, to the old neutrality. The League Council recognized this memorandum, and declared in a resolution dated May 14, 1938 that Switzerland would not be obligated to participate in the sanctions of Art. 16 of the League Covenant.

This case of a restoration is extraordinarily instructive. It proved that the permanent neutrality of Switzerland was stronger than was the League of Nations. However, that only meant that the Geneva methods had proven to be weak and helpless. In no way did it mean that, together with the return of *integral* Swiss neutrality, the foundation and existential presupposition on which it was based, namely the old spatial order of the *jus publicum Europaeum*, had been restored. In reality, the restoration was apocryphal, because the enduring neutralization of one country could not remain suspended as an isolated and unconditional institution within an empty space.

The fate of the second classical case — that of the neutrality of *Belgium* guaranteed by the Great Powers — can be demonstrated similarly. In 1917, Belgium revoked the 1839 treaties guaranteeing its neutrality. The Versailles Treaty terminated these treaties, calling them "no longer relevant;" Art. 31 of the Versailles Treaty compelled Germany to confirm

11. [Tr. "The Covenant of the League of Nations," in *The League of Nations Starts*, *op. cit.*, p. 220.]

this termination, and to recognize the new situation of a no longer neutral Belgium. But here, too, paralleling the intensifying League crisis was a remarkable attempt to restore the old neutrality. Belgium declared (on October 14, 1936) its return to voluntary neutrality. France and England absolved Belgium of its responsibilities, but held firm to their own responsibilities of assistance to Belgium (April 24, 1937). For its part, Germany absolved itself of its guarantee of neutrality (on October 13, 1937). The relation of all these declarations and guarantees to the rights and obligations that Belgium had as a League member remained unclear under many provisos. Nevertheless, it is obvious that the idea of an enduring assurance of neutrality for certain European countries in the sense of the 19th century still was stronger than was the League's alleged new order of the earth. However, also in Belgium's case, unfortunately it was not said that the return to neutralization signalled a return of all Europe to its old spatial order and a restoration of the old *jus publicum Europaeum.*

F. The League of Nations and the Western Hemisphere

3. Such a restoration would not have been easy or simple. In reality, the problem of the relation between the League and Europe was the problem of the relation between the League and the Western Hemisphere. In turn, owing to the overwhelming economic and political power of the United States, this problem was, above all, the relation between the League and the United States. In this respect, legal positivism was not the issue. The United States had refused to ratify the Versailles Treaty; it had concluded a special peace with Germany on August 25, 1921, and had not joined the League. Even the League's efforts to have the United States at least participate in the International Court of Justice in the Hague had not succeeded. Thus, the United States, in all forms and apparently in an especially decisive way, remained *absent* from Geneva. But, as regards other European questions, it was *present* in Geneva in an immediate and, thus, no less effective and intense way. This resulted in a peculiar mixture of official absence and effective presence, which characterized the relation of the United States to the League and to Europe. We now must consider this situation in order to understand the spatial disorder from 1919 to 1939.

Numerous Western Hemisphere states were League members. For various reasons and in many respects, these states were considered to be "sovereign." But they were dependent on, and their foreign policies were controlled by the United States. States such as Cuba, Haiti, Santo Domingo, Panama, and Nicaragua were members of the League and occasionally also

of its Council. However, not only were they economically and effectively dependent on the United States, but they were located within the spatial and political sphere of the Monroe Doctrine and the so-called Caribbean Doctrine. In their foreign policies as well, they were bound to the United States by formal treaties. Treaties, such as the one the United States concluded with Cuba on May 22, 1903, or with Panama on November 18, 1903, are typical of the modern form of control, whose first characteristic is renunciation of open territorial annexation of the controlled state. The territorial status of the controlled state is not changed if its territory is transformed by the controlling state. However, the controlled state's territory is absorbed into the spatial sphere of the controlling state and its special interests, i.e., into its spatial sovereignty. The external, emptied space of the controlled state's territorial sovereignty remains inviolate, but the material content of this sovereignty is changed by the guarantees of the controlling power's economic *Großraum.*

This is how the modern type of intervention treaties in international law came about. Political control and domination were based on intervention, while the territorial *status quo* remained guaranteed. The controlling state had the right to protect independence or private property, the maintenance of order and security, and the preservation of the legitimacy or legality of a government. Simultaneously, on other grounds, it was free, at its own discretion, to interfere in the affairs of the controlled state. Its right of intervention was secured by footholds, naval bases, refueling stations, military and administrative outposts, and other forms of cooperation, both internal and external. The controlling state's right of intervention was recognized in treaties and agreements, so that, in a strictly legal sense, it was possible to claim that this was no longer intervention.

The significance of this new procedure was the fact that it destroyed the order and orientation that had obtained in the previous form of sovereign territory. This was obvious in all the characteristic details of the new methods of domination and control. Territorial sovereignty was transformed into an empty space for socio-economic processes. The external territorial form with its linear boundaries was guaranteed, but not its substance, i.e., not the social and economic content of territorial integrity. The space of economic power determined the sphere of international law. A state whose freedom of action is determined by rights of intervention is very different from a state whose territorial sovereignty consists of its power to make its own sovereign decisions about the concrete realization of such concepts as independence, public order, legality, and legitimacy,

or a state whose territorial sovereignty lies in its freedom even to decide on its constitution of property and economy, or is free to realize the maxim *cujus regio, ejus economia.* The above-mentioned [Caribbean and Central] American states belonged to the spatial order of the Western Hemisphere presupposed in the Monroe Doctrine and, according to the system of treaties binding them in international law, also to the United States' sphere of *spatial sovereignty.* Nevertheless, if they also were League members, this meant that, in addition to the worldwide, specifically spatial system of the British Empire, they belonged to a second, closed *Großraum* system that had arisen within the structure of the Geneva organization, although obviously in a special and unique way. In other words, several controlled states were present in Geneva as sovereign and equal members, while the controlling sovereign power was absent.

G. The League of Nations and the Monroe Doctrine

Thus, Europe was overshadowed by the Western Hemisphere. But the League had subjugated itself from the outset. It had retreated before the Monroe Doctrine in Art. 21 of the League Charter, which states that the Monroe Doctrine, as an *entente régionale* assuring the maintenance of peace, is "not incompatible" with the League Charter. The history of the origin of this declaration is of great significance in the present context. Of the many, often mentioned details, the following facts are especially noteworthy. First, the deliberations of the League Committee at the Paris Peace Conference were discontinued from February 13 to March 22, 1919, because President Wilson returned to Washington to learn about American political sentiment. There, he became convinced that the isolationist movement had become much stronger and that the Senate would adhere to the explicit proviso of the Monroe Doctrine. As a result, when Wilson returned to Paris he insisted that this proviso be included in the text of the League Charter. French politicians were depending on American help in Europe; they saw in the League only a substitute for an American guarantee or an alliance. So when Wilson declared, in a few guarded words, that the United States would not join the League without the explicit Monroe Doctrine proviso, the French representatives withdrew their objection. However, Wilson did not stop there. He spelled out the practical political significance of the Monroe Doctrine and claimed, for example, that it forbade the League from interfering in American affairs.

In response to Wilson's demand that explicit recognition of the Monroe Doctrine be included in the League Charter, a prominent French jurist

of international law, Ferdinand Larnaude, posed a few relevant questions about the Monroe Doctrine. He was concerned in particular that, based on the Monroe Doctrine, the United States would refuse to intervene in European affairs (and thereby would not provide effective protection for France). Such questions called attention to Wilson's difficult situation. He vacillated between the traditional [American] doctrine of isolation of the Western Hemisphere and his own goal of a universal League of World Peace. This dilemma of isolation and intervention, whose deeper meaning we will examine below, ultimately made Wilson despondent. The reason was that in Paris, owing to misunderstood assurances about the Monroe Doctrine, he had been forced to insist upon explicit recognition of the Monroe Doctrine in the League Charter. Without such recognition, as said before, the United States would not join the League. Thus, the explicit Monroe Doctrine proviso was incorporated into the League Charter (Art. 21). Thereby, this proviso constituted a symbol of the Western Hemisphere's triumph over Europe. Nevertheless, the United States Senate refused to ratify both the Versailles Peace Treaty and the League Covenant, and the United States did not join the League of Nations. In this way, the participants in Geneva abandoned the idea of a reciprocity of continents or hemispheres. They withdrew from the Western Hemisphere without clarifying which spatial principle the League would build upon. Thus, the superiority of American principles of spatial order and the special, even paramount position of the American continent were stated solemnly in the League's Charter. Simultaneously, the League renounced its own spatial system, which was neither specifically European nor consistently global. In so doing, it also renounced a clear spatial order.

The practical significance of Art. 21 of the League Charter becomes clear only in light of the history of its origin. Once the priority of the Monroe Doctrine — the traditional principle of Western Hemisphere isolation, with its wide-ranging interpretations — was asserted in Geneva, the League abandoned any serious attempt to solve the most important problem, namely the relation between Europe and the Western Hemisphere. Of course, the practical interpretation of the ambiguous Monroe Doctrine — its application in concrete cases, its determination of war and peace, its consequences for the question of inter-allied debts and the problem of reparations — was left solely to the United States. The League thus lacked jurisdiction or authority to deal with relations between Western Hemisphere states or even between a European state and one in the American spatial sphere. Despite occasional concern with the affairs of Western Hemisphere states,

it was crippled in this respect, and limped along, whereas the rights of Western Hemisphere member states remained the same as those of other, particularly European member states. Whereas the Monroe Doctrine forbade any League influence in American affairs, the League's role in European affairs, for example with respect to plans for a European Union (1929-30) or a Customs Union between Germany and Austria (1931), was co-determined by these American member states. Consequently, while the League was absent in America, eighteen Western Hemisphere states were present in Geneva. The leading Western Hemisphere power, the United States, was not present officially. But, since the Monroe Doctrine had been recognized and other Western Hemisphere states were present, in reality it was impossible for the United States to be absent completely.

H. Separation of Politics and Economics

Such a mixture of official absence and effective presence caused jurists, who only concern themselves with official matters, to disregard a great problem. In general, however, this mixture was not an irrelevant contingency, and could not be dismissed as a matter of President Wilson's personal peculiarities or for some similar peripheral reason. The key to understanding this mixture lies in the separation of politics and economics that the United States claimed and that Europe acknowledged. This separation appeared to express the famous, traditional, and typical maxim: as much trade as possible, as little politics as possible. Internally, that meant the domination of an economy free of the state and, in the same sense, of a free society over the state. Externally, it did not constitute a rejection of customs duties, protectionism, and economic autonomy (United States foreign policy was characterized more by a highly protectionist customs policy). Rather, it constituted an indirect method of exerting political influence. The most important characteristic of this influence was that it was based on free trade, i.e., on trade free of the state, on an equally free market as the constitutional standard of international law, and on ignoring political territorial borders by utilizing such devices as the "open door" and "most favored nation." Thus, in the sense of the separation of politics and economics, official absence meant only *political* absence, while unofficial presence meant an extraordinarily effective — economic — presence and, if need be, also political control. Until today, the separation of politics and economics is considered by many French, English, and American theoreticians to be the last word in human progress, and to be the criterion of the modern state and civilization. But, in reality, given the primacy of the economic motive, it only intensified the disorder occasioned by the

unsolved problem of the spatial order of the earth.[12] This impenetrable tangle was an outgrowth of the discussion about *political* debts. Here, too, it became clear that the significance that the maxim *cujus regio, ejus religio* had had for international law in the 16th and 17th centuries had become *cujus regio, ejus economia*, but obviously with new proportions and dimensions that *regio* had assumed in the industrial-technical age.

Numerous examples of the further development of the problem of European debts and reparations between 1924 and 1933 are relevant to our discussion, but they need not be elaborated on here. The depoliticization and commercialization of the debt problem in the deliberations of the Hague conferences of 1929 and 1930, the so-called Young Plan (1929), only confirmed, but did not change this view. The Young Plan removed foreign controls and, with them, the symptomatic and symbolic figure of a co-controlling citizen of the United States. But it made Germany responsible for full payment in foreign currency. It also distinguished, without expressly saying so, between what Germany should continue paying to America and an unconditional amount in foreign currency (660 million Reichsmark yearly). The United States did not participate, at least not officially, in the Bank for International Exchange in Basel that was founded on the basis of the Young Plan. But there, too, it was unofficially present, namely through two private American bankers, while the European countries were represented by the presidents of their issuing banks. Given the European situation, it was taken for granted that the important postwar economic questions — reparations and inter-allied debts — could not be regulated without the United States. Given the significance of the Monroe Doctrine and the United States' strong tendency to isolation, it was obvious that, in principle, the United States sought to avoid any interference in European political affairs. As said before, that appeared to be consistent with the old maxim: as much trade as possible, as little politics as possible.

Trade in the style of the 18th century was very different from *economy*

12. Cf. the chapter titled "Political Government and the Economic Order," in R. M. MacIver, *The Modern State* (Oxford: The Clarendon Press, 1926), pp. 291-316. He refers to an English sentiment, to which he gives such a central place that I must quote it here in the original: "The expansion of England in the seventeenth century was an expansion of society and not of State." And when, in the 18th century, the state wanted to exert pressure on the expanding society in America, a federation of new states arose. So said George Unwin in the introduction to a book by Conrad Gill that appeared during World War I, *National Power and Prosperity: A Study of the Economic Causes of Modern Warfare* (London: T. F. Unwin, Ltd., 1916). The most important juridical presentation of this *équilibre politico-économique* is in Chapter VII of Hauriou, *Principes de droit public*, *op. cit.*, pp. 269ff. On the political and economic centralization of the nation, see the 2nd ed. (1916), pp. 303 and 343ff.

in the age of industrialism and modern technology. Nevertheless, effective economic primacy gave the United States great discretion, and the separation of the political from the economic allowed the United States perhaps more advantage and leeway to exercise a voluntary politics in all directions. Fully possessing such benefits, America was able to adopt a discretionary view of the inter-European struggle over the *status quo* or the revision of territorial borders — as long as this struggle remained purely economic and did not become political. But separation of the economic from the political soon proved to be precarious, given Europe's actual situation. All postwar economic questions, in particular those concerning inter-allied debts, had an inevitable and immediate political significance, and the United States' discretionary power with respect to economic matters was only an indication that its economic power immediately could be turned into political power. Thus, America's political absence definitely was a factor in the uncertainty. The United States decided that the war of 1914-18 was the "First World War," while in Europe's view it was a completely Eurocentric war. Moreover, the United States assumed the role of arbiter in the numerous conferences between the victors and the vanquished. Therefore, its characteristic joining of absence and presence developed from the various methods of both its economic and political participation and influence. While its economic presence did not need to be any more effective or intensive than necessary, its political absence was unable to hinder the political repercussions of its economic presence.

I. The Spatial Chaos of the League of Nations

From the standpoint of spatial order, the question posed regarding the relation between the League of Nations and Europe now can be answered to an extent, if we again focus on the territorial problem. Jurists considered territorial questions to be *eo ipso* political and, thus, not juridical.[13] But this was true not only of jurists; economists considered these questions to be non-economic and the experts in commerce considered them to be non-commercial. Consequently, without further ado, the United States was able to exclude these questions from its official view. Nevertheless, these questions were not some *domaine réservé*, i.e., some matters that could be dismissed as purely internal to Europe. And this impeded the League of Nations, which was not a European, but a universal organization. However, the League's universalism

13. Dietrich Schindler, "Die Schiedsgerichtsbarkeit seit 1914: Entwicklung und heutiger Stand," in *Handbuch des Völkerrechts*, ed. by Gustav A. Walz, Vol. V, Part 3 (Stuttgart: W. Kohlhammer, 1938), pp. 98ff. "In the case of drawing borders, i.e., the adjudication of territory, the court has to solve a non-juridical task."

consisted essentially of the fact that European questions were not answered by Europe. Where the League should have functioned as the arbiter of fundamental European problems, it stood in the shadow of the leading Western Hemisphere power. In 1930, when this shadow fell on Europe, it was sufficient to transform all plans for a European Union into empty discourse.

The results of this spatial chaos were obvious. The general problem of a spatial order of Europe was perceived and discussed. But where could a solution be found to the rigidity of proponents and opponents of the *status quo*? Where could reason find a refuge? In particular, what justice and fairness could the vanquished expect? They could rely neither on the former European Great Powers, France and England, nor on the League of Nations, nor on the United States. France, the then leading power of the European continent, was bogged down in its own security concerns with the *status quo* of territorial borders set in 1919. England remained *of Europe*, but not *in Europe*. The League, as we have seen, was not in a position to create a spatial order. It did not even have a clear concept of a definite *status quo*. Moreover, by recognizing the Monroe Doctrine, the League had subjected itself to ideas of spatial order emanating from the Western Hemisphere. These ideas, as I will demonstrate, lacked any power to create internal order in Europe, because the United States put a high value on remaining politically absent, and held officially to the isolation line of the Western Hemisphere.

On the one hand, this line created no new *nomos* of the earth, but on the other, this line no longer abided by the old *nomos* of European international law. Given that it separated politics and economics in an age of intense industrialism, this line complicated the problem of spatial order in international law and, ultimately, confused the binding maxims *cujus regio, ejus economia* and *cujus economia, ejus regio*. The United States believed it could turn the political into an external facade of territorial borders, that it could transcend territorial borders with the essential content of the economic. But, in a decisive moment, it was unable to prevent the political grouping of friend and enemy from becoming critical. It was helpless with respect to efforts to achieve the monopoly of global peace sought by the stronger world powers in the West and in the East. The League of Nations submitted itself to both West and East — to the American Kellogg Pact of 1928 and to Soviet aims in 1933 and 1936, i.e., as much to the solemn abolition of war as to the introduction of just war through definitions of aggression. Both West and East sought to accommodate themselves to the League Charter. But war and peace took their own course over West and East.

Chapter 4

Transformation of the Meaning of War

The First World War began in August 1914 as a European state war in the old style. The warring powers mutually considered themselves to be equally legitimate and sovereign states. They were recognized as such in international law, and were *justi hostes* in the sense of the *jus publicum Europaeum*. *Aggression* was not yet a juridical concept of traditional European international law. At the start of the war, the formal declaration of war was regulated by the Third Hague Agreement of 1907 as a preliminary, unequivocal, and motivated proclamation. It was not an act of aggression in any incriminatory or discriminatory sense. On the contrary, it was a proper act and expression of war in form.[1] The declaration of war was based on the desire for juridical form, and on the premise that there is no third party in matters of war and peace: *Tertium non datur*. In the interest of belligerents and neutrals, and in order to avoid the intermediate situation of what today is called "cold war," international law clearly distinguished between two distinct *statuses*.

But soon after the war began, the first signs of a transformation of war became evident. From the Belgian side, a distinction between just and unjust war was made with reference to violation of Belgium's neutrality, and with the goal of condemning Germany, which militarily had occupied the greater part of Belgian soil for four long years, and of denying the position of such an occupying power in international law.[2] Above all, however, the peace treaties that ended World War I contained

1. On war in form, cf. Part III, Ch. 2, pp. 152ff.

2. See Ch. de Visscher's June 28, 1916 lecture, "De la belligérance dans ses rapports avec la violation de la neutralité," in *The Grotius Society*, Vol. II, *Problems of the War* (London: Sweet & Maxwell, 1917), p. 102: "Cette égalité juridique, qui existe entre belligérants ordinaires dans le cas de guerre *régulière*, se trouve exclue ici en raison du caractère *injuste* de l'agression." [Tr. This juridical equality, which exists between ordinary belligerents in a *regular* war, is excluded here because of the *unjust* character of aggression.]

a series of features that pointed to a transformation. This is true especially of the Versailles Treaty. Since it still was concerned with specifically European developments, we should focus on a few more of its characteristics. For this same reason, namely that European powers still were in the forefront, we should give special consideration to the so-called Geneva Protocol of October 2, 1924.[3]

A. The Versailles Treaty (1919)

Two Versailles Treaty articles contained significant signs of a new concept of war, in that they deviated from traditional European international law: Art. 227, which indicted the former Kaiser, Wilhelm II; and Art. 231, the so-called war guilt article. In their positive contractual regulations, both articles referred only to World War I. In international law, however, they must be considered to be a symptom of, if not a precedent for a conceptual change. Historically speaking, Art. 228 should be considered together with Art. 227, although the former deals exclusively with war crimes in the *old* sense, whereas the latter already contains a new type of war that is considered to be a crime.

Today, the term "war crimes" signifies a number of circumstances that individually are distinct, not only superficially and in particulars, but in their legal structure. The difference between them not only is theoretical. Practically speaking, this difference immediately becomes extremely significant when it involves legal enforcement and preparation of a case for trial. Then, the difference in the legal content of the circumstances becomes relevant both in the particulars and in questions of substantive law: What are the facts of the crime? Who is the criminal? Who are the collaborators, assistants, and accessories after the fact? This is true as well of procedural questions: Who is the plaintiff? Who is the defendant? Who is the judge? What is the court? In whose name is the judgment rendered?

B. War Crimes in the Old Sense (Art. 228 of the Versailles Treaty)

War between states that mutually recognize each other as sovereign

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3. [Tr. It is unknown what sources Schmitt used for his discussion of the Geneva Protocol. For general reference, see: P. J. Noel Baker, *The Geneva Protocol for the Pacific Settlement of International Disputes* (London: P. S. King & Son, Ltd., 1925); Roth Williams, *The League, the Protocol, and the Empire* (London: George Allen & Unwin, 1925); David Hunter, *The Geneva Protocol* (New York: The Macmillan Company, 1925); Quincy Wright, *Significance to America of the Geneva Protocol* (Chicago: Chicago Council on Foreign Relations, 1925); and Hans Wehberg, *Das Geneva Protokoll betr. die friedliche Erledigung internationaler Streitigkeiten* (Berlin: Verlag Georg Stilke, 1927).]

and that practice *jus belli* with respect to each other cannot be a crime, at least not in the criminal sense of the word. As long as the concept of *justus hostis* is in effect, war between states cannot be criminalized, and the term "war crimes" cannot mean that war as such is a crime. Thus, the transformation described below does not mean the criminalization *of* war, but something essentially different. In classical European international law, "war crimes" specifically refers to crimes committed *during* hostilities, primarily by members of the forces of a belligerent state. War crimes are offences against law in war, of *jus in bello*, such as violations of the Hague Land War Convention, of the norms of maritime law, of the law relating to prisoners of war, etc. These norms presuppose that war is permitted, and that both sides are equally just. If war as such is outlawed or becomes a crime, these norms must change fundamentally.

There is no difficulty in defining this old type of war crimes, because their special nature immediately is recognizable. When one spoke of war crimes before 1914, only this type of offenses was meant. Such war crimes were recognized and discussed in criminal trials, in the military instructions of belligerent states, and in the literature of international law, even as were retrospective presuppositions of legal procedures, such as reprisals, liabilities of states, and criminal responsibility of perpetrators *vis-à-vis* one's own state and the enemy state. The same is true of the significance of military command as a basis for a defense or a pardon of this crime.[4]

Articles 228-230 of the Versailles Treaty (Art. 173 of the Treaty of Saint-Germain, corresponding to the other suburban Paris treaties) are concerned with this type of war crimes, i.e., crimes in the sense of violations of *jus in bello*. However, at least in one important respect these peace treaties contained an innovation in terms of the international law that governed before 1914, namely that the vanquished state was obligated to turn over to the enemy state its *own* citizens who committed war crimes. This constituted a serious and fundamental change with respect to a basic legal institution: *amnesty*. Until 1918, amnesty normally was an integral part of a peace treaty, be it explicitly stated or implicitly assumed as an accepted practice of the peace process between two mutually recognized

4. The typical textbook and bibliographic treatment of this question is found in Josef Laurenz Kunz, *Kriegsrecht und Neutralitätsrecht* (Vienna: J. Springer, 1935), pp. 35ff. A remarkable monographic elaboration of this question is Alfred von Verdross, *Die völkerrechtswidrige Kriegshandlung und der Strafanspruch der Staaten* (Berlin: Duncker & Humblot, 1920).

partners.[5] Now, amnesty was destroyed by a discrimination against the vanquished. The change was unmistakable. Yet, despite this anomaly in Arts. 228-230, the *contractual* foundation for the surrender of a state's own citizens was maintained. Also, the maxim *nullum crimen, nulla poena sine lege* [no crime, no penalty without law] remained valid, as did presuppositions of this crime, i.e., acts in violation of the laws and customs of war, and punishments laid down by law.[6]

C. Wilhelm II as a War Criminal

In the Versailles Treaty, Art. 227, directed against the former German Kaiser, Wilhelm II, is located under the heading "Penalties" in Section VII. Here, the qualification of an action as a criminal offense is expressed clearly in the heading, and a criminalization is intended.

Not only the five leading powers, but also the combined associated and allied powers are listed as *plaintiff*, without specifying whether this means a single power, a group of powers, or all the powers together. The former Kaiser is indicted publicly. He is the only *defendant* and, as such, is named: Wilhelm II of Hohenzollern, former German Kaiser. Thus, the Kaiser was made the only defendant of this new type of international crime, despite Chancellor Bethmann-Hollweg's public declaration in 1919 that he assumed full responsibility for his administration (1914-17) and for all official acts performed under the Kaiser. None of those listed as *plaintiff* took this declaration of the constitutionally responsible Chancellor under consideration. This indictment of the new crime of war was limited personally to the head of state.

As regards the *facts of the case* against the defendant, Art. 227 refers to the "supreme offense against international morality and the sanctity of treaties." In addition, however, Art. 227, Sec. 3 says that the court should be guided by the highest motives of international *policy*, not international

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5. William Edward Hall, *A Treatise on International Law*, 8th ed., ed. by Pearce Higgins (Oxford: Clarendon Press, 1924), p. 677; Lassa Oppenheim, *International Law: A Treatise*, 6th ed., ed. by H. Lauterpacht (London and New York: Longmans, Green and Co., 1940), Vol. 2, pp. 476f. (mentions Versailles as a notable exception); Paul Fauchille, *Traité de droit international public*, an extension and expansion of Henry Bonfils, *Manuel de droit international* (Paris: Librairie Rousseau, 1921), 8th ed., Vol. II, §1700, p. 1038; the amnesty article by Alfred von Verdross, in Karl Strupp's *Wörterbuch des Völkerrechts und der Diplomatie* (Berlin and Leipzig: Walter de Gruyter, 1924-1929), Vol. I, §34; Grotius, *De jure belli ac pacis*, *op. cit.*, Vol. III, p. 20, §17.

6. The further course of the punishment of German war criminals of World War I, in particular also the later proceedings of the German Supreme Court in Leipzig, has been described often in recent years and can be presumed to be well-known.

law, because in public consciousness the traditional *law* did not recognize this new crime. Art. 227 also obliges the court to promote respect for the solemn duties of international undertakings. Finally, since the court was to have five officiating judges, each of the allied and associated leading powers, which are not designated as leading powers but are named only individually, was to choose one judge. As regards *procedure*, the Treaty says that the defendant should be given notice assuring him of the guarantees essential to the right of self-defense. As for *punishment*, the Treaty says this should be determined by the court.

In 1919, it was not difficult for Art. 227 to be criticized and to be refuted according to both traditional European international law and criminal law. European international law did not recognize international jurisdiction of one state over another or of one sovereign over another. *Par in parem non habet jurisdictionem*. According to accepted practice, the only legal subject of international law, also with respect to a crime in international law, was the state. Thus, a crime in international law was not a crime in the sense of a state's criminal law. War was conceived of strictly as a relation between states, not between individuals or groups. In international law, war was pursued neither by individuals, nor by heads of state personally, but by the state as such. The enemy was *justus hostis*, i.e., he was distinguished from a criminal.

Art. 227 is not very specific about what this new crime entailed. The guidelines for a judge referred to morality and politics, rather than exclusively to law. The punishment likewise was indefinite and completely at a judge's discretion. Apparently, it was assumed that since the court surely would impose a penalty, the defendant could anticipate the judge's decision. Obviously, the principle *nullum crimen, nulla poena sine lege* had been rejected. By naming a particular individual, Wilhelm II, in this indefinite criminal case and this indefinite threat of penalty, Art. 227 acquired the odium of an all-too-personal law of exception. Thus, it was said that this stance in international law with respect to a criminalization of aggressive war in Europe would have no lasting effect on the legal consciousness of European peoples and governments. The whole matter of this attempt to bring Wilhelm II before an international court for an international crime soon was forgotten by the European public. By 1920, England and France had ceased to pursue the matter.

Since November 1918, Wilhelm II had taken up residence in Holland, a neutral state. The Dutch government refused to honor French and British requests for extradition, arguing that this was forbidden by the international

law of the classical *jus publicum Europaeum*. Neither France nor England pursued the matter. Thus, at least in Europe, the general conviction must have been that any new type of war crime claimed in Art. 227 not only would be unsuccessful, but would become a precedent in the opposite direction.

It was different with respect to public opinion in the United States. At the Paris Peace Conference deliberations, American delegates put the greatest emphasis on the illegality of aggressive war. Obviously, such remarks conflicted with those of other American delegates, who emphasized that war as such had not been disallowed under traditional international law and that war was not an illegal act. The confusion was all the greater since various legal viewpoints, such as the punishment of Wilhelm II, the penalties for violations of the laws of war, and the problem of reparations, gave occasion to speak of war crimes in a general sense.[7]

To begin with, of particular interest are remarks made in the *Commission des responsabilités des auteurs de la guerre*, which also handled issues later codified in Art. 227, i.e., the punishment of Wilhelm II, and in Art. 228, i.e., the punishment of war crimes in the old sense. With reference to the latter, the American delegates, led by Robert Lansing, contrary to the English and French representatives, said unequivocally that it was improper to equate punishment for crimes against humanity with punishment for violations of the laws of war. They referred to the 1865 precedent of Henri Wirz — a case pursued by a military court process in Washington against the commandant of a prison in the South after the War of Secession, which ended in November 1865 with the officer's execution. The American delegates emphasized that for such war crimes, i.e., for violations of *jus in bello* and for their punishment, the principle of *nullum crimen sine lege* must remain inviolable. They also referred to the 1812 precedent of USA vs. Hudson (7 Cranch 32), which held that, before a final judgment could be made, an act must have been designated a punishable crime by the legislative power of the Union and, in addition, that the act must have designated the legislative power of the Union as the proper venue. To the extent that the charges dealt with war crimes in the old sense, the American delegates rejected the new concept of crimes against humanity. "The American delegates, as reported in a statement of these deliberations, know of no written international law and no treaty between states that makes violation of the laws and uses of war a crime in international law subject to the penalties and specifications of a qualified court." The statement said: "As the American delegates more than once

7. As regards the war guilt article (Art. 231), more will be said below.

remarked, war always has been inhuman and still is. But actions in accord with the laws and customs of war are, despite their inhumanity, not subject to a court of law. A court is only concerned with valid law and its application; it leaves transgressions against custom and the treatment of crimes against humanity to a higher judge. The American delegates have the very legitimate feeling that the plan to create an international court of criminal justice is a consideration of no value; there is no precedent for such and it is not consistent with the customs of nations."

These declarations refer *in concreto* not to Art. 227, but to Art. 228. Thus, they do not refer directly to the question of aggressive war as such, but only to war crimes in the old sense. With respect to Art. 227, however, it was precisely the American delegates who demanded that heads of state be punished and that aggressive war be designated a *moral* crime against humanity. The dominant, typical American view in the *Commission des responsabilités des auteurs de la guerre* is found in a passage of the draft dated March 12, 1919, which designated the August 1914 war as unjust and as a war of aggression,[8] to which was appended an important, longer description of the responsibility of heads of state: "The heads of state of the Central Powers, inspired by the desire to acquire the land and sovereign rights of other powers, have confessed to a war of conquest, a war that surpassed all other wars in modern times in its extent, its relentless cruelties and its unbearable suffering. The evidence for this moral crime against humanity is convincing and conclusive. The law, which is inseparable from the feeling of justice, is restrained and even helpless before the nations that have perpetrated such cruelties, unable to use the means of law to punish such crimes. But the originators of this shameful war should not go into history without a stigma. They also should be brought before the court of public opinion and receive the judgment that humanity pronounces against the originators of this greatest of all crimes against the world."

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8. "*Le droit de faire la guerre existe seulement lorsqu'il y a nécessité impérieuse d'employer la force pour la protection de la vie nationale, le maintien du droit national ou la défense de la liberté et de l'humanité. La guerre inspirée par tout autre motif est arbitraire, inutile et s'accomplie en violation de la morale et de la justice internationale. Elle ne peut être justifiée. Jugée d'aprés ce critérium, la guerre commencée en 1914 était injuste et inadmissible. Ce fut une guerre d'agression.*" [Tr. The right to wage war exists only when it is absolutely necessary to employ force in order to protect national life, to maintain national law or to defend freedom or humanity. A war inspired by any other motive is arbitrary, useless, and is pursued in violation of morality and international justice. It cannot be justified. Judged according to this criterion, the war begun in 1914 was unjust and inadmissible. It was a war of aggression.] *La paix de Versailles, Responsabilités des auteurs de la Guerre et Sanctions* (Paris: Les Éditions internationales, 1930), pp. 334-335.

No doubt, in such declarations there is a conscious divergence from the concept of war in traditional international law. The fundamental idea of war between states in European international law, the doctrine of *justus hostis*, was abandoned. Yet, the talk was still not about a general criminalization of aggressive war, but only about a moral crime against humanity, committed only by the heads of state of the Central Powers and nobody else. Moreover, as regards the setting of precedent, remarks by James Brown Scott and Robert Lansing were made in internal discussions and originally were not meant for public consumption. They also were contrary to the position taken by such other American delegates as John Foster Dulles, who stuck to the old concept of war crimes in the question of war guilt.[9] Decisive for the setting of precedent, however, was what ultimately found its way into the peace treaty. In this respect, the position of the United States did not comply with precisely this Part VII of the Versailles Peace Treaty, namely penalties.

As is well-known, the United States did not ratify the Versailles Treaty, but concluded a separate peace treaty with Germany, on August 25, 1921. Art. II of this treaty contains those same parts of the Versailles Treaty enumerating those rights and benefits the United States insisted upon for itself, i.e., Parts V, VI, VIII, IX, etc. But Part VII of the Versailles Treaty, containing Art. 227 and Art. 228 on war crimes, was excluded. It was not made an issue in relations between the United States and Germany in international law. For Germany, then, Part VII also did not set a precedent for these relations, despite what might have been said by American delegates in the *Commission des responsabilités des auteurs de la guerre.*

Obviously, one cannot ignore completely the great diversity of public opinion in the United States. In 1920, the respected American weekly, *The Literary Digest*, sought the opinions of American judges about criminal proceedings against Wilhelm II. Of 328 answers, 106 demanded the death penalty, 137 demanded exile, and 58 demanded imprisonment and other penalties; only 27 opposed a conviction.[10] The antithesis of official behavior, on the one hand, and public opinion, on the other, was unmistakable. What such an antithesis would mean for the crimes of World War II in international law with respect to the principle of *nullum crimen sine lege* is another question that cannot be answered here.

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9. *Ibid.*, pp. 339ff.

10. [Tr. "American Jurists Sentence the Kaiser," in *The Literary Digest* (February 7, 1920), pp. 47-59.]

D. The War Guilt Article of the Versailles Treaty

The war guilt article, Art. 231, was not placed under "Penalties," but under "Reparations." Thus, it was posited more in economic than in criminal-legal terms. It dealt with the financial and economic demands of the victors, which were not war indemnities in the old style, but rather claims for damages, i.e., legal demands that could be derived from the legal responsibility of the vanquished. We need not deal with the war guilt problem as a whole, which has been treated specifically in an enormous amount of publications of all types. Our focus is primarily on the question of whether the Central Powers (as the Entente claimed in its note of January 10, 1917) had pursued an unjust war of aggression, and thus should be held liable for all damages without limits, or whether the legal basis of claims for reparations lay in the fact that Germany, in the autumn of 1918, had received President Wilson's note, in particular Lansing's note of November 5, 1918, and was liable only for reparations mentioned therein.

For the most part, the French delegates based their arguments on civil law constructions. They pointed, for example, to §823 of the German Civil Code,[11] which allowed a claim for liabilities for an illegal act. An Italian based his argument for Germany's liability for its citizens on §830 of the German Civil Code, as liability for a *societas sceleris* (morally bad society). These are examples of the numerous and varied constructions designed to prove that Germany's war was unjust and aggressive. But one cannot say that the transformation of aggressive war into an international crime in the criminal sense was intended. The reproach that the Central Powers had pursued a war of aggression served to widen the scope of reparation obligations and to reject all limitations on reparations for, e.g., the violation of Belgian neutrality or injuries to civilians.

In the deliberations that led to passage of Art. 231, the American representative, John Foster Dulles, insisted that war is not an illegal act in international law.[12] The European legal concept of *justus hostis* still is discernible

11. BGB: *Bürgerliches Gesetzbuch* — the German Civil Law Code of 1900.

12. "Reparations would not be due for all damage caused by a war, unless the war in its totality was an illegal act. This is by no means a conclusion that can be assumed, in view of the fact that international law (see in particular the Hague Conventions) recognizes the right of a nation, in the absence of a treaty engagement to the contrary, to declare and prosecute, in certain defined ways, war against another nation. Further, in the conditions of peace laid down in his address to Congress on January 8, 1918, the President declared that the invaded territories must be restored, as well as evacuated and freed. The Allied Governments felt that there should be no doubt as to what this provision implied. By it, they understood that Germany would pay compensation for all damages done to the Allies' civilian populations and property resulting from *German aggression* by land, sea, and air."

here. President Wilson believed in the doctrine of just war. But the legal conclusions that he drew from this belief are not easy to determine. Even with respect to the question of moral war guilt, his standpoint is based not simply on criminal law. For example, in an October 26, 1916 speech, he said: "No single fact started the war, but in the last analysis the whole European system bears the deeper guilt of the war — its combination of alliances and agreements, a developed web of intrigue and espionage, which assurance drew the whole family of nations into its web."

The connection between aggressive war and reparation liabilities ultimately was treated not only in the deliberations of the Commissions, but also, in May 1919, in the exchange of notes between the German delegation in Versailles and the Allied governments. The German delegation protested against the charge that Germany alone had started the war, and insisted that Germany's reparation liabilities be based on the Lansing note of November 5, 1918. In their response, the Allies emphasized that the Lansing note had contained the word *aggression*, and that by accepting the note Germany also had accepted *responsibility* for the world war. In fact, the Lansing note did contain the word *aggression.*

Here, too, as in numerous attributions of guilt in the discussions concerning reparations, the question was raised as to whether or not a total transformation in the meaning of war was evident. Had the transition from the political concept of war between states in European international law to a discriminatory concept of war with one side just and the other unjust already occurred? And could the word *aggression* in this context be seen as a precedent for the complete criminalization of aggressive war? If it were a question of Germany's guilt, and if this guilt were to be found in aggression, then, generally speaking, it was completely conceivable that guilt in a criminal sense was meant and that the facts of the case constituted a crime in the criminal sense. But, concretely, only reparations were at issue: it was only a matter of Germany's economic and financial obligations, not of real punishment, as stated in Part VII of the Versailles Treaty. At Versailles, in no sense was anyone predisposed to create a new crime in international law. They did not want to destroy a concept of war that had been recognized for two hundred years, and that had determined the legal structure of traditional European international law as a whole, with all its legal procedures for pursuing war and protecting neutrality. Had that occurred, and had other explanations been needed, a criminalization would have indicated more than a general declaration of illegality. The Lansing note referred only to Germany's march into neutralized

Belgium and to the issue of the scope of reparations for civilian injuries and damages. It did not indicate any intention to make this crime a new concept of war and a new type of crime in international law.

The whole question of war guilt after 1919 was discussed primarily in connection with *reparations*. All European jurists understood the difference between the criminal guilt of certain individuals and the legal obligations of a state, since the latter concerned only financial and economic matters. They also understood that the determination of a legally disallowed act with liabilities for damages immediately would lead to a completely new type of "crime" in international law: a criminal offense.

Had this been the intention of Versailles, then at least the League Covenant would have had to declare aggressive war in all its forms to be a crime in the criminal sense. That did not happen. Thus, the possible precedent that might have been realized in establishing German war guilt was paralyzed at the start. To the extent that there was any doubt about this, it was decisive for European legal consciousness that, despite President Wilson's signature, the United States had withdrawn from Versailles after 1919 and had isolated itself from European political issues. Thus, as noted, in the special peace with Germany that the United States signed on August 25, 1921, there was no reference to the question of criminal guilt.

E. Initial Stages of a Criminalization of Aggressive War in the 1924 Geneva Protocol

The two decades from 1919 to 1939 were spent searching for a new order of international law. President Wilson had made the most important attempt at such a new order in 1919 at the Paris Peace Conference. But the United States then withdrew from Europe and left the European peoples to their political fate. The following synopsis is not meant to provide a complete picture of the chaotic period of transition between 1919 and 1939, but only to answer the question of whether the search for an abolition and outlawry of war that was attempted during these two decades had succeeded in transforming the meaning of war, and whether, in fact, interstate war in European international law had been replaced by the action against a criminal felon.

Every European statesman and every European citizen knew that the question of the abolition of war was one of disarmament and security. He could judge juridical formulations of the abolition of war only by their practical effects. The numerous disputed projects, with their subtle distinctions, must have appeared to him to be products of the sinister sovereignty of many European states. In the difficult juridical formulations for and against a

revision of the Versailles Treaty, he must have recognized the political maneuvers of competing governments. The great impression that the strong participation of American citizens made on him (I recall the names James Brown Scott, James T. Shotwell, and Hunter Miller) must have been paralyzing, since the United States had adopted a strong policy of neutrality and even isolation. The antithesis between American public opinion and official policy was striking.

Actually, the great attempt to criminalize war in international law was embedded in a series of impenetrable antitheses that were difficult for the common man to understand: the distinction between juridical and political ways of thinking; the distinction between moral and legal obligation; the antithesis between political and economic problems; and finally, the antithesis of private presence and official absence characteristic of relations between the United States and Europe. In the following presentation, it is difficult but important to keep in mind that the attempt to criminalize war unfolded out of these manifold antitheses.

F. Origin of the Geneva Protocol (October 2, 1924)

The 1919 League of Nations Covenant contained prescriptions for prevention of war (Arts. 10-17). States would break the peace if they resorted to war without following certain procedures. Foreseen as sanctions against such a breach of the peace were financial, economic, and military measures by the other members (Art. 16). Nothing was said about a criminalization of war as such. The idea of the equality of rights of all states on the basis of equal sovereignty remained so strong in 1919 that the League Covenant was able to contain a criminal prohibition of war only implicitly. Perhaps there were some initial steps that could have been turned into a practical interpretation. But the United States, whose influence at the Paris Peace Conference was pervasive, remained officially distant from the League.

Between 1920 and 1924, many attempts were made to strengthen the League's war prevention system. But there was no agreement that war or any particular type of war should be a punishable international crime for certain individuals. To a continental European jurist it was obvious that mere utilization of the word *crime* in international law was not a criminalization in the sense of the principle *nullum crimen, nulla poena sine lege*,[13]

13. At that time, Donnedieu de Vabres had made this point emphatically. Cf. the lecture of Prof. Osten Unden, delivered at the Hochschule für Politik in Berlin on January 31, 1930, "La guerre d'aggression comme problème *international*," in *Publications de la Conciliation internationale* (Paris: Carnegie Endowment for International Peace, Division of Intercourse and Education, 1930), Bulletin 6, p. 24.

as long as the facts of the case — the perpetrator, the penalty, and the court — were not spelled out clearly and written down.

However, the Geneva Protocol on the peaceful resolution of international disputes contains a statement that aggressive war is an international crime. For Europe, this was the first visible expression of the idea that war is a crime. Previously, there had been drafts of a pact and a treaty with guarantees of mutual assistance, wherein it was said that aggression and aggressive war is an international crime. But none of these drafts became an international agreement. Neither did the Geneva Protocol become law. It was accepted as a proposal at the Fifth Meeting of the League, on October 2, 1924, and was signed by the following states: Albania, Belgium, Brazil, Bulgaria, Chile, Czechoslovakia, Estonia, Finland, France, Greece, Haiti, Latvia, Liberia, Paraguay, Poland, Portugal, Spain, Uruguay, and Yugoslavia. Only Czechoslovakia ratified the Protocol (on October 28, 1924). English opposition was the primary cause of its defeat. The English declaration, delivered by Sir Austen Chamberlain before the League Council on March 12, 1925, is an especially important document, which will be cited below.

A group of American citizens initiated the Geneva Protocol. The group's spokesman was James T. Shotwell, Professor of History at Columbia University and a member of the American delegation to the Paris Peace Conference.[14] The League Council concluded at its June 1924 meeting an "action of unprecedented nature" in that it transmitted a report of this group — the so-called Shotwell resolution — as an official League document. Therein, a series of private, distinguished Americans exerted direct influence on an important decision, although the United States did not belong to the League and, consistent with a fundamental isolationism, had distanced itself above all from all political questions of Europe. Titled "Outlawry of Aggressive War," this Shotwell resolution declared aggressive war to be a crime, although it designated the *state* as the only perpetrator of this

14. James T. Shotwell must be mentioned. His lecture at the Hochschule für Politik in Berlin in March 1927 rightly is considered to be the first European preparation for the Kellogg Pact. This lecture is of great significance, because it outlines the historical-philosophical horizon of the transformation. See James T. Shotwell, "Stehen wir an einem Wendepunkt der Weltgeschichte?," in *Politische Wissenschaft: Schriftenreihe der Deutschen Hochschule für Politik in Berlin und des Instituts für Auswärtige Politik in Hamburg*, No. 8 (1929), pp. 15-30. Shotwell contended that war belongs to the *pre*-scientific and *pre*-industrial stage of human history. In this stage, it still could be calculated in static, cyclical, and seasonal terms. By contrast, the scientific-technical present cannot be calculated. It is dynamic, meaning that war no longer can be controlled. Therefore, it must be outlawed and replaced by an international jurisdiction. Every action taken against an aggressor immediately must set in motion an international tribunal to oversee the action.

crime.[15] Then followed a more precise definition of acts of aggression and sanctions (which were not criminal, but primarily economic in nature). Yet, any signatory power could take coercive measures against an aggressor state. Moreover, the guilty state was obliged to pay damages to the other signatory states for its aggression.

G. Content of the Geneva Protocol

The Geneva Protocol declared aggressive war to be a crime. However, it spoke only of the *state* as the aggressor and the perpetrator of this new international crime, and respected state sovereignty, i.e., the essential hurdle of criminalizing war in a truly criminal-legal sense. The contrived sanctions were only economic, financial, and military, and were directed only against the state. No mention was made of the particular originator of the war, such as the head of state, members of the government, or some responsible person as the perpetrator of this new crime. On the contrary, Art. 15, No. 2 of the Geneva Protocol says that the aggressor *state*, which is accountable for the sanctions, should bear all costs, to the limit of its capacity. But, in other respects (consistent with the given territorial guarantees of all members of the League in Art. 10 of the Covenant), its territorial integrity and its political independence should remain inviolable.[16]

Such consideration for the criminal aggressor state and its political independence certainly would have been inconceivable to American public opinion. It is indicative of how strong respect for recognized state authority was among the representatives of European governments in Geneva. As regards such sanctions, which avoided any mention of criminal penalties, no jurist of continental European criminal law was able to conceive of any criminalization or any adequate foundation for criminal punishment. The crime characterized as aggressive war was a special type of crime in international law. A crime in traditional European international law was distinguished sharply from a crime in domestic criminal law.

15. Art. 1: The High Contracting Parties solemnly declare that aggressive war is an international crime. They severally undertake not to be guilty of its commission. Art. 2: A *State* engaging in war for other than purposes of defense *commits the international crime* described in Art. 1. Art 3: The Permanent Court of International Justice shall have jurisdiction over the complaint of any signatory, to make a judgement to the effect that the international crime described in Art. 1 has or has not been committed in any given case.

16. "*Toutefois, vu l'article 10 du Pacte, il ne pourra, comme suite à l'application des sanctions visées au présent Protocole être porté atteinte en aucun cas à l'intégrité territoriale ou à l'indépendance politique de l'Etat agresseur.*" [Tr. Nevertheless, according to Art. 10 of the Pact, the territorial integrity or political independence of the aggressor state cannot be jeopardized with the application of the sanctions described in this Protocol.]

Even use of the word "crime" still had no criminal content in the sense of domestic criminal law. One might speak of a possible parallel with piracy in another context, but in this Geneva Protocol we are not describing a comparison between aggression or aggressive war and piracy.

H. Facts of the Case of the New Crime: Acts of Aggression; Aggressive War; Unjust War

It can be assumed that wide circles of public opinion in the United States considered the words *outlawry* of war and *crime* of war to be sufficient cause for a criminalization, precisely in the sense that the one responsible for starting a war could be punished as a criminal. Yet, the facts of the case of this new crime had not been clarified. If one were to compare the 1924 Geneva Protocol and the 1932-34 Disarmament Conference, the conflict between the methods of continental European jurists and the American public's state of mind is obvious whenever the question concerns the abolition of war. This deep antithesis could be solved only by clarifying the juridical question of the essential facts of the case of the new international crime.

In all efforts to *outlaw* war, it is important to determine clearly whether by *aggressive war* one was speaking of war as a whole (whereby the question arose as to whether, given the further development of wars, such as coalition wars, etc., such a war constituted a unified whole) or whether one was speaking of *aggression* as a specific fact, which juridically would have to be distinguished from war as a whole. Obviously, to take the first shot or to be the first to invade enemy territory was not the same as to cause war. The crime of aggression, the crime of aggressive war, and, finally, the crime of unjust war obviously are three different crimes with completely different circumstances. For a complex judgment of war, they are related, but not identical, and, to a greater part of the general public, their distinction appears to be a juridical artifice.

1. Aggression and Attack

The distinction between an aggressive war and an act of aggression is artificial and formalistic only at first glance. As soon as the question is posed as to precisely which action constitutes the punishable crime, a certain legal precision is required. Juridically, this distinction is not difficult to understand; basically, it is indisputable. Every war, even an aggressive war, is normally a bilateral process, a struggle between two sides. By contrast, aggression is a unilateral act. The question of the justice or injustice of war, also of aggressive war, is very different from the question of the

justice or injustice of a particular act of aggression, whether this act leads to war or can be stopped legally. Aggression and defense are not absolute or moral concepts, but situationally determined processes. Yet, this fact is often unrecognized and therefore obscured.

For this reason, in English usage "aggressor" is understood as "violator" and is synonymous with offender. For example, this is the case in Blackstone's *Commentaries of the Laws of England*: indeed, "as the public crime is not otherwise revenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body of goods of the aggressor." The same is true in French: "*Attaque est l'acte, le fait; agression est l'acte, le fait considéré moralement et pour savoir à qui est le premier tort.*" [Tr. Attack is the act, the deed; aggression is the act, the deed, judged from a moral viewpoint and to know where the first wrong lies.] This is how it is defined in Littré's famous *Dictionnaire de la langue française*. Nevertheless, aggression and defense can be mere methods that change with the situation. In all great contests of battle, one side or the other is soon either on the offensive or on the defensive. Thus, who fired the first shot or first crossed the border, i.e., who the aggressor is at a particular moment of a conflict need not remain the same throughout the course of the conflict. Considering the matter as a whole, the aggressor need not be the one who started or caused the war, the guilty party, and need not always be unjust. By the same token, the one who, at a particular moment and in a particular situation is on the defensive is not always and totally in the right.

We must bear in mind the linguistic significance of aggression and defense, because prohibition of aggression differs from prohibition of aggressive war. We have observed[17] that originally, in the 19th century, one spoke of the crime of aggression as a *crime de l'attaque* (not *de l'aggression*). The juridical content is clearer [in French] than in German, wherein the word *Angriff* also has the (value-free) meaning of aggression, as does the value-free category of *attaque* or attack. Naturally, both are illegal, if both are prohibited. Nevertheless, the crime of firing the first shot differs from the crime of war, even as the crime of aggressive war is not the same as an unjust war. If war legally is prohibited, then obviously this means only unjust war. The prohibition of aggressive war is not simply a case of prohibiting unjust war, because there is also a just aggressive war, as the traditional doctrine of just war always has maintained.[18] In particular, the right

17. See Part II, Ch. 2, p. 117.
18. See Part II, Ch. 1, pp. 95f.

to self-defense and to choose the necessary means of self-defense always is reserved, so that even the old maxim that the best defense is a [good] offense can be of practical significance. The justice of a war is a question of *justa causa*, i.e., the causes of war cannot be separated from foreign policy.

All efforts to abolish war immediately are thrust into the context of three great substantive problems, which are more political than juridical if one chooses to make a distinction between juridical and political: security, disarmament, and peaceful change. Based on these substantive problems, i.e., on the question of *justa causa*, England rejected the Geneva Protocol. Thus, it failed. Chamberlain made this very clear in his detailed government declaration before the League Council on March 12, 1925.[19]

The question of the legality or illegality of a war and of the deeper circumstances of war guilt leads naturally to difficult historical, political, sociological, and moral considerations, whose result cannot be anticipated if one wants to reach a practical solution. But the question of the legality or illegality of a single act of aggression is easier to answer, at least if it can be isolated juridically from the deeper questions of guilt, whereby it can be determined precisely, and thereby can be prohibited.

2. Aggression and Aggressive War

For decades, efforts to find a juridically useful definition of aggression and the aggressor stemmed not from formalistic inclinations, but from this greater determination of the act of aggression. One sought a precise determination of aggression and the aggressor. For example, should the one who first resorts to military force or who first violates the territorial sovereignty of an opponent or declares war without adhering to a prescribed period of time or to an accepted procedure be called the aggressor? The ideal was to find a simple criterion that could be applied to a set of circumstances, so that, where possible, it *ipso facto* would be obvious who the aggressor is, without the need to examine complicated and often impervious foreign policy. A focus on the act of aggression thus is practical and even necessary in order to answer the difficult question of *justa causa*, i.e.,

19. "The brooding fears that keep huge armaments in being have little relation to the ordinary misunderstandings inseparable from international (as from social) life, misunderstandings with which the League is so admirably fitted to deal. They spring from deeply-lying causes of hostility, which, for historic or other reasons, divide great and powerful states. These fears may be groundless; but if they exist they cannot be effectually laid to rest by even the most perfect method of dealing with particular disputes by the machinery of enquiry and arbitration. For what is feared in such cases is not injustice but war — war deliberately undertaken for the purpose of conquest or revenge."

to avoid having to deal with such matters as unjust war and war guilt.

The specific character of this method, represented especially by French jurists, is that a systematic procedure is brought into play without the need to consider the legality or illegality of an externally satisfactory *status quo*, in order to have at least the beginnings of a juridically useful way to proceed. The superficiality and formality of this method allows for the aggressive act and the use of force to be stopped as quickly as possible, and even for the outbreak of war to be prevented. In other words, it is concerned with a provisional protection of property (*interdictum uti possidetis*). The momentary property situation is protected legally, without at first considering whether the possession is legal or illegal, or whether the aggressor perhaps has a good right or any moral claim to change the momentary situation.

In Art. 10 of the League Covenant, the members had agreed on a protection against such "aggression." Ultimately, of course, this was supposed to prevent war. But the case against aggression had to be distinguished clearly from that of war. In Art. 16, as I have said, it was decided that economic, financial, and military sanctions would be imposed against any member that resorted to war. The word "war," rather than "aggression" was used. But it soon became obvious that "war" did not mean war, but aggression, because the intention was to avoid war by stopping aggression before it led to war. Thus, aggression had to have been removed juridically from war as an independent fact, because the contractual obligations of sanctions and assistance *vis-à-vis* the aggressor would obtain whether or not war was anticipated. Especially after the 1925 Locarno Pact and after numerous non-aggression pacts that non-members of the League (such as the Soviet Union) had concluded subsequently, at least diplomats and jurists had to acquaint themselves with the juridical character of the *act* of aggression as distinguished from aggressive *war*. At the 1932-34 Disarmament Conference, discussions of the definition of aggression and the aggressor, initiated by the Greek delegate and commentator, Nicolas Socrate Politis, and by a Soviet representative, Foreign Minister Maxim Litvinov, in preparation for a draft of the declaration, were extraordinarily precise and profound. But the legal core of the major question remained unchanged.

The distinction between aggression and aggressive war deals with matters known to every jurist of international law. However, since most laymen are unaware of this distinction, its practical significance must be emphasized, because it involves a profound distinction between a purely

juridical and a purely moral way of thinking. Above all, one should not overlook the fact that prohibition of an aggressive act, with all the many compromises and efforts needed to define aggression and the aggressor, should result in prevention of an unjust war, but only with full awareness of the distinction between the justice of war and a *justa causa*. One of the first and most respected protagonists of a peaceful regulation of all international disputes, Lord Robert Cecil, the originator of an important plan for a treaty of guarantee (1923), formulated the distinction with great clarity. It presented the necessity of having a speedy and simple determination of the aggressor. The aggressor would be determined by a three-quarter majority of votes in the League Council, and the treaty of guarantee would designate as the aggressor the party who, intentionally and unreservedly, had violated the territory of another. Moreover, Lord Cecil, the famous protagonist of peace, emphasized that such a determination would not decide which side was right, but only which side had initiated hostilities.[20]

3. Juridical Abstractions

Any jurist can understand how the precise definition of aggression is separated absolutely and intentionally from the question of a just war. The distinction between *possessorium* [of the possessors] and *petitorium* [of the petitioners] has been common in the juridical thinking of educated peoples for centuries, as has been the separation of a so-called abstract or formal legal procedure from its *causa*. A jurist would notice such a distinction if a precise determination of the facts of a case revealed that not only economic and military sanctions against a state, but also criminal charges against certain individuals are in order, i.e., when it is a true criminal case, whereby the principles of *nullum crimen* and due process come into play. However, the great problem of war concerns not only jurists, but also wide circles of concerned citizens who, by and large, view the juridical abstraction of *justa causa* as an artificial formalism or even as a sophistic diversion from the essential task. Such an abstraction is almost as difficult to prove as is the idea that

20. "*La question à trancher par le Conseil n'est pas de savoir où est le bon droit dans le litige, mais de savoir qui a commis le premier acte d'hostilité. Le traité spécifiera à cet effet que tout Etat qui violera de propos délibéré le territoire d'un autre Etat sera considéré comme l'agresseur.*" [Tr. The question to be resolved by the Council is not to decide on whose side the law is in the litigation, but rather who committed the first act of hostilities. The treaty will specify that any state which deliberately violates the territory of another state will be considered to be the aggressor.]

a *justus hostis*, i.e., an enemy, possibly has right on his side. Nevertheless, it presupposes an authentic international administration of justice that did not exist previously, and that provides a quick victory for the just cause, also with respect to the provisional protection of property. Without immediate and equilateral construction of an impartial international court of justice, the old maxim that "the best defense is a [good] offense" would be reversed, and the new maxim would be "the best defense can be the best and most effective aggression."

The dilemma between a juridical and a political type of thinking is demonstrated here in an especially difficult and dangerous way. On the one hand, juridical precision is necessary if criminalization of war is to be realized; on the other, the actual justice or injustice and guilt of war (as perceived directly by the general public) recedes, and the deeper causes of war, such as general rearmament and lack of security, intentionally are disregarded in such definitions of the aggressor. The dilemma between a juridically formal handling of the prohibition of war, as expressed in the Geneva Protocol, and a political, moral, and substantive solution to the great problem of the causes of war, such as rearmament and security, becomes more severe. In fact, it becomes a real nightmare when applied to such an enormous problem as war with modern means of destruction. In this dilemma, the ordinary man in the chaotic situation of Europe between 1919 and 1939 felt that the prohibition and criminalization of war were products of complicated legal provisos, rather than simply of efforts to eliminate the danger of war. That is what all European peoples, revisionists and anti-revisionists alike, experienced between 1919 and 1939. Thus, all Geneva Protocol efforts were frustrated.

England's March 12, 1925 declaration, which doomed the Geneva Protocol, spoke openly of this difficulty and dilemma. In particular, it referred to the fact that such "written" definitions of the aggressor could not determine whether or not military actions served a defensive objective.[21] The declaration also said that such formal determinations of aggression and the aggressor did not hasten, but rather hindered solution of the particular problem, namely the causes of war and rearmament. This

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21. "It may be desirable to add that, besides the obvious objections to those clauses already indicated, their great obscurity, and the inherent impossibility of distinguishing, in any paper definition, military movements genuinely intended for defense, and only for defense, from movements with some ulterior aggressive purpose, must always make them a danger to the unwary rather than a protection to the innocent. They could never be accepted as they stand."

was so because they made preparations for struggle against a possible aggressor necessary, and, as a result, turned the duty to assist in these preparations into an expansion of the war. This became especially dangerous when this assistance was directed against a non-member of the League whose economic power of resistance was considerable.[22]

With its ideal of an automatic prohibition against aggression, the Geneva Protocol had to begin with the given territorial *status quo*. Thereby, it became caught up in the struggle between revisionism and anti-revisionism. To avoid this, the English pacifist Cecil had interjected into the discussion the problem of peaceful change, in order to effect both a formal-juridical and a substantive-political prohibition of war by eliminating its causes. The general (at least in Europe, the dominant) impression of any formal efforts of the League Covenant was expressed in the well-known principle that such a formal definition of aggression and the aggressor would be "a trap for the innocent and a guide for the guilty."[23] The deep dilemma between juridical efforts to obtain a legal prohibition of aggression and moral demands for an immediate abolition of war was expressed succinctly in this figure of speech.

The Geneva Protocol failed because it did not answer the substantive circumstances of the question of just war, and did not even attempt to. The impression that this failure made on European governments and peoples, in particular the impression made by the English declaration of March 12, 1925, was great indeed. It prevented any European conviction that a new international crime had been or could be established. However, American proponents of outlawing war were not dissuaded by this failure, and in 1928, in the Kellogg Pact, succeeded in making a formal condemnation, an abolition of war, a means of national policy.

The Kellogg Pact changed the global aspect of international law. That is more important than any single detail of the norms or formulations of this pact, more important than the interpretation of its condemnation of

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22. The problem of the connection between the duty to assist and the *justa causa* of a just war is very old. (See Vitoria on the *jus protectionis* as *justus titulus*, Part II, Ch. 2, p.102n.). Apropos of the statement cited in the text, it is reminiscent of a much cited allegation by Cicero. The great orator had said, in all seriousness, that the Romans had only waged just wars. He certainly was seeking a reason for his compatriots to wage a just war. In this way, it was not difficult to prove that the Romans had waged only just wars.

23. This formulation came from a speech by Sir Austen Chamberlain in the House of Commons on November 24, 1927; the decisive sentence said: "I therefore remain opposed to this attempt to define the aggressor, because I believe that it will be a trap for the innocent and a guide for the guilty."

war, more important even than the interpretation of the numerous explicit and implicit provisos that it contained. The Western Hemisphere now took its place, and determined further development of the transformation of the meaning of war. All attempts to bring the condemnation of war expressed in the Kellogg Pact into accord with the League Covenant and the Geneva Protocol were unsuccessful. At the same time, however, from the East, the Soviet Union interjected itself into determination of the transformation. Already in the 1932-34 Disarmament Conference and in the July 1933 London Convention, the Soviet Union took the lead when it came to definitions of aggression and aggressor. Thus, the axis of power that had created the concept of war in European international law became unhinged, as power in the East and in the West came to dominate European states no longer certain of themselves. For a moment, in the London Statute of August 8, 1945, East and West finally came together and agreed. Criminalization now took its course.

At this point, we end our discussion. Now, we need only add a few remarks on the global aspect of the West.

Chapter 5

The Western Hemisphere

The Western Hemisphere counterposed to the Eurocentric lines of a global worldview a new global line that was no longer Eurocentric, and called into question the global position of old Europe. The public history of this new line in international law began with the proclamation of the so-called Monroe Doctrine on December 2, 1823.

In President George Washington's political testament, his famous 1796 Farewell Address, he spoke of the Western Hemisphere without any geographical specificity. By contrast, President Monroe used the word "hemisphere" deliberately and with specific emphasis in his proclamation, which defined the space of *America* as *this continent* and *this hemisphere.* Intentionally or unintentionally, the expression "hemisphere" in this context signified that the political system of the Western Hemisphere, as a realm of freedom, was opposed to the political system of European absolutism. Ever since, the Monroe Doctrine and the Western Hemisphere have been linked together. They define the sphere of the special interests of the United States.[1] They encompass a space far exceeding the boundaries of the state proper — a *Großraum* in the sense of international law. The traditional American interpretation of this doctrine in international law has been that juridically it constitutes a zone of self-defense. Every true empire around the world has claimed such a sphere of spatial sovereignty beyond its borders. Yet, Central European jurists, given their states' contiguous borders and spatially limited territorialism, seldom had seen such a case. For more than a century, the Monroe Doctrine had been discussed at great length. But its significance for the spatial structure of the earth in international law had not been considered, and there was no interest in any precise geographical determination

1. A. Lawrence Lowell, "The Frontiers of the United States," in *Foreign Affairs*, Vol. 17, No. 4 (July, 1939), pp. 663-669.

of the Western Hemisphere. This indicates how far removed America still was from contemporary European thinking.

In 1939, it appeared that the term "Western Hemisphere" finally had caught on. It was utilized in important United States Government declarations, so that it also appeared to be an American political slogan at the onset of the new world conflict.[2] Declarations of other Western Hemisphere states, in particular those of Panama's Secretary of Foreign Affairs (1939) and of Cuba's Secretary of Foreign Affairs (July 1940), did not speak of the "Western Hemisphere," but only of "America," of the "American continent" (in the singular), or of "areas which geographically belong to America." Yet, at the beginning of May 1943, in his declaration on the American occupation of the French island of Martinique, the President of Brazil said that this island belonged to the "Western Hemisphere."

A. American Security Zone

The October 3, 1939 Panama Declaration had a very special significance for the spatial problem of international law at that time. To protect the neutrality of American states, it forbade warring states from undertaking hostile acts within a specified *security zone*.[3] The line of the neutral security zone extended 300 sea miles into the Atlantic and the Pacific from both American coasts. At the Brazilian coast, it reached 24 degrees longitude west of Greenwich, which means it approached the 20 degrees longitude that customarily marked the dividing line between West and East. The practical significance of this circumscribed American security zone of October 1939 quickly vanished, because the presupposed neutrality of the American states vanished. Nevertheless, it remains of extraordinary and fundamental significance for the spatial problem of modern international law. First of all, and different from a declaration consistent with traditional United States policy extending beyond its borders, this security zone adhered to the concept of *America* and its inherent limitations. Moreover, it

2. This turning point was contained in the United States Government's June 1940 proclamation presented to the German, Italian, and other European governments: "In line with traditional policy concerning the Western Hemisphere, the United States declares that it will not tolerate any transfer of a region belonging geographically to the Western Hemisphere from an American to a non-American power." See Philip C. Jessup, "The Monroe Doctrine in 1940," in *American Journal of International Law*, Vol. 34 (1940), p. 709.

3. The decisive passage stated: "As a means of continental self-defense, the American republics, as long as they remain neutral, can claim as a hereditary right that the waters bordering the American continent, which they consider of particular importance and which are directly necessary for their interaction with each other, must remain free of any enemy action instituted from the land, the sea or the air."

had a great, one might even say sensational effect, because it went from *three* to *three hundred* miles, thereby reducing to an absurdity the measures and provisions of the traditional three-mile limit and the customary dimensions of coastal waters. Ultimately, it also extended *Großraum* thinking over the free sea, in that, for the benefit of neutrals, it introduced a new type of spatial limiting of the free sea as a theater of war. The two spheres feature of the Monroe Doctrine, i.e., its land and sea aspects, had undergone an important change in the Panama Declaration. Formerly, if one spoke of the Monroe Doctrine, in general one had in mind the firm land of the Western Hemisphere, whereas the world's oceans were presupposed to be free in the 19th century sense of the freedom of the sea. Now, however, the borders of America were drawn also on the sea.[4] That was a new form of sea-appropriation, which destroyed earlier concepts.

This last point is especially important. The transition from land to sea had precipitated unforeseen consequences in world history. In this case, it had affected the basic structure of European international law and its separation of firm land and free sea. As long as one understood by "Western Hemisphere" only a continental landmass, it was linked with a mathematical-physical line of division, as well as with a concrete geographical-physical and historical form. But its expansion and displacement to the sea made the concept of "Western Hemisphere" even more abstract in the sense of an empty and overwhelming, mathematically and geographically determined spatial dimension. As Friedrich Ratzel put it, *space* had protruded into the expanse and evenness of the sea. In military science and in strategic discussions, one occasionally finds the sharp formulation of a French author that the sea is a level surface without obstructions, upon which strategy dissolves into geometry. Of course, this mere surface dimensionality led to the suspension of the antithesis between land and sea, and, as soon as airspace was introduced as a new dimension, to a new spatial structure.

B. Demarcation of the Western Hemisphere

Given the political application of the "Western Hemisphere," geographers recently have concerned themselves with the problem. Of particular interest is a precise geographical demarcation of the Western Hemisphere

4. See Quincy Wright, "Rights and Duties Under International Law as Affected by the United States Neutrality Act and the Resolutions of Panama," in *The American Journal of International Law*, Vol. 34 (April 1940), p. 248. Wright thinks that, in the new form, the Monroe Doctrine harks back to concepts of a *mare clausum*, as the Portuguese and the Spaniards had contended, and Grotius had opposed. This appears to me to be an improper parallel, because it remained too oriented to the conceptual formulations of a pre-global spatial order.

that the State Department geographer S. W. Boggs made in connection with defining the sphere of the Monroe Doctrine. In general, he said that the Western Hemisphere is understood as the *New World* that Christopher Columbus discovered. But in other respects, the geographical and historical concepts of *West* and *East* are determined neither by nature nor by common agreements. Cartographers have been accustomed to demarcate the Western Hemisphere with a line running through the Atlantic Ocean 20 degrees longitude west of Greenwich mean time. The Azores and the Cape Verde Islands then belong to the Western Hemisphere, which, as Boggs adds, of course conflicts with their historical orientation to the Old World. However, in the American geographer's reckoning, Greenland belongs almost completely to the Western Hemisphere, although it was not discovered by Christopher Columbus.[5] He says nothing about the arctic region of the North Pole and the antarctic region of the South Pole. On the Pacific side of the globe, he does not make the border line simply correspond to 160 degrees longitude, but to 20 degrees nearer the so-called international date line, i.e., 180 degrees longitude. In so doing, he includes some indentations in the north and in the south. In his view, the islands west of Alaska, as well as New Zealand, belong completely to the West, while Australia belongs to another hemisphere. It was not a practical problem for him that (prior to the outbreak of war with Japan) the enormous surface of the Pacific Ocean, at least provisionally, also fell within his understanding of the Western Hemisphere; this was of concern mostly to cartographers. However, in the fall of 1940, the American international law specialist Philip S. Jessup added the following statement to Boggs' treatise: "Today the dimensions change rapidly,

5. The American geographer includes Greenland and even Iceland in the Western Hemisphere. Cf. Vilhjalmur Stefansson, *Iceland: The First American Republic* (New York: Doubleday, 1939). In the Greenland trial before the Permanent International Court of Justice in the Hague, as far as I can see, the Monroe Doctrine was not used by either side in the discussions. Gustav Smedal added that the State Department answered an inquiry in 1931 to the effect that it could offer no written material regarding the question of the application of the Monroe Doctrine to Greenland and the polar icecaps. See Gustav Smedal, *Acquisition of Sovereignty Over Polar Areas*, Vol. 36 of *Skrifter om Svalbard og Ishavet* (Oslo: I. Kommisjon hos. Jacob Dyband, 1931), pp. 45 and 67. One of the geographical maps Smedal mentions, made by Albert Bushnell Hart in 1916, i.e., the map of the area which comprises the Monroe Doctrine, is meaningless for our question. It is simply a geographical map of the political development of the American continent in the 19th century, which is not relevant to the important geographical problem of the demarcation of the Western Hemisphere and is not mentioned in Hart's book, *The Monroe Doctrine: An Interpretation* (Boston: Little, Brown and Company, 1916). Under the caption "Suggested Geographical Limitation" (p. 306), the question of whether it was necessary to exclude certain areas of South America (for example, Chile or Argentina) from the sphere of the Monroe Doctrine is discussed. In the author's opinion, that only would facilitate Germany's colonization of these areas.

and the interest we had in Cuba in 1860 corresponds to our interest today in Hawaii; perhaps the argument of self-defense will lead the United States one day to pursue war on the Yangtze, the Volga, or the Congo."[6]

The problem of drawing such lines was not new to professional geographers. First of all, abstractly speaking, any arbitrary disposition and stipulation of a zero-meridian is possible anywhere, just as, chronologically speaking, any arbitrary point of time can be made the termination point of a time sequence. Moreover, it is obvious that the concept of a global western or corresponding eastern hemisphere is problematic, because the earth is a sphere that rotates on a north-south axis. Thus, north and south appear to be more exactly determinable. The earth is divided by the equator into northern and southern halves, which are not problematic in the sense of a division into eastern and western halves. We have a North Pole and a South Pole, not an East Pole and a West Pole. The opposites, corresponding to right and left, are different from the opposites of above and below, both in extent and degree. This also is demonstrated, for example, in that a designation like "Nordic race," though purely geographical, is still more precise than is the equally geographical opposition of western and eastern races. Everyone knows that the "Western Hemisphere" is more specific than is an *eastern* hemisphere. This difference has been evident since time immemorial. For example, for the natural horizon, north and south signify the limits of night and light, whereas east and west flow into each other and are only the "opposite flowing of a little to night and to light."[7] Thus, all stipulations and demarcations,[8] especially lines drawn through the oceans, remain uncertain and arbitrary, as long as they are not based on recognized contractual arrangements.

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6. Philip S. Jessup, "The Monroe Doctrine in 1940," in *The American Journal of International Law*, *op. cit.*, p. 704.

7. Edmund Pfleiderer, *Die Philosophie des Heraklit von Ephesus im Lichte der Mysterienidee, nebst einem Anhang über heraklitische Einflüße im alttestamentlichen Koholet und besonders im Buche der Weisheit, sowie in der ersten christlichen Literatur* (Berlin: Reimer, 1886), p. 162.

8. In an article containing graphic maps with various lines, a German geographer also has criticized the slogan "Western Hemisphere." See Arthur Kühn, "Zum Begriff der 'Westlichen Hemisphäre': Ein Beitrag zur politischen Geographie," in *Zeitschrift der Gesellschaft für Erdkunde zu Berlin*, Nos. 5/6 (1941), pp. 222-238. He demonstrates the "geographical indeterminacy" of this demarcation and suggests that, if the practical intention is to distinguish between the spheres of influence of the European and the American continents, then this only could be done mathematically, and then only by drawing a line with the same distance separating the islands from the continents to which they belong. But such a dividing line would remain a mathematical-geographical theory, and would intersect the areas of interest and the property of various powers.

C. The Moral Significance of Isolation

The term "Western Hemisphere" still has a global political and historical content in international law that goes far beyond its mathematical-geographical borders. In the spheres of politics and international law, it has its own sources of power and, consequently, also its own internal boundaries. Concealed within these boundaries is its *arcanum*, i.e., the secret of its undeniable historical effect. The "Western Hemisphere" is part of a great historical tradition, and is linked to very specific phenomena of modern global and historical consciousness. By comparison with the two previous types of global lines, *rayas* and amity lines, it is the most important example of what we have called the *global linear thinking* of Occidental rationalism.

The American line of the Western Hemisphere is neither a *raya* nor a amity line. All previously mentioned lines concerned a land-appropriation. But in President Monroe's 1823 pronouncement, the American line rejected European claims to land-appropriations. From the American perspective, this line at first had a defensive character directed at the powers of old Europe. It was a protest against further European land-appropriations of American soil. It is easy to see that the line thus gave the United States freedom to appropriate land on its own behalf, i.e., freedom to undertake its own land-appropriations in the Western Hemisphere, since there were still wide open spaces of American soil. But the American posture *vis-à-vis* old monarchical Europe did not signify a renunciation; the United States continued to belong to the sphere of European civilization and to what was essentially still the European community of international law.

A first-rate specialist, Bernard Fay, even concluded that the word *civilization* originated at the beginning of the 19th century, and was designed to emphasize the continuity that bound European antiquity with France and the United States.[9] Neither Washington's Farewell Address nor the Monroe Doctrine was meant to establish an extra-European international law. From the outset, the American impulse was directed much more at being a representative of European civilization and European international law.[10] The Latin American states that arose at that time assumed

9. Bernard Fay, *Civilisation américaine* (Paris: Sagittaire, 1939), p. 9.

10. In the case of "United States vs. the Schooner La Jeune Eugénie" (May Term 1822), Justice Story said that "no principle belongs to the law of nations, which is not universally recognized as such, by all civilized communities, or even by those constituting, what may be called, the Christian states of Europe." See William F. Mason, *Reports of Cases Argued and Determined in the Circuit Court of the United States for the First Circuit* (Boston: Wells and Lilly, 1824), Vol. II, p. 448.

that they, too, belonged to the "family of European nations" and to its community of international law. In the 19th century, American international law textbooks took this claim for granted, even when they were speaking of a specifically American, as compared to European international law.[11] Although drawn especially and explicitly to exclude old Europe, the global line of the Western Hemisphere can be called anti-European only in a certain sense. But in another sense, and contrary to the moral and cultural claim, it even can be said to embody the free, true, and essential Europe. Yet, this claim at first was concealed, because it was combined with a sharp isolationism. At first glance, the demarcation line of the Western Hemisphere is a line of isolation in a very specific sense. By contrast with the distributive *rayas* and the agonal amity lines, it represents a completely different, third type, namely a line of self-isolation.

We will focus on the clear and consistent formulations of this type of thinking, which are characteristic of the so-called Jefferson Line. Given their relation to the proclamation of the Monroe Doctrine, it is sufficient for our purposes to cite two famous statements made on January 2, 1812 and August 4, 1820, respectively. In both, hatred of England and disdain for old Europe are evident. Particularly notable is the stand the United States took against England in defense of the European law of the sea. "The fate of England . . . is nearly decided, and the present form of her existence is drawing to a close. . . . When our strength will permit us to give the law of our hemisphere, it should be that the meridian of the mid-Atlantic should be the line of demarcation between war and peace, on this side of which no act of hostility should be committed, and the lion and the lamb lie down in peace together."[12] One still can detect clearly something of the character of an amity line, only America no longer is "open" and a theater of ruthless conflicts in the sense of the 16th and 17th centuries, but rather is a peaceful realm, whereas the rest of the world has become a theater of war, and obviously a war of the "others" from whom America will remain apart. What was typical of the old amity lines — their agonal meaning and character —

11. James Kent deals with international law in his *Commentaries on American Law*, 12th ed., ed. by O. W. Holmes, Jr. (Boston: Little, Brown and Company 1896); cf. Henry Wheaton, *History of the Law of Nations in Europe and America: From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks & Co., 1845). Carlos Calvo called his famous 1868 work *Derecho internacional teórico y practico de Europa y America, op. cit.*; cf. also Sa Vianna, *De la non-existence d'un droit international américain, op. cit.*, p. 202.

12. [Tr. Thomas Jefferson, Letter to Dr. John Crawford (January 2, 1812), in *The Writings of Thomas Jefferson*, Definitive ed., ed. by Albert Ellery Bergh (Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1907), Vol. XIII, pp. 118-119.]

appears to have been reversed. In 1820, Jefferson wrote: "The day is not distant, when we may formally require a meridian of partition through the ocean which separates the two hemispheres, on either side of which no European gun shall ever be heard, nor an American on the other."[13] As in the Monroe proclamation, the term "Western Hemisphere" is used in the sense that the United States identifies itself with all countries that morally, culturally, or politically belong to the substance of this hemisphere.

Jefferson's ideas should not be exaggerated. But they also should not be ignored, if we are to have a clear picture of the essential historical and world-political character of such a line of isolation. In terms of the history of ideas, the consciousness of the elect stems from a Calvinist-Puritan outlook. It proceeds in a deistic and secularized form, and, for this reason, often becomes even more intense, because, of course, the feeling of absolute dependency on God does not become secularized simultaneously. In the last quarter of the 18th century, after the Declaration of Human Rights (1775), the American feeling of dependency received from France an infusion of new moral powers of a purely mundane and worldly character. Enlightenment philosophers, among them Raynal and Condorcet, had created a new picture of human history. The European conquest of America in the 16th century, i.e., the great land-appropriation of American soil that had been justified by Catholics and Protestants alike as a mission of Christian faith, now, from a humanitarian perspective, appeared to have been an inhuman act of atrocity. It was not difficult to find material in Las Casas to support this view. The American Bill of Rights was conceived of as a kind of rebirth of humanity. For the 17th century philosopher Hobbes, America remained a realm of the state of nature, in the sense of a pre-state, of a free struggle of egoistic instincts and interests. For Locke, as we have seen,[14] America was also, although in a different sense, at the threshold of civilization and in a state of nature. But toward the end of the 18th century, French Enlightenment philosophers came to view North America as free and independent, as a different type of primitive state, namely the state of nature in Rousseau's sense, i.e., as a land still unspoiled by the corruption of over-civilized Europe. The effect of Benjamin Franklin's sojourn in France was decisive, not only with respect to agreements concluded between France and the United States (1778), but

13. [Tr. Thomas Jefferson, Letter to William Short (August 4, 1820), in *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson*, ed. by Thomas Jefferson Randolph (Boston: Gray and Bowen/New York: G.& C.& H. Carvill, 1830), Vol. IV, p. 328.]

14. See Part II, Ch. 2, p. 97.

also with respect to this spiritual brotherhood. Thus, for a second time in European consciousness, America became a sphere of freedom and naturalness, although this time with a positive content. Essentially, the old sense of the global line of struggle was transformed, and the line of isolation acquired a positive meaning.

In political terms, this fundamental isolation created a new spatial order of the earth. It sought to achieve this by separating a sphere of guaranteed peace and freedom from a sphere of despotism and corruption. This American idea of isolation is well-known and often discussed. Here, we are concerned specifically with its relation to the spatial order of the earth and the structure of international law. If the Western Hemisphere was the unspoiled New World, not yet infested with the corruption of the Old World, then, of course, it had to be in a different situation with respect to international law than was the corrupt Old World, which, until then, had been the center of the earth, as well as the creator and representative of Euro-Christian international law, of the *jus publicum Europaeum*. If America was the soil upon which the elect had been saved and where they would live a new, pure form of existence in virginal conditions, then all European claims to American soil were canceled. American *soil* now acquired a completely new *status* in international law *vis-à-vis* all former soil statuses in international law. As we have seen, the *jus publicum Europaeum* had developed several such soil statuses. Thereafter, American soil would not belong to any soil status that European international law had recognized in the 19th century: neither soil with no master (and thus open for occupation in the former sense), nor colonial soil, nor European soil as the territory of European states, nor a battlefield in the sense of the old amity lines, nor a European sphere of extraterritoriality with consular jurisdiction, as in Asian countries.

After this new *line* was drawn, what was the status of the Western Hemisphere from the standpoint of the European order of international law? It was completely extraordinary, even predestined. It would not be too much to say, at least for an extremely consistent opinion, that America was considered to be a refuge of justice and efficiency. The essential significance of this line of the elect lay much more in the fact that only on American soil did conditions exist whereby meaningful attitudes and habits, law and freedom were possible as a normal situation. In old Europe, where a condition of bondage prevailed, even a person of good stock and character could become a criminal and transgressor of laws. But in America, the distinction between good and evil, justice and injustice, decent person and criminal, was not complicated by false situations and false "habits." The deep conviction that

the condition of America was normal and pacific, while that of Europe was abnormal and combative, still could be recognized by Mello Franco (1925) in the League of Nations' handling of the problem of minorities. Consequently, the global line was a type of quarantine, of pest control, which cordoned off a contaminated area from a healthy country. This was not as expressly stated in President Monroe's proclamation as it was in Jefferson's declarations. But whoever had the brains to see and the ears to hear could not miss in the wording and phrasing of Monroe's proclamation both the fundamental moral tone of repudiation of the whole political *system* of the European monarchies, and the moral and political significance and mythical power concealed in the American line of separation and isolation.

Strangely enough, the term "Western Hemisphere" was opposed precisely to Europe, the old West, the old Occident. It was not opposed to old Asia or to old Africa, but rather to the old West. The new West claimed to be the true West, the true Occident, the true Europe. The new West, America, would supersede the old West, would reorient the old world historical order, would become the center of the earth. The West, and all that belonged to it in the moral, civilizing, and political sense of the word "Occident," would neither be eliminated nor destroyed, nor even dethroned, but only displaced. International law ceased to have its center of gravity in old Europe. The center of civilization shifted further west, to America. Like old Asia and old Africa before her, old Europe had become the past. As always, old and new are used here not only in the sense of condemnation, but also, and above all, in the sense of the redistribution of order and orientation. As such, they are the basis of the highest historical, political, and legal claims. They had changed the structure of European international law long before. Since 1890, the inclusion of Asiatic states, most prominently Japan, had expanded the community of European international law into a spaceless, universalist international law.

We are not concerned with the extent to which the claims of Jefferson and Monroe were morally and politically justified, or with to what extent their conviction that they represented a morally and politically new world made good sense. But a piece of European culture in fact had found a home and had prospered on American soil. Europeans of old Europe must acknowledge the fact that men like George Washington and Simon Bolivar were great Europeans, even that they came closer to realizing the ideal meaning of "Europe" than did most British and Continental European statesmen of their time. Moreover, given the parliamentary corruption of the English and the absolutist degeneration of the French in the

18th century, and given the narrowness and constraints of the post-Napoleonic restoration and the Metternichian reaction in the 19th century, America had great possibilities to represent the tried and true Europe.

D. Reactionary Europe

America's claim to be the true Europe, to be the refuge of law and freedom, had a great historical impact. It expressed strong European tendencies and had a real political energy or, more modernly formulated, a war potential of the first rank.[15] This reservoir of historical energy had strong potential in the 19th century, especially during the European revolutions of 1848. In the 19th century, millions of disappointed and disillusioned Europeans left old, reactionary Europe behind and migrated to America, there to begin a new life in virginal conditions. The false Caesarism of Napoleon III and the reactionary movements in other European countries after 1848 showed that Europe was not in a position to solve the social, political, and spiritual questions that came to the fore with such enormous force in France, Germany, and Italy in the decade before 1848. In this connection, one should not forget that the Communist Manifesto was written in 1847, and that already in 1842 Bakunin had appeared in Berlin. Instead of seeking an answer, after 1848 all European peoples and

15. Bernard Fay's extraordinary work, cited at the beginning of this chapter, should be extended to cover especially the period of the restoration. Cf. *L'Esprit révolutionnaire en France et aux Etas-Unis à la fin du XVIIIe siècle* (Paris: E. Champion, 1925). However, this work provides (pp. 299 and 317) important clarifications of the origins of Tocqueville's ideas and his astounding prognosis at the conclusion of the first volume of *Democracy in America* (1835). A further example deserving special mention is a statement made by the young Augustin Thierry, a historian and sociologist of class theory and racial theory in the 19th century. Not only is this statement of pioneering significance; it is an expression of the strong European impulse emanating from Saint-Simon, which said that, if Europe again sinks into the old barbarism of the feudal Middle Ages, into class conflict and racial enmity, then we have a way out that our forbearers did not have: "*La mer est libre, et un monde libre est au-delà.*" [Tr. The sea is free, and a free world is beyond.] See Augustin Thierry, "Sur l'antipathie de race qui devise la nation française," in *Censeur européen* (April 2, 1820). For Germany, good material can be found in Hildegard Meyer, *Nordamerika im Urteil des deutschen Schrifttums bis zur Mitte des 19. Jahrhunderts: Eine Untersuchung über Kürnbergers "Amerika-müden,"* in *Übersee Geschichte*, Vol. 3, ed. by Adolf Rein (Hamburg: Friedrichsen de Gruyter & Co., 1929). On the antithesis between the despotic East and the free West, see Carl Wenzelaus von Rotteck, *Allgemeine Weltgeschichte fiir alle Stände, von den frühesten Zeiten bis zum Jahre 1831* (Stuttgart: Carl Hoffmann, 1831-32). Europe, says Rotteck, is sinking back into the chains of historical right. The last sentence of Rotteck's *Allgemeinen Geschichte vom Anfang der historischen Kenntnis bis auf unsere Zeiten* (Freiburg im Breisgau: in der Herderischen Kunst und Buchhandlung, 1835) reads: "Europe will view the holy fire, which until now it preserved, only from afar, from beyond the Atlantic Ocean."

governments only hastened to suppress the deep problematic that was manifesting itself as socialism, communism, atheism, anarchism, and nihilism, and to cover the abyss with legitimist or legalitarian, conservative or constitutional facades. The great contemporary critics remained isolated and unfashionable individualists — Søren Kierkegaard as well as Donoso Cortés, Bruno Bauer as well as Jacob Burckhardt, Charles Baudelaire as ultimately also Friedrich Nietzsche. By comparison with such a reactionary Europe, America's self-confidence made it appear to be the new and the true Europe. This was a magnificent, world-historical claim. It seemed as though America's resolve could extricate the country from the ptomaine of a world-historical cadaver and still could summon up world-political powers that could establish a new *jus gentium*.

But already at the end of the 19th century, around 1900, these great possibilities appeared in a new light, both externally and internally. The Spanish-American War (1898) was a sign to the rest of the world that United States foreign policy was turning to open imperialism. The war did not abide by the old continental concepts of the Western Hemisphere, but reached deep into the Pacific Ocean and into the old East. The antiquated Monroe Doctrine was replaced by a demand for the "open door" to the wide open spaces of Asia.[16] From a global geographical perspective, this was a step from the West to the East. In relation to the new East Asian sphere rising in world history, the American continent was now in a position to displace an eastern continent, just as one hundred years earlier old Europe had been thrust aside in the eastern hemisphere by the world-historical rise of America. Such an illuminating change would be a highly sensational theme for an intellectual history of geography. In 1930, under the rubric "rise of a new world," it was suggested that America and China should unite.[17]

Equally profound as this world-historical shift from West to East was the fact that the old belief in the New World was changed from within — from internal American developments. When the United States embarked upon a foreign policy of imperialism, its domestic situation changed, as the era of its newness ended. The presupposition and foundation of everything that one could call the *novelty* of the Western Hemisphere disappeared,

16. Alfred Thayer Mahan, *The Interests of America in International Conditions* (London: S. Low Marston, 1910), pp. 117f. Mahan stressed that, *vis-à-vis* Europe in general and Germany in particular, the "noninterference" of the Monroe Doctrine did not mean absence. Mahan's idea of a union of both Anglo-Saxon empires [the United States and England] contained the proposal for a fusion of the New World with the Old World.

17. Hermann Alexander Graf von Keyserling, *Amerika, der Aufgang einer neuen Welt* (Stuttgart and Berlin: Deutsche Verlags-Anstalt, 1930).

both ideologically and in reality. Around 1890, the freedom of internal land-appropriation in the United States ended, as did settlement of formerly free soil. Until then, the old boundaries separating settled from free land, i.e., unsettled open land free for appropriation, still had existed. Together with these old boundaries there appeared a new type — the *frontier* — that could be changed from settled to free soil. This freedom ended when there was no more free soil. Even though the norms of the 1787 American Constitution remained in effect, the meaning of the fundamental order of the United States, the *radical title*, changed. The open doors to the old refuge of unlimited freedom closed when laws were introduced that limited immigration and became discriminatory, in part for racial and in part for economic reasons. Keen observers immediately recognized the change. One great philosopher and typical thinker of American pragmatism, John Dewey, seems to me to be particularly noteworthy. He took the end of the *frontier* as the starting point of his consideration of the concrete social situation of America. It also was important in the thinking of Ralph Waldo Emerson and William James, whose optimism and high spirits presupposed *open borders*. Free soil remained a factor in 1896, when William James published his essay "The Will to Believe."

E. Separation of State and Economy

In the chapter on the first global lines,[18] we referred to the structural relation between Hobbes' concept of the state of nature and the sphere of ruthless freedom existing prior to the state. We examined all the principal historical facts to explain how this realm of freedom found concrete historical orientation in the then new world *beyond the line* — in an enormous open space free for land-appropriation. More than one hundred years before the outbreak of the 1848 revolutions, Hegel, in the introduction to his lectures on the philosophy of history, had made a remarkable diagnosis of the structure of this New World. In a profound mixture of naïvete and erudition, he had ascertained, even at the time of the first Monroe Doctrine, that the United States of America still did not constitute a *state*, that the country remained in a stage of civil society, i.e., in a pre-state condition of the freedom of interests that precedes the state's dialectical overcoming of the concept of every man for himself. In an 1842-43 work, the young Karl Marx began with Hegel's diagnosis and went even further in an important observation about the United States. Marx said that, as in 19th century

18. See Part II, Ch. 1, pp. 86ff.

monarchies, republics, too, had defined the constitution and the state in terms of bourgeois property. Owing to the separation of state and society, politics and economics, he said that the material content of the political state lay outside politics and the constitution.[19] However, Anglo-Saxon theoreticians of the state had raised this relation between state and society, politics and economics, to the level of an axiom. The key to clarification of the contradictions of presence and absence lay precisely in the separation of politics and economics, because a world no longer ideologically new still had to maintain its old novelty, if it wanted to link its economic presence to its political absence, and to maintain the ideology of its earlier freedom, even though the situation and the ground for it no longer existed. The attempt to retain the consciousness of an unpolitical, pre-state condition in an already over-politicized state reality created an artificially prolonged virginity whose dilemma will be discussed in the following chapter.

19. *Marx-Engels Historisch-Kritische Gesamtausgabe*, ed. by David Riazanov (Frankfurt am Main and Berlin: Marx-Engels Archiv, Verlagsgesellschaft MBH, 1927-1932), Vol. 1, p. 437. My attention was drawn to this reference in an article by Ernst Lewalter, "Zur Systematik der Marxschen Staats- und Gesellschaftslehre," in *Archiv für Sozialwissenschaft und Sozialpolitik*, Vol. 63 (1933), p. 650. Of particular interest is the book by Hugo Fischer, *Karl Marx und sein Verhältnis zu Staat und Wirtschaft* (Jena: Gustav Fischer, 1932), p. 45: "To the extent that the politics of 1931 is economic politics, it is external politics, which is the reverse of the internal politics of the 19th century."

Chapter 6

Transformation of the Meaning of Recognition in International Law

Often in world history, peoples and empires have sought to isolate themselves from the rest of the world and to protect themselves from an infection by a defensive line. But the question remains: out of such a separation and isolation, which posture should they adopt *vis-à-vis* other peoples? America's claim to be the new, uncorrupted world was raised in the 19th century when there was growing consciousness that the earth is a sphere, a globe. As long as this claim was combined with a consistent isolationism, the rest of the world considered the line of the "Western Hemisphere" to be a voluntary separation. A global line that divided the earth into two halves, one good and one bad, portrayed a *plus* and *minus* line of moral valuation. It contained a perpetual renunciation of the other side of the planet, as long as this global line was not combined with a complete separation. In every other sense, a dialectic of isolation and intervention developed, whose dilemma increased with each further stage of historical evolution.

A. The Dilemma of Isolation and Intervention

The dilemma of isolation and intervention first became evident when the United States finally succeeded in overcoming the aftereffects of the War of Secession (1861-1865) and resumed its old feeling of superiority *vis-à-vis* the European Great Powers. In a transitional stage that can be dated from 1890 to 1939 this unsolved dilemma expressed itself in a mixture of presence and absence[1] that determined the fate of the League of Nations. With growing global consciousness, however, the compulsion to presence and absence became irresistible, ineluctable, and simultaneously narrower and sharper, since it corresponded to the growing spatial and

1. See Part IV, Ch. 3, pp. 255ff.

political dimensions of such global linear thinking and such a modern industrial-economic *Großraum*. Since the start of the so-called imperialistic era, i.e., since the end of the 19th and beginning of the 20th century, the Western Hemisphere had found itself facing an enormous alternative between a plurality of *Großräumen* and a global claim to world power, pluralism and monism, polypoly and monopoly. Any sociologist, historian, jurist, or economist who has observed the development of the United States since 1890 and of the Western Hemisphere that it dominates has noticed the dialectic of these developmental contradictions. After World War I, this also was perceptible in Europe. As a result, enormous masses of whole continents oscillated aimlessly and abruptly, back and forth, between contradictory and impossible antitheses. However, any strong life and certainly any great world politics is more than just general antagonisms or polarities of contradictory tendencies, more than mere contrasts and tensions. The contradictions stem from the unsolved problematic of a spatial development that is compelled either to make the transition to a *Großraum* and to find its place in a world of other recognized *Großräume*, or to transform the concept of war contained in traditional international law into a global civil war.

During World War I, President Wilson's politics fluctuated abruptly between the extremes of self-isolation and world-intervention, until they came down hard on the side of the latter. It is sufficient to cite two of his declarations, the first made at the start of the war (1914), the second when America entered the war (April, 1917). Wilson's starting point was "to be neutral in fact as well as in name." In his August 19, 1914 speech, he held solemnly to the ideal of an absolute, rigorous, even scrupulous neutrality, he anxiously avoided taking sides with the belligerents, and he maintained a strict line of isolationist neutrality. He even warned his countrymen against the emotional temptation to take sides, if only in ideas and feelings, and against a neutrality that exists only externally, in name only, while the soul no longer is neutral. "We must remain neutral in thought and action, keep our feelings in check, and avoid any action that might be considered provocative by any of the belligerents." In November, 1916, under the slogan "he kept us out of the war," Wilson was reelected to a second term. However, in his April 2, 1917 declaration, he changed his position in all respects, and publicly said that the time and era of neutrality was past, that world peace and the freedom of peoples justified America's entry into a European war. By virtue of this fact, a European war in the old style was transformed into a world war, a war of all mankind. Every important interval of American history in

recent decades has demonstrated that this turn from isolation to intervention was a matter not only of Wilson's personal opinions and psychological motivations, but of objective forces and tendencies. It was a matter, as I have said, of the problematic of self-isolation and world-intervention.

The history of the League of Nations[2] is only one example of this problematic. The condemnation of war that the United States formulated in the 1928 Kellogg Pact left the relation between the Kellogg Pact and the League Charter unclear. Nevertheless, in effect, the Kellogg Pact left the great decision concerning the approval of a world war in the hands of the United States. This was as true for the League as for its two dominant European powers, England and France. The traditional type of neutrality, which had not been destroyed completely by the League Charter, was destroyed by the Kellogg Pact in the transition to just war as a principle of international law. One international law jurist, John B. Whitton, formulated this as simply as possible in the thinking of the time: formerly, neutrality was a symbol of peace; now, according to the new international law created by the League of Nations and the Kellogg Pact, it had become a symbol of war.

Just as the dilemma of isolation and intervention was reflected in Wilson's declarations during World War I, so, after 1939, astounding parallels of this same development became evident, and require a deeper and closer examination. Speaking in Chicago on October 5, 1937, Franklin Delano Roosevelt declared that isolation and neutrality were insufficient to deal with international anarchy and lawlessness worldwide. However, the official declaration of United States neutrality, issued on September 5, 1939, professed allegiance to the old concept of neutrality in interstate international law, i.e., it held to the most rigid impartiality and equal friendship *vis-à-vis* the belligerents. It even utilized the traditional European formula of *aequalitas amicitiae*, based on the neutrality of *equal friendship* with both parties in war, and even contained the expression "*on terms of friendship*." There is no need to explain how the impartiality of equal friendship developed thereafter, but only how this concept increasingly threw the whole world into turmoil, given its connection to the problem of the Western Hemisphere and the internal dialectic of isolation and intervention. After 1939, and during World War II, the strict neutrality consistent with self-isolation was abandoned in the stirring words the President used upon entering the war.

The memorandum prepared by the [former] American Attorney-General and [then] Supreme Court Justice Robert H. Jackson on the presidential yacht Potomac, which was read at a White House press conference on

2. See Part IV, Ch. 3, pp. 251ff.

March 31, 1941, openly proclaimed the end of the old isolation and neutrality. "I do not deny," said the United States spokesman, "that in the 19th century certain rules of neutrality were established, based on the idea of neutrality, and that these rules were supplemented by various Hague Conventions. Nevertheless, the application of these rules has become outdated. Events since the World War have robbed them of their validity. Through the acquiescence of the League of Nations to the principle of sanctions against aggressors, through the Kellogg-Briand Pact, and through the Argentine treaty outlawing war, the principles of the 19th century, according to which all belligerents should be treated equally, have been swept away. We have reverted to *older* and *sounder* views." Already we have seen what this return to older and sounder views actually meant in the history of ideas.[3]

For our consideration of international law, it is sufficient to focus on the problem of *recognition* in international law, since it is the key problem of any order based on the co-existence of large and independent entities. The significance of recognition in international law has changed many times in recent decades, and the structural transformation of the spatial order in international law has been reflected in this change.

According to classical European international law, in case of war, recognition of another state or another government presupposes recognition of the enemy as *justus hostis*, based on complete equality and mutual respect. Every recognition in international law is essentially an expression of the fact that the recognizing state has recognized a territorial change or a new regime. This recognition either is based on the existing spatial order or is compatible with a newly created spatial order. In times of stability, relatively firm customs and legal institutions are established; in times of change, the whole structure, including *de jure* recognition, becomes a *de facto* recognition, and the dilemma of isolation and intervention appears on a global scale. Accordingly, in the international law praxis of American statesmen and jurists, the concept of recognition became a general act of approval that could be extended to any state of affairs, any event, any war, and any territorial change anywhere in the world.

As for the Stimson Doctrine,[4] more will be said shortly. But here we will examine some examples of recognition in international law that are

3. Cf. on Vitoria, Part II, Ch. 2, pp. 101ff.

4. [Tr. This doctrine was enunciated by Secretary of State Henry Stimson on January 7, 1932 in notes to Japan and China. Cf. Part IV, Ch. 6, p. 307n. It is unknown what sources Schmitt used in his discussion. For general reference, see Robert Langer, *Seizure of Territory: The Stimson Doctrine and Related Principles in Legal Theory and Diplomatic Practice* (Princeton, N.J.: Princeton University Press, 1947).]

instructive for our theme, because a discussion of their model character will allow us to discern the dilemma of isolation and intervention as sharply as possible: recognition of insurgents as *belligerents* and recognition of a new *government*. Both are especially illuminating with respect to the question of spatial order, because they reveal clearly that intervention is inseparable from any form of coexistence in international law, and, in the total system of international law, they demonstrate that when war turns into just war, it turns into civil war. On the whole, aside from colonial wars and Indian wars, until the two world wars American concepts of war were constituted only from the experiences of two great *civil wars*: the War of Independence (1776-1779) and the War of Secession (1861-1865). In both, but above all in the latter, the question of *recognition* of *insurgents* and of *parties to civil war* lay at the core of international law discussions.

B. Problematic of the Recognition of Rebels: Developed on the Basis of the War of Secession

European international law in the 18th and 19th centuries had developed recognition of insurgents as belligerents, as *combatants*, into a type of legal institution. The specific problematic consisted in the fact that the purely *inter*state concept of war in European international law was transformed into a purely *intra*state struggle, i.e., into a civil war. Together with the problem of non-discriminatory war, this raised the question of the intervention of one sovereign state in the internal affairs of another. With Vattel, the legal institution of recognition of rebels as belligerents arose from ideas of neutrality and their connection to non-intervention.[5] Obviously, however, for rebels, recognition as belligerents meant an extraordinarily significant and fundamental upgrading of their status. For the legal government in question, it meant a downgrading and a serious intervention. This intervention was pursued in the name of the alleged neutrality. What appeared, both internally and externally, to one side to be rebels, treason, felony, and criminality, and to the other side to be prosecution of crimes, administration of justice, and police action, now became for the recognizing state a *bellum justum*, in the sense of the non-discriminatory, interstate concept of war. At the same time, a legal state government, to its disfavor, had to accept this ongoing, extraordinary change. The legality or legitimacy of a *justa causa*, which is most essential to a government endangered by rebels, thereby became as juridically

5. Vattel, *Le droit des gens*, *op. cit.*, p. 103.

insignificant as the illegality of the criminal rebels.

Nevertheless, where such a legal institution was in force, a legal and legally recognized sovereign state government had to upgrade its own internal, illegal enemies, and thereby had to accept an equivalent downgrading of its own legal situation in international law. The internal problematic of such a legal institution is possible only in relation to a comprehensive spatial order of international law. In reality, the conventional precedent of recognition of insurgents as belligerents only was an expression of the control and intervention of the leading powers, which thereby gave form to war in the sense of international law, recognized *justi hostes*, and ultimately also effected territorial changes they considered to be acceptable. A typical example was recognition of the Greek insurgents (1821) by the leading European powers. Actually, this was only the expression of European control *vis-à-vis* the declining Ottoman Empire, which still was not recognized as a member of the European order of international law, still did not belong to the narrower spatial order of Europe, and whose soil, in a certain sense, was open to Eurocentric international law. This recognition was an indication of superficial generalizations that, from this Eurocentric act, one had come to expect from the European powers *vis-à-vis* a non-European empire. It was a precedent for real inter-European civil wars. By the same token, the fact that the Italian revolutionaries under Garibaldi (1859) were recognized as belligerents was an expression of European Great Power politics *vis-à-vis* weaker European states. As the spatial order of a common European international law disintegrated, such recognitions lost their meaning. For this reason, during the Spanish Civil War (1936-1939) no side any longer was recognized as a belligerent. By then, the so-called non-intervention committee of the Great Powers had become nothing more than a facade for the internal nihilism of traditional European international law.

The praxis of recognition in Eurocentric international law had a corresponding praxis within the Western Hemisphere. In 1816, the United States recognized the revolutionaries of South and Central America as belligerents in their struggle against the legal Spanish and Portuguese governments (Buenos Aires, Columbia, and Mexico against Spain; Brazil and Artigas [Uruguay] against Portugal). From 1817 to 1822, when South American belligerents were recognized as independent states, American President James Monroe reported to Congress yearly via ambassadors. Recognition of these belligerents was mentioned expressly in the great Monroe message of December 2, 1823. There, the conflict between the belligerents and

Spain was construed to be an expression of complete United States neutrality. In reality, this politics and praxis of the United States sprang from the claim in international law to respect the line of the Western Hemisphere, which was expressly stated in Monroe's message of December 2, 1823. As a result, it culminated in an especially interesting conflict when the American War of Secession began in May 1861, and the insurgent Southern states were recognized as belligerents by the European Great Powers, England and France. No longer was it a matter of the internal European or internal American spatial order, but of the limits of traditional Eurocentric international law and of the relation between the two great spaces on either side of the Western Hemisphere. This recognition of belligerents in 1861 was unique. It could not become a test case for Eurocentric international law, and also could not be used as a true test case of Eurocentric international law. However, when the Western Hemisphere confronted old Europe with a new dignity all its own, it raised an issue all the more significant and instructive for the new spatial problem of the earth.

The great controversy between the United States and the two European Great Powers, raised by recognition of the confederated Southern states, was drawn out over a whole decade. It began with England's May 13, 1861 proclamation and France's June 10, 1861 proclamation, and continued even after withdrawal of these recognitions (in June 1865) and through discussions of the Alabama case in 1871. The American position was very difficult, both theoretically and practically. England and France were able to rely on generally accepted opinions and respected authors, such as Vattel and Wheaton. They also were able to refer to the precedents of Greece (1821) and South America (1822), and even to President Washington's famous declaration of neutrality issued on April 22, 1793, during the Revolutionary War between Jacobin France and the anti-revolutionary coalition led by England and Austria. However, given the contemporary political situation, the United States was unable to authenticate its own argument with reference to the spatial viewpoint of the Western Hemisphere and the Monroe Doctrine, because precisely during these critical years (1861-1865) the Monroe Doctrine was obscured the most. While offended by official English and French reference to the Greek precedent of 1821, the Union government did not argue from this position. Instead of disavowing the right to recognize insurgents as belligerents, in its notes and expositions it reproached only a precipitate, unnecessary recognition without prior consultation and negotiation with the legal government. In addition, the Union criticized as incorrect and unfriendly the fact that England and France had

dealt with this question in concert. Finally, it emphasized the indestructible unity and indivisibility of the United States, and, on this basis, claimed that any recognition of another country's rebels was a serious problem, and that, in principle, such recognition was impossible in international law.

Especially instructive in this respect is a May 21, 1861 letter that the American delegate in London, Charles Francis Adams, addressed to Secretary of State William Henry Seward in Washington. Adams referred to a speech made by the English Lord Chancellor, who had said that, since the Southern states had been recognized as belligerents, the war would continue as a *justum bellum*. Since the American delegate had lodged a protest, the Lord Chancellor replied: "Under such circumstances it seemed scarcely possible to avoid speaking of this in the technical sense as *justum bellum*, that is, a war of two sides, without in any way implying an opinion of its justice, as well as to withhold an endeavor, so far as possible, to bring the management of it within the rules of modern civilized warfare. This was all that was contemplated by the Queen's proclamation."[6] In a June 21, 1861 letter to Lord Lyons, the English representative in Washington, the Foreign Minister, Lord Russell, returned to this point, and made a distinction completely consistent with the classical tradition of the doctrine of *bellum justum*, in that he consciously eliminated the question of *justa causa*. The English Foreign Minister said: "I had quoted in the House of Commons the case of the Turks and Greeks in order to avail myself of the sound maxim of policy enunciated by Mr. Canning, that the question of belligerent rights is one, not of principle but of fact; that the size and strength of the party contending against a government, and not the goodness of their cause, entitle them to the character and treatment of belligerents."[7]

Such formulations also demonstrate just how strongly English jurists held to the classical tradition of the interstate concept of war. If they always speak of their neutrality *vis-à-vis* both sides in a civil war, in reality they mean by it only the application of the non-discriminatory, interstate concept of war to an intrastate civil war. But that was precisely the point, and the deep agitation of the American government was completely

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6. The passage is important enough to be cited in full: "It was designed to show the purport of existing laws, and to explain to British subjects their liabilities in case they should engage in the war. And however strongly the people of the United States might feel against their enemies, it was hardly to be supposed that in practice they would now vary from their uniformly humane policy of war." This last remark of the Lord Chancellor ignored the connection between just war and civil war. See Viktor Bruns, *Fontes Juris Gentium* (Berlin: Carl Heymanns Verlag, 1933), Series B, Section I, Vol. 1, Part 2, p. 109.

7. *Ibid.*

understandable. The practical, as well as the moral and the juridical question of recognition of rebels is anything but a purely factual or declarative matter. Any recognition that a Great Power gives to another state's insurgents intensifies, in a very effective way, the moral, juridical, propagandistic, and military fighting potential of these insurgents, traitors, and saboteurs. In view of this fact, all claims to a purely factual and declarative character of recognition are untrue. If one abstracts from the *justa causa* and recognizes the *bellum justum* of insurgents, then this is a serious injury and injustice to the legal government with respect to all legal questions. In reality, American arguments manifested legal concern with recognition of insurgents as belligerents, not only because recognition of an intrastate war is inseparable from the unity and indivisibility of state sovereignty, but also because the legal equation between a legal government and its intrastate illegal enemies in no way appears to be an expression of perfect neutrality. Rather, it constitutes a downgrading of the authorized government and an exception to the recognized interstate procedure. To this extent, such recognition always is consistent with *intervention.*

From this perspective, Secretary of State Seward's June 19, 1861 instruction to Charles Francis Adams is relevant: "This government could not, consistently with a just regard for the sovereignty of the United States, permit itself to debate these novel and extraordinary positions with the government of her Britannic Majesty; much less can we consent that that government shall announce to us a decision derogating from that sovereignty, at which it has arrived without previously conferring with us upon the question. The United States are still solely and exclusively sovereign within the territories they have lawfully acquired and long possessed, as they have always been. They are at peace with all the world, as, with unimportant exceptions, they have always been. They are living under the obligations of the law of nations, and of treaties with Great Britain, just the same now as heretofore; they are, of course, the friend of Great Britain, and they insist that Great Britain shall remain their friend now, just as she has hitherto been. Great Britain, by virtue of these relations, is a stranger to parties and sections in this country, whether they are loyal to the United States or not, and Great Britain can neither rightfully qualify the sovereignty of the United States, nor concede nor recognize any rights or interests of power of any party, state, or section in contravention to the unbroken sovereignty of the Federal Union. What is now seen in this country is the occurrence, by no means peculiar, but frequent in all countries, more frequent even in Great Britain than here, of an armed insurrection

engaged in attempting to overthrow the regularly constituted and established government. There is, of course, the employment of force by the government to suppress the insurrection, as every other government necessarily employs force in such cases. But these incidents by no means constitute a state of war impairing the sovereignty of the government, creating belligerent sections, and entitling foreign states to intervene or to act as neutrals between them, or in any other way to cast off their lawful obligations to the nation thus for the moment disturbed." Especially important for our consideration is the following statement that the American Secretary of State appended to this explanation: "Any other principle than this would be to resolve government everywhere into a thing of accident and caprice, and *ultimately all human society into a state of perpetual war*."[8]

C. Transformation of the Meaning of Recognition of a Foreign Government

This 1861 American communication is based on the idea that a state's legal position *vis-à-vis* another state's internal affairs can constitute an interference contrary to international law. This is decisive for the second type of recognition in international law, which now we must consider from the viewpoint of the Western Hemisphere. It deals with recognition of a government and with the question of when a new government requires a new, special recognition. In this respect, European international law had found a certain balance, and had turned recognition of states and governments into a type of legal institution. Thereby, the interests of the recognizing state *vis-à-vis* a trustworthy contractual partner, as well as the principle of non-interference in another state's internal constitutional matters, were regulated legally. International law jurists of the 19th century, such as James Lorimer and Henry Bonfils, had developed (irrespective of the distinction between *de jure* and *de facto* recognition) various types of recognition: complete recognition, partial recognition, and natural recognition.

Until the end of the 19th century, recognition within Europe was considered to be an acceptance into the family of nations, an admission into a society and, therefore, to be a constitutive act. For Lorimer, as we have seen, such recognition was the basic institution of European international law. However, to the same degree that the concrete order of European international law disintegrated, so, too, did the consciousness of this constitutive character. Recognition of a new state or a new government as the dominant

8. *Ibid.*, pp. 108-109.

doctrine in international law thus ceased to be a constitutive act of admission. But it did not become thereby an empty formality; rather, it was conceived of as a "certification of trust" between one state and another, one government and another. In this construction, the spatial element contained in every recognition in international law no longer was relevant. On the whole, and with respect to the question of recognition, European praxis sought to safeguard the difficult middle ground between intervention, which was inadmissible, and abstention from any legal position, which in practice was impossible. In the contradictory posture of the Soviet Union from 1917-1924, recognition proved to be the key problem of a new world order. It revealed the reality of the new world situation: a new territorial *Großraum* in Eastern Europe, a complete disintegration of the community of European international law, a Western Hemisphere still vacillating precariously between isolation and intervention, and a helpless League of Nations.

On American soil, the extreme antithesis between non-intervention and intervention was evidenced in the recognition of new governments, and in a manner so immediate and sharp that the Western Hemisphere also appeared to be the magnified and crude mirror image of the 19th century European problematic. After the Tobar Doctrine, which, on December 20, 1907 consolidated an agreement among the Central American republics of Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, no government of one state could recognize the government of another that had come to power by *coup d'état* or revolution, rather than constitutionally by democratically elected representatives. Thereby, the democratic form of legality and legitimacy was declared to be the standard in international law. President Wilson raised this standard of democratic legitimacy in the Western Hemisphere to the level of a principle in international law. Thereafter, only governments that were legal in the sense of a democratic constitution were recognized. Of course, what *democratic* and *legal* meant in practice was left to the recognizing government, i.e., these terms were defined, interpreted, and sanctioned by the United States. Obviously, such a doctrine and practice of recognizing new governments had an interventionist character. For the Western Hemisphere, the result was that Washington could control every constitutional and governmental change of any and all states in Central and South America. As long as the United States confined itself to the Western Hemisphere, this affected only this *Großraum*. However, as soon as the United States raised this doctrine to a global claim of world interventionism, it affected every other state on earth.

On American soil, the call for the independence of any state had the opposite effect of creating a radical construction. In international law, recognition *as such* was declared to be an unacceptable means of intervention and was repudiated. This standpoint had the dialectical value of a consistent antithesis, and it retained this value even when it became nothing more than a powerless gesture, which is how it is understood in the Mexican Estrada Doctrine. Any such recognition was seen as contrary to international law, even as an offense against the ostensibly recognized state or government, and was rejected on that basis.[9] Thereafter, in international law, all reciprocal relations between states, between governments, and between civil war belligerents became merely particular relations of a purely factual nature case by case. All *de jure* recognitions, even all *de facto* recognitions, disappeared; all that remained were *de facto* relations. Clearly, this manifested the opposite of a centralized and global praxis of recognition.[10]

Intervention developed as a typical and specific means of a general concept of recognition and non-recognition in international law, which was not confined to new states and governments in the traditional sense of the praxis of European international law. It was a legal approval or disapproval of any change, in particular a territorial change, considered to be significant anywhere in the world. This position found its first

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9. This doctrine bears the name of Señor Don Genaro Estrada, Foreign Minister of Mexico. The basic text of his declaration reads: "After a very careful study of the subject, the Government of Mexico has transmitted instructions to its Ministers or *Chargés d'Affaires* in the countries affected by the recent political crises, informing them that the Mexican Government is issuing no declaration in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favorably or unfavorably, as to the legal qualifications of foreign regimes." See "Estrada Doctrine of Recognition," in *American Journal of International Law*, Vol. 25 (1931), No. 4, Supplement, p. 203, reproduced.

10. From this viewpoint, it is useful to note that "the modern Swiss policy of recognition has much in common with the Mexican doctrine." "The position of the federal authorities *vis-à-vis* the Franco government is to a certain extent reminiscent of the Estrada Doctrine. . . . One can say flatly that with this position — to provide neither *de jure* nor *de facto* recognition but to decide voluntarily on a case by case basis — the Federal Council had adopted the only doctrine consistent with the understanding that in the contemporary situation all questions of recognition are ruled by political rather than juridical considerations." This quotation is from an article by the Swiss Peter Stierlin, "Die Rechtsstellung der nichtannerkannten Regierung im Völkerrecht," in *Zürcher Studien zum Internationalen Recht*, ed. by Hans Fritzsche and Dietrich Schindler (Zurich: Polygraphischer Verlag, 1940), pp. 29 and 200. These sentences are all the more important, since the Swiss were concerned about presenting an example of correctness in international law.

authentic formulation in the Stimson Doctrine, which was linked juridically to the 1928 Kellogg Pact. Its first documentation occurred in 1932,[11] whereby the United States assumed the right to refuse "recognition" to territorial changes anywhere in the world that were brought about by illegal force. This meant that the United States, ignoring the distinction between the western and eastern hemispheres, assumed the right to decide the justice or injustice of any territorial change anywhere in the world. Such a claim concerned the spatial order of the earth. "An act of war in any part of the world is an act that injures the interests of my country." This was the core of the Stimson Doctrine enunciated by President Herbert Hoover. The praxis of the *jus publicum Europaeum* had sought to encompass conflicts within the framework of a system of equilibrium. Now, they were universalized in the name of world unity. "Except for this viewpoint and these covenants [the Kellogg Pact and the League of Nations Covenant], these transactions in far-off Manchuria, under the rules of international law theretofore obtaining, might not have been deemed the concern of the United States."[12] From the new viewpoint, however, interventions were justified, and encompassed all important political, social, and economic matters of the earth. Stimson's August 8, 1932 declaration also contained (and consciously so) the following statement: "It (war) is an illegal thing. Hereafter, when two nations engage in armed conflict, either one or both of them must be wrongdoers — violators of this general treaty law (the Kellogg Pact). We no longer draw a circle about them and treat them with the punctilios of the duelist's code. Instead, we denounce them as law-breakers."[13]

At this juncture, we should remember Secretary of State Seward's

11. The Stimson Doctrine was articulated in an identical note of January 7, 1932 sent to China and Japan, and then elaborated on in a speech Secretary of State Stimson delivered to the Council on Foreign Relations on August 8, 1932. See The Department of State Publication, No. 357. The January 7 note stated that the American government "would recognize no situation, no treaty, and no agreement which was brought about by means contrary to the agreements and obligations of the treaty of August 27, 1928 (the Kellogg Pact)." A resolution of the League of Nations dated March 11, 1932 declared that "League members are predisposed to recognize no situation, no treaty, and no agreements brought about by means contrary to the League of Nations Covenant or the Pact of Paris (the Kellogg Pact)." In a declaration dated August 3, 1932, 19 states in the Americas declared with respect to the Chaco War between Bolivia and Paraguay that they "would no more recognize a territorial regulation of the present (Chaco) conflict that was not brought about by peaceful means than they would the validity of territorial acquisitions brought about through occupation by armed conquest." The Saavedra Lamas Pact followed on October 10, 1933.

12. The elaboration of August 8, 1932, *op. cit.*

13. *Ibid.*

statements in 1861, at the beginning of the War of Secession, when the United States was isolated and on the defensive. By contrast, the 1932 declaration was based on the new doctrine of intervention. Secretary of State Stimson presented his own spatial concept in a June 9, 1941 speech at West Point. He said that the whole world was no greater than it had been in 1861 at the outset of the War of Secession, when the United States already had become too small for the antagonism separating the northern and southern states. That is an important statement for the problem of the new *nomos* of the earth, especially if one bears in mind my comments on the maxim *cujus regio, ejus economia* and its highly modern reversal, *cujus economia, ejus regio*. But that is all I will say about this matter.

Chapter 7

War with Modern Means of Destruction

Natural science today offers any ruler the means and methods to transcend the concept of arms and, thus, also of war. Development of modern means of destruction has accompanied and even intensified the transformation of war. Until now, these modern means have moved in step with criminalizations. Given our theme, I will limit myself to a few remarks that illuminate the spatial perspective of war in traditional European international law.

A. The Spatial Perspective of the Theater of War on Land and on Sea

In the 18th and 19th centuries, European international law achieved a bracketing of war. The opponent in war was recognized as a *justus hostis* and was distinguished from rebels, criminals, and pirates. To the same degree, war lost its criminal character and punitive tendencies, thereby ending discrimination between a just and an unjust side. Neutrality was able to become a true institution of international law, because the question of the just cause, the *justa causa*, had become juridically irrelevant for international law.

In this way, war was transformed into a relation between mutually equal and sovereign states. The opponents, recognized on both sides in the same way as *justi hostes*, squared off against each other on an equal plane. This equality of belligerents, which in the 16th and 17th centuries had been stressed as the *aequalitas hostium* by the true founders of European international law, Alberico Gentile and Richard Zouch, was developed in the 18th and 19th centuries only for European *land war*. Both civil wars and colonial wars remained outside this bracketing. Only European land wars of this epoch were fought by state-organized armed forces on both sides. Given the fact that war was fought against enemies rather than against rebels, criminals, or pirates, it was possible to establish numerous legal institutions. In particular, it became possible to view prisoners of war and

the vanquished no longer as objects of punishment or vengeance, or as hostages, and no longer to treat private property as war booty, and to conclude peace treaties with self-evident amnesty clauses.

Other legal institutions were developed for *sea war* that also were brought about through humane concerns. But modern sea war did not develop in the manner of land war. According to the rules of sea war, if a warship sank, it was not customary for the leading European countries to hoist a white flag and to treat the vessel as an enemy, as it would a stronghold on land. Also, sea war was recognized generally as trade war or economic war that was not confined to belligerent states' naval forces. Sea war was and remained prize war, and was directed against hostile and even neutral private property. It was and remained trade war, and trade in the 19th century was considered to be essentially free, i.e., not a political, but rather a private matter.[1] Until the formal abolition of piracy at the 1856 Paris Conference, state-sponsored privateers actively participated in sea wars. To a great extent, the American War of Secession (1861-1865) was still this kind of war, a freebooter war. However, after the abolition of piracy, privateers and their private property remained passive objects of sea war and of prize law. Blockade-runners and smugglers, whose property was good prize, were not states, but privateers. Neutral trade ships running blockades and taking contraband were not violating neutrality; they were acting within the space of the free sea — the space free of state control — where free, i.e., non-state merchants had determined that private, i.e., non-state property taken by military action would be considered to be the booty or good prize of a warring state.

Sea war thus lacked the complete and consistent equality of both sides characteristic of European interstate war, which purely military land war in 19th century Europe had developed into such classical legal institutions as *occupatio bellica.* On this basis, it had been established that sovereign states at war faced each other as equals and respected each other as such. In sea war, a warship, a component of a state-organized sea power, pursued enemy actions *directly against privateers*, not against equal states and organized powers. Much more could be said about a sovereign state, about privateers in the service of another state, and even about privateers flying their own flag. Such privateers were not

1. The "freedom of trade as a cardinal principle of international law at sea" is the theme of a book by Serge Maiwald, *Die Entwicklung zur staatlichen Handelsschiffahrt im Spiegel des internationalen Rechts: Die Staatsfreiheit des Handels als Kardinalprinzip des Seevölkerrechts* (Stuttgart: Wissenschaftliche Verlagsgesellschaft, 1946).

identical to a sovereign state at war, and could fight sovereign states as equals, although in sea war the two sides did come into direct contact.

This privateer of private trade, who either ran blockades or took contraband, was viewed as an enemy by a warring sea power. But was he a *justus hostis*? Not in the same sense as an equally sovereign state, but also not in the sense of a foe in a war of annihilation against criminals and pirates. Blockade-runners and smugglers were not outside international law. They proceeded at their own (private) risk; their actions were not illegal, but precarious. Their ventures were possible, because both operations — blockade-running and smuggling — occurred in principle in the no man's land of a double freedom, i.e., in the non-state sphere: first spatially, in the sphere of the free sea, and second, substantively, in the sphere of free trade. But parties to a sea war — both the state practicing prize law and privateers pursuing trade whose ships or property could become the object of state prize law — appeared before a prize court. Moreover, both were subject to the ruling of an independent judge, i.e., a judge from a non-warring state, who applied the rules of international prize law. In this way, the idea of equality before the law and of equal treatment was assured. In a purely state war, this was grounded in the quality of *justus hostis* and in the mutual *aequalitas* of this quality of enmity. When the specific state character of *justus hostis* was destroyed, so, too, was the essence of bracketed land war in international law and all the classical legal institutions. In sea war, it was prize jurisdiction that prevented a corresponding destruction, both in form and in principle.

The extraordinary significance of prize jurisdiction in international law lies in the fact that it created the possibility of law and reciprocity with respect to a *non-state enemy*. Thus, its significance in sea law is fundamental. If it becomes obsolete, then sea law is transformed. Its classical formulation was created by the great prize judges of the Napoleonic age, and was developed with full awareness that it was not a national institution of the state, but an international institution of international law. Certainly, the prize judge was commissioned by the national state; however, he was invested not with national, but with international legal tasks and powers.

All such institutions of international law based on legal and moral equality had a spatial counterpart based on the *equal surface* of the theater of war. In classical international law, a land war and a sea war were distinguished clearly. Land war in traditional European international law was *purely terrestrial*; sea war was *purely maritime*. Both spatial orders, which corresponded to two distinct types of war, also were divided spatially. It was

possible that land war and sea war would meet spatially, whereby the means of land war could be effective at sea, and vice versa. However, given the technical means of 19th century war, seldom was the impact of land war on the sea considered. The opposite possibility, the effect of sea war on land, was much greater. Blockade of a harbor or of a coastline, and bombardment of harbors and coastal cities are obvious examples of a sea war not confined to the space of the sea, but effectively applying the specific means of sea war to land. But this collision of land war and sea war occurred only on the fringes of both spheres, and lacked any great significance on land. Sea war did not require a sea power pursuing a blockade to abide by certain obligations in international law with respect to land and its inhabitants, such as would be required with the *occupatio bellica* of an occupying land power. Infringements of maritime war on the terrestrial sphere led to a series of borderline questions of blockade and of booty and prize law, such as the question of whether prize law could be applied to rivers or to the problem of so-called land prizes. Such borderline cases did not bring into question the purely terrestrial or purely maritime substance of either type of war. As always, land and sea were separate and distinct worlds. As a result, the theaters of war were as different as were the types of war.[2]

In the 19th century, international law was accustomed to distinguishing between land and sea as separate spatial orders and separate surfaces, and to allowing the free sea to begin at the border of the three-mile limit of coastal waters. But the spatial orders and their corresponding laws of war scarcely were considered. For example, despite the purely maritime character of an insular empire such as England, a sea power, English soil was considered to be firm land and a theater of a reciprocal land war, in the same sense as was the soil of any of the larger or smaller land powers on the Continent, such as Germany, Russia, or Switzerland. To international law jurists at the time, land was land, and a disturbance in London harbor (also when ships directed there to search for contraband or goods stored in the harbor were taken as land prizes) would be treated *juridically* in the same way as would be a commotion in a cornfield in Swabia. The fundamental spatial problem can be settled only in positivistically handled case studies or in politically and polemically handled generalities, but not in systematic juridical ways of thinking.

A completely isolated view, which has been misunderstood and has gone unnoticed by contemporary jurists, should be mentioned, precisely

2. Cf. Ferdinand Friedenburg's dissertation, *Der Kriegsschauplatz* (Berlin: 1944).

because of its uniqueness. It is that of General Gustav Ratzenhofer, an important sociologist and theoretician of the science of war.[3] From the standpoint of an essentially terrestrial existence, this soldier of the Austro-Hungarian monarchy, a land power, was sensitive to the antithesis posed by the purely maritime existence of England. Drawing a far-reaching consequence for international law, Ratzenhofer said that if the island were invaded, war on English soil would not proceed according to the rules of land war in international law, but would follow the rules of prize law. He reasoned that England had followed sea law consistently, and had rejected any limitations of prize law similar to those that had been adopted in international law with respect to land war. This was the thesis of a land-bound, terrestrial thinker, who sought to come to terms with the results of fundamental reprisals. Nevertheless, Ratzenhofer's thesis is mentioned as an exception only for heuristic reasons. Obviously, it is a very instructive exception, because it reveals the antithesis of land and sea, and of types of war and their various concepts of enemy, war, and booty in their totality. We now will examine the counterpart, i.e., the perspective from a sea-bound, maritime sphere.

B. Transformation of the Spatial Perspective of Theaters of War

The spatial perspective of the separated surfaces of land and sea had to change fundamentally when an independent third type of arms — the air force — took its place beside the army and the navy. At first, the new type of weapon was considered to be a mere reinforcement and augmentation of both land war and sea war, to be a mere appurtenance to and component of old weapons. For this reason, the air force was considered in terms of the old concepts of enemy, war, and booty, together with all their old orientations to a separate theater of war. Soon, however, it became evident that this reinforcement and augmentation had altered fundamentally the essence of the theater of war and the attendant space on which it was based. It immediately was obvious that a naval fleet shielded by aircraft no longer was confined to the surface of the free sea, that purely maritime weapons had become old style. It also immediately was obvious that prize law augmented by airplanes had changed essentially the purely maritime character and, thus, the traditional juridical justification of prize law. Naturally, one could use an airplane to pursue prize law on the high sea. For many, this changed nothing juridically with respect to maritime prize law. This new

3. Gustav Ratzenhofer, *Die Staatswehr: Wissenschaftliche Untersuchung der öffentlichen Wehrangelegenheiten* (Stuttgart: J. G. Cotta, 1881), pp. 274f.

and effective means of controlling commerce by sea was considered to be purely technical, to be an additional means of detaining, capturing, and re-routing ships, etc. In reality, however, the airplane had abrogated the purely maritime character of the old prize law, because it had nullified the surface of the free sea and, thereby, the clear antithesis of mutual enemies.

The submarine had effected a consistent spatial change, because it was a purely maritime means of combat and transport. While the former concepts of the theater of sea war primarily were conceived in terms of the surface of the free sea, this was not true of the submarine. Thus, all legal concepts of sea war were muddled when large numbers of submarines came on the scene, as means of either war or commerce. For example, a controversy arose over the commercial submarines "Deutschland" and "Bremen," which, during World War I (1916), traveled unarmed from Germany to the United States, transporting goods (nickel and rubber). Not only did England and France claim that these commercial submarines in effect were warships, but English jurists contended that submarines were *essentially* warships and, in general, could not be considered to be commercial ships in the sense of traditional international law.[4] This thesis had a result that was as fundamental from a maritime perspective as was General Ratzenhofer's thesis from a terrestrial perspective.

The introduction of submarines into sea war in the early months of World War I (1914) already had demonstrated their spatial significance. The practice of prize law shifted (in the winter of 1914-15, with the insertion of the so-called Kirkwall praxis) from free sea to firm land. Commercial ships were ordered to enter the harbor of a warring power, where they were boarded and inspected by customs officials, rather than by naval officers. Still, in 1913, in the case of the Carthage, the Hague had ruled that a prize law inspection in the harbor of a warring power contravened international law, because, in the traditional concept, the pursuit of the right of booty was confined to the surface of the free sea. In many other cases, it was maintained tenaciously that a change in technical means did not affect the validity of accepted norms. As we have seen,[5] the three-mile limit still held firm when artillery technology changed the effective

4. "The Deutschland" by His Honour Judge Atherley-Jones, in *The Grotius Society*, Vol. III (1918), pp. 37f. This notion became dominant in England and France during World War I. Raoul Genet considered commercial submarines to be warships in *Précis de droit maritime pour le temps de guerre* (Paris: E. Müller, 1937-38), 2 vols.; see also on this question, James Wilford Garner, *International Law and the World War* (London: Longmans Green and Co., 1920), Vol. II, p. 467.

5. See Part III, Ch. 3, p. 182.

range of cannon fire, which the *vis armorum* had increased one hundredfold from the three miles of the 18th century. Now, however, with astounding speed all warring powers took it for granted that technical necessities immediately required a new praxis with respect to the line of passage and transfer of prize law from sea to land. The 1913 Hague ruling had become outdated very quickly. It did not make the slightest impression on Western jurists of sea war that the Soviet Union, in an October 26, 1939 note to the English government, referred to the Carthage case to protest against the praxis of the line of passage. This protest also did not have the slightest effect on the transfer of prize law from sea to land. The purely maritime character of an important component of the conduct of sea war — the pursuit of prize law — had been changed fundamentally and conclusively by the introduction of submarines.

Nevertheless, while the submarine remains an element of the ocean, the airplane leaves behind not only the water's surface, but also the maritime element itself. If an airplane pursues prize law, then the line of passage becomes autonomous, because that destroys the power to control commercial shipping. As a result, with the appearance of the airplane, the pursuit of prize law no longer was confined to the open sea in the harbor, but was transferred from sea to land. Commercial war at sea ultimately assumed a purely terrestrial character. Prize law on the high sea became practically obsolete, or at least limited to a few cases. Everything essential took place in the harbor. The naval certification system proceeded with scarcely any opposition worth mentioning. It was simply an inevitable result, an expression of this terrestrialization of the conduct of sea war — to the extent that sea war, as had proved to be the case, was immediately prize war.

A second, but equally important spatial effect of the introduction of aircraft into the conduct of sea war lay in the fact that whole spaces of free sea were declared to be war zones or battlegrounds, i.e., they had to be distinguished from the space of the free sea. Moreover, this development, which need be mentioned only in passing, had been brought into play in World War I with the introduction of the submarine. With the advent of the airplane, it was intensified enormously and became completely irreversible. From a practical standpoint, it is obvious that the airspace over the closed sea zone also became a zone of embargo.

Within the framework of traditional sea war, utilization of aircraft had changed the character of this type of war. Once the air force had been combined with sea war, the high sea — the free sea — no longer was considered to be a theater of war in the sense of the classical legal institutions of

sea war. However, independent air war, no longer confined to purely land war or sea war operations directed against an enemy's war potential, presented a new type of war, with no analogies or parallels to the rules of traditional land war or sea war. The independent air force introduced an equally independent type of application of force, whose specific results for the concepts of enemy, war, and booty we now must consider.

C. The Spatial Transformation of Air War

It is well-known that the major powers have been unable to agree on precise rules of air war. From the experiences of two world wars, obviously the general maxim that only militarily significant objects can be bombing targets is only a problematic formulation, not a precise rule. In view of this vacuum, it is conceivable that jurists of positive international law should seek first to abide by traditional norms of European international law, in order to answer questions of air war with the aid of transfers, analogies, and parallels of the laws of land war or sea war. Only in this way can they attain an independent legal perspective on air war, which is needed in order to bracket this new type of war. It stands to reason that English authors, given their maritime existence, were able to provide parallels to the laws of sea war. For them, an airplane capable of bombing men and installations in the enemy's hinterland was comparable in international law to a ship capable of bombarding a coast with artillery that could reach far inland. In this respect, it is irrelevant whether explosives are delivered by artillery from the sea, the land, or the air, because they have the same effect on men and things. Others have proposed that the military objective and, thus, the legitimate goal of a bombing raid should be analogous to the concept of contraband, and that everything considered to be contraband in sea war should be considered to be a permissible target in air war.

This last parallel between sea war and air war reveals the problematic of transferring the rules of war from sea to air especially well, precisely because it misconstrues a specific aspect of international law: the connection between the type of war and prize law. The concept of contraband is intended to determine the object of a right of plunder and seizure that is peculiar to sea war. Objects obtained through prize law are not conceived of as matters of mere destruction, and their determination and definition do not follow from this viewpoint. In contrast, the only purpose and meaning of an air raid is destruction. Independent air war is a completely new type of war, with weapons and methods incomparable to those of either traditional land war or sea war. Above all, it is distinguished from

both land war and sea war by the fact that, in general, it is not a war for booty, but purely a war of destruction. It would be futile to see a moral advantage or disadvantage in the fact that independent air war, given the specific means and methods of the air force, does not lend itself to booty, whereas this possibility exists in both land war and sea war.

Certainly, weapons with the same destructive power can be used as well in land war and sea war as in air war. But land war does not exclude the possibility that its means and methods may serve the occupation of an enemy country. In the view of European international law, occupation is even the necessary and, in a certain sense, the natural goal of land war operations. An army that occupies an enemy country normally has an interest in maintaining security and order there, and in establishing itself as the authority. To the exercise of military occupation belongs the *autorité établie* of the occupying power.[6] Whether in the future this state of affairs will be voided by an extraordinary intensification of long-range weapons remains to be seen. Nevertheless, given the tendency of occupation in land war in the 18th and 19th centuries, there were strong attempts to limit the purely destructive aspects of war, and greater possibilities for an effective bracketing of war. It even can be said, as we have seen above,[7] that *occupatio bellica* had become a true institution of international law.

To a far greater degree, sea war contains elements of purely destructive war. If the means of sea war are compared to those of land war, then blockade rather than occupation would be standard. As opposed to an occupying land power, a sea power pursuing a blockade would have no interest in establishing security and order in enemy territory. Land forces can have an *autorité établie*, i.e., a positive relation to the occupied territory and its inhabitants, because military occupation can be accomplished only by an army that is present and establishes its authority. This introduces the necessity of direct contact between the occupying army and the occupied territory, and results in legal relations between the occupying power and the occupied country. By contrast, a blockading fleet has only a negative relation to enemy territory and its inhabitants, because it considers both the land and the people to be nothing more than the goal of a forceful action and the object of a means of compulsion. Here one can speak of a blockading power, but not, analogous to an occupying authority, of a blockading authority and of legal relations *vis-à-vis* the population. To the degree that, in international law, sea war is bracketed prize war, its interests in booty

6. See Art. 43 of the Hague Convention of 1907 concerning the order of land war.
7. Cf. Part III, Ch. 4, pp. 199ff.

are directed not against objects on land, but only against the maritime trade of the blockaded country, which is consistent with prize law.

The distinction between methods of applying force is essential, because it concerns the core of all human order: the mutual relation of protection and obedience. Of course, land war also can be conducted as purely destructive; it often has been conducted purely for plunder. But the occupying land power also can have an interest in the security and order of the occupied territory. Thus, it was possible for military occupation to become a legal institution of international law, as in fact it did in the 19th century in the Hague land war conventions. Given that the occupying army maintains public security and protects the population in the occupied territory, the latter is obliged to obey the occupying authority. In this case, the direct relation between protection and obedience is obvious. It is based on a clear spatial relation between an effectively present occupying authority and the population of the occupied territory. The occupying land power can have various plans or perspectives: it may incorporate the occupied territory; it may want to annex the territory or to use it as an object of exchange or guarantee; or it may want to assimilate or exploit the population. Even if it takes hostages, a relation between protection and obedience always is conceivable and, at least in the age of European international law, on European soil there always was some kind of positive relation to the occupied country and its inhabitants. Land war as immediate and total prize war or even as purely a war of extermination and destruction had ceased once the religious wars of the 17th century had been replaced in the 18th and 19th centuries by the institutions of European state wars and the classical bracketing of war had been accomplished.

By contrast, the international legal regulations of blockade in sea war, which are undertaken from the sea, lack any possibility of realizing this relation of protection and obedience. To inhabitants of enemy territory effectively blockaded by a sea power, the blockading power is distant and absent. It exercises power and, perhaps through bombardment or forced starvation, also a very effective means of compulsion. Lacking are those tendencies to protection and order that can obtain with occupying land forces, even in a territory being exploited, because the troops are near and present. The interests that the blockading navy has in the blockaded country's conditions are only negative, and are directed only at the destruction of any order.

Only when land war and sea war are considered from the viewpoints of the spatial order of international law is it possible to ascertain the new problematic of air war in international law. From a spatial perspective, the

great transformation of war is demonstrated by the fact that, as regards airspace, it no longer is possible, as it was before, to speak of a theater of war. After the 17th century, after the beginning of interstate European war, it was customary to think of war in terms of a *theater of war*, a *theatrum* of land war. It also was possible, even if no longer very precise, to consider the theater of sea war to be the counterpart of the theater of land war. Independent air war has its own space, but no theater and no spectators. Apart from air battles, independent air war does not play out, as in land war and sea war, in a horizontal counterpart in which both warring parties face each other on the same plane. Airspace is not some entity suspended above land or sea, which one can conceive of as a superstructure within which air war is conducted in the same way as land war or sea war, only transposed by a hundred or a thousand feet.

All constructions that work with such concepts, and that are inclined to make air war analogous partly to land war and partly to sea war in international law, are flawed in principle and useless in practice. They end up insisting that air war over firm land be conducted according to rules of land war, and that air war over the free sea be conducted according to rules of sea war, whereby coastal areas must be considered to be mostly firm land. A bomber flying over firm land should consider private property to be sacred, but only as long as he flies there. One second later, when he has reached the airspace of the free sea, that same private property is a means of war and the same enemy suddenly no longer is sacred, but has become the object of prize law or justified destruction. At this decisive point, all transferences, analogies, and parallels that formerly could be drawn from land war and sea war and applied to air war become untenable. All institutions and principles that formerly were possible for a law of war, i.e., for a bracketing of war, lose their meaning.

Today, it no longer is possible to abide by traditional spatial concepts and to consider airspace to be a mere appurtenance or component of either land or sea. From above and below, this can be thought of only naïvely, from the perspective of an observer who, from the surface of land or sea, looks up and down, up and down, while bombers pass in the airspace overhead and execute their missions from the sky to the earth. Despite the differences between land war and sea war that otherwise obtain in both types of war, there was a common plane, and the struggle was played out spatially in the same dimension, given that the warring parties faced each other on the same surface. By contrast, airspace has its own dimension, its own space, which is not attached to separated yet surface spheres of land and

sea; its separation is not considered, and, for this reason, its sphere of operations is structurally different from those of the two other types of war. The horizon of air war differs from that of land war or sea war; it is even a question of to what extent one can speak of a *horizon* of air war. The structural transformation is all the greater because, from the air and with respect to air raids, the surfaces of both land and sea are indiscriminate. However, the lives of people on the ground or on the water are at risk equally from the air.

Independent air war dissolved the connection between the force applying power and the population in question to a greater degree than exists in a sea war blockade. With air bombardment, the lack of relation between military personnel in the air and the earth below, as well as with inhabitants thereon, is absolute. Not even the shadow of the relation between protection and obedience remains. Independent air war allows neither the one nor the other side a possibility to establish a relation. The airplane flies over and drops its bombs; low-flying pilots dive down and then fly up and away; both execute their destructive function, then immediately leave the scene, with all that has befallen men and materials on the ground, whose fate is in the hands of the sovereign of the surface state. As with an examination of the relation between a type of war and booty, so an examination of the relation between protection and obedience demonstrates the absolute disorientation and, therewith, the purely destructive character of modern air war.

D. The Problem of Just War

One may respond by saying that this type of air war is only a technical problem, namely a matter of long-range weapons. That is correct. But precisely this reference leads to an important further connection with the problem of war in international law. In addition to prize law and the relation to the militarily affected population, the limitation of means of destruction — the bracketing of war — also concerns the question of just war. This third aspect has two different sides: the legally recognized enemy, the *justus hostis*, as distinguished from the criminal and the brute; and the just cause, the *justa causa*. Both sides have a specific relation to the type of weapons. If the weapons are conspicuously unequal, then the mutual concept of war conceived in terms of an equal plane is lacking. To war on both sides belongs a certain chance, a minimum of possibility for victory. Once that ceases to be the case, the opponent becomes nothing more than an object of violent measures. Then the antithesis between the warring parties is increased exponentially. From the distinction between power and law, the vanquished are displaced into

a *bellum intestinum* (internal war). The victors consider their superiority in weaponry to be an indication of their *justa causa*, and declare the enemy to be a criminal, because it no longer is possible to realize the concept of *justus hostis*. The discriminatory concept of the enemy as a criminal and the attendant implication of *justa causa* run parallel to the intensification of the means of destruction and the disorientation of theaters of war. Intensification of the technical means of destruction opens the abyss of an equally destructive legal and moral discrimination.

James Brown Scott, the American international law jurist, sees in the modern turn to a discriminatory concept of war a return to the Christian-theological doctrine of just war. But modern tendencies do not resurrect Christian doctrines. Rather, they are ideological phenomena attending the industrial-technical development of modern means of destruction. Bombing pilots use their weapons against the population of an enemy country as vertically as St. George used his lance against the dragon. Given the fact that war has been transformed into a police action against troublemakers, criminals, and pests, justification of the methods of this "police bombing" must be intensified. Thus, one is compelled to push the discrimination of the opponent into the abyss. Only in one respect can the medieval doctrine of just war have any direct application today. We have noted the medieval prohibition against long-range weapons, which the Second Lateran Council (1139) issued regarding war between Christian princes and peoples. Limitation of the prohibition against war between Christians indicated that long-range weapons were allowed against an unjust enemy. Obviously, they were used because war against such an enemy was assumed to be just war. But soon, the connection between long-range weapons and just war also was adopted for battles between Christians, because the annotators had interpreted the Church prohibition to be valid only for the unjust part, whereas one could not prohibit the representative of right from using any effective weapon against the unjust. In fact, that argument seemed to be irresistible, and allowed one to recognize this essential connection. Thus, in conclusion, I will add a few remarks on this example from the Middle Ages.[8]

We recall one of Hegel's claims, namely that during the transition from feudalism to absolutism humanity needed gunpowder, *and immediately it was there.* Should modern means of destruction also be there because modern man needs them? And what will humanity need when

8. Cf. Part III, Ch.1, p. 141.

such weapons of destruction are there? In any case, one needs a just war to justify use of such means of destruction, because, to quote Henry Adams, if the foe was "not what they said he was — what were they?"[9] Recall Vitoria's five *dubia circa justitiam belli* and still more his nine *dubia quantum liceat in bello justo.* Today, we are experiencing the answer to Adams' question. Modern natural science and technology give us the answer: *Tantum licet in bello justo!* [To the degree possible in just war!] Historically speaking, new amity lines are on the agenda. But it would be unfortunate if they were to be achieved only through new criminalizations.

9. Henry Adams, "Foes or Friends (1862)," in *The Education of Henry Adams: An Autobiography* (New York: The Modern Library, 1996), p. 131.

Part V

Appendix: Three Concluding Corollaries

Chapter 1

Appropriation/Distribution/Production: An Attempt to Determine from Nomos *the Basic Questions of Every Social and Economic Order*[1]

The scholarly treatment of questions of social life is divided into juridical, economic, sociological, and other areas of specialization. But the need for a comprehensive consideration that acknowledges the inherent relation among these different disciplines is becoming more evident. For this reason, so, too, is the scholarly problem of discerning basic categories that not only are intelligible immediately, but that provide a proper formulation of questions common to them all.

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1. "Nehmen/Teilen/Weiden: Ein Versuch, die Grundfragen jeder Sozial- und Wirtschaftsordnung vom Nomos her rightig zu stellen" (1953), republished in Carl Schmitt, *Verfassungrechtliche Aufsätze aus den Jahren 1924-1954: Materialien zu einer Verfassungslehre*, 2nd ed. (Berlin: Duncker & Humblot, 1973), pp. 489-501. [Tr. When this article was republished in 1973, Schmitt added the following note to the "Postscript," *op. cit.*, p. 502.] Reference to the Greek word *nomos* leads to philological discussions, which are not the point here. On the contrary, we are concerned with legal and theoretical constitutional matters, and our deliberations should throw new light on the original meaning of *nomos* and on the changes it underwent through sophism and normativism. This is true also of the meaning of the word in the Old and New Testaments. The antithesis of pre-exile and post-exile *nomos* now became fundamental. Cf. Martin Noth, *Das Gesetz im Pentateuch und andere Aufsätze in seinen Gesammelten Studien zum Alten Testament* (Munich: Christian Kaiser Verlag, 1957). Philo of Alexandria's assertion, repeated for years and still found in Jean Bodin's *Methodus* and Blaise Pascal's *Pensées*, namely that Homer never used the word *nómos* (accent on the first syllable), now appears in a clearer light. Nevertheless, it should be emphasized that our legal and constitutional findings are not tied to the changing situations of disputed philological questions. This is true also of various philological opinions about whether the German word *nehmen* can be traced to the Greek root *nem.* Cf. Emmanuel Laroche, *Histoire de la racine nem- en grec ancien* (Paris: Librairie Klincksieck, 1949). According to Heinimann, "the verb *nemein* [is] related etymologically to the German *nehmen*." See Felix Heinimann, *Nomos und Physis: Herkunft und Bedeutung einer Antithese im griechischen Denken des 5. Jahrhunderts* (Basel: F. Reinhart Verlag, 1945), p. 59.

To deal with this problem, we will attempt first to apprehend the original meaning of the word *nomos* and then to ascertain elementary and true categories that are both basic and inclusive. The examples of their application to doctrines and systems of social science outlined below should serve only as a concise indication of their usefulness. But the general application should help overcome the limitations of specialization, without denying achievements in various disciplines. I have in mind more than an interpolation using philosophical generalities or general provisions of natural law.

We need not undertake a detailed philological analysis of *nomos*, since there is an excellent philological study of the antithesis of *nomos* and *physis* by Felix Heinimann.[2] But Heinimann's study gives too much credence to modern disciplinary abstractions, by defining *nomos* as "a term valid for a group of living beings," and thereby linking the word with the modern concept of "value" and with a very specific normativism. I am prepared to learn from philologists, but I would prefer to make the original meaning of *nomos* relevant to social problems. I invite philologists to bear with me for a moment.[3] Unlike philologists, jurists and historians usually translate *nomos* as "law" or, to distinguish it from written law, as "tradition" or "custom." I prefer the simplest approach, since we are interested in determining the structure of various social orders and doctrines in all the specialized disciplines, and in finding the

2. Cf. Heinimann, *Nomos und Physis*, *ibid*.

3. This presentation of the three basic meanings of *nomos* is intellectually self-contained and self-evident. Those interested in its relation to the totality of my work in jurisprudence should consult my book, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1950), which contains a corollary on the meaning of *nomos*. Let me add a further observation. In that corollary, I infer that the third verse of the beginning of the *Odyssey* reads: "Many cities *astea* did he visit and many were the nations with whose customs *nomos* [or, according to the standard version, *noos*] he was acquainted." I prefer the version with *nomos* to the standard version common today, which substitutes *noos* for *nomos*. The reasons and perspectives that led me to prefer the version with *nomos* are outlined in the above-mentioned corollary. From a philological viewpoint, what seems to be the most impressive argument against this version is that *nómos* (with an accent on the first syllable) is not used by Homer, and consequently the *nomos* version would introduce a so-called *apax legomenon*, i.e., a unique and improbable word. I admit that a version that introduces such a word is somewhat unsatisfactory. But philologically, the matter is quite different. Even though Homer does not use the word *nomos*, he nevertheless employs typical words in combination with *nomos*: *Amphinomos* [one who rules externally], *Ennomos* [one who rules internally], and *Eyryvnomos* [one who rules over vast expanses]; even (which, concerning the *astea* of Verse 3 of the *Odyssey* 1, is especially meaningful) *Astynomos* [one who rules over a city]. All these proper names designate space and location: they indicate the concrete parcel of land that the bearer of the name has acquired through appropriation and division. In such a context, proper names have more evidential validity than do other words.

proper formulation of the questions with respect to the core of their ethic and their view of history.

I

The Greek noun *nomos* comes from the Greek verb *nemein*.[4] Such a noun is a *nomen actionis*, i.e., it indicates an action as a process whose content is defined by the verb. Which action and process is indicated by *nomos*? Quite obviously, it is the action and the process of *nemein*.

The first meaning of *nemein* is *nehmen* [to take or to appropriate]. The German word *nehmen* has the same linguistic root as the Greek *nemein*. If the noun *nomos* is a *nomen actionis* of *nemein*, then the first meaning of *nomos* indicates a *nehmen*. Just as *logos* [speech, word, or reason] is the *nomen actionis* of *legein* [to gather or to speak], and *tropos* [a figure of speech or turn of phrase] is the *nomen actionis* of *trepein* [to turn], so *nomos* indicates an action and a process whose content exists in a *nemein*. Just as there is a linguistic relation between the Greek words *legein* and *logos* and the German words *sprechen* [to speak] and *Sprache* [language], so there is a linguistic relation between the Greek words *nemein* and *nomos* and the German words *nehmen* and *Nahme*. Thus, the first meaning of *nomos* is appropriation.

The second meaning *of nemein* is *teilen* [to divide or distribute]. Accordingly, the second meaning of *nomos* is the action and process of division and distribution — an *Ur-teil*[5] and its outcome. The first meaning of *nomos* as appropriation has long been forgotten in jurisprudence. However, no prominent legal scholar[6] has forgotten this second meaning

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4. [Tr. *Nemein* means to take, to allot, or to assign. In Old English, the word *niman* meant to take or to seize, while *nemel*, from which the word nimble derives, meant to seize quickly. From the Greek *nomos* and *nemein* derive such English words as economy, antinomy, nomology, nomothetic, numismatic, etc. Of particular interest in this context is the derivation of the word nomad, since *nomos*, from the Greek *nome*, meant capturing, grazing, or wandering in search of pasture, which in German is *weiden*.]

5. [Tr. Schmitt illustrates linguistically the relation between *Ur-teil*, meaning literally original part or division, and *Urteil*, meaning specifically decision or judgment.]

6. [Tr. The following note was added in Schmitt's 1973 "Postscript" to his article, *op. cit.*, pp. 502f.] If great philosophers like Thomas Aquinas and Thomas Hobbes recognized a primary division — a *divisio primaeva* — at the beginning of every legal order, then this perspective requires an elaboration: the division and distribution, i.e., the *suum cuique*, presuppose the appropriation of what is to be distributed, i.e., an *occupatio* or *appropriatio primaeva*. The continuity of a constitution is manifest as long as the regress to this primary appropriation is recognizable and recognized. In every extensive plan there is dividing and distributing, and what is divided and distributed first has been appropriated, be it land and property, the means of production, labor and jobs, the social product, or the disposition of hard currency.

of *nomos* as a fundamental process of division and distribution, of *divisio primaeva.* Thomas Hobbes' *Leviathan* (1651) contains a classic passage: "Seeing therefore the introduction of *propriety* is an effect of commonwealth, which can do nothing but by the person that represents it, it is the act only of the sovereign; and consisteth in the laws, which none can make that have not the sovereign power. And this they well knew of old, who called that *nomos*, that is to say, *distribution*, which we call law; and defined justice, by *distributing* to every man *his own*."[7]

Thus, "law," understood in the sense of the *Anteil* [part or share] that each gets, the *suum cuique*, belongs to the second meaning of *nomos.* Abstractly speaking, *nomos* is law and property, i.e., the part or share of goods. Concretely speaking, *nomos* is, for example, the chicken in every pot that every peasant living under a good king has on Sunday, the parcel of land every farmer cultivates as his property, and the car every American worker has parked in his garage.

The third meaning of *nemein* is *weiden* [literally, pasturage]. This is the productive work that normally occurs with ownership. The commutative right of buying and selling in the market presupposes ownership as well as production deriving from the primary division: *divisio primaeva.* This third meaning of *nomos* derives from the type and means of production and manufacture of goods. The nomads Abraham and Lot searching for pasture and tending their animals, Cincinnatus plowing his field, the shoemaker Hans Sachs at work in his shop, the industrial work of Friedrich von Krupp in his factory, all this is *nemein* in the third sense of *nomos*: to pasture, to run a household, to use, to produce.[8]

II

Each of these three processes — appropriation, distribution, and production — is part and parcel of the history of legal and social orders. In every stage of social life, in every economic order, in every period of legal history until now, things have been appropriated, distributed, and produced. Prior to every legal, economic, and social order, prior to

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7. [Tr. *The English Works of Thomas Hobbes*, Vol. 3, *Leviathan: or, the Matter, Form, and Power of a Commonwealth, Ecclesiastical and Civil*, 2nd ed. (Aalen: Scientia Verlag; 1966), Part II, "Of Commonwealth," Chapter XXIV, "Of the Nutrition, and Procreation of a Commonwealth," p. 234.]

8. The verb "use" (*nutzen*) is particularly significant, because it embraces both production and consumption and the antithesis between them, which has become so problematic. This should not be forgotten, even if in what follows we often speak only of production, in order to simplify matters.

every legal, economic, or social theory are these elementary questions: *Where and how was it appropriated? Where and how was it divided? Where and how was it produced?*

The major problem is the sequence of these processes, which has changed often in accord with how appropriation, distribution, and production are emphasized and evaluated, both practically and morally, in human consciousness. The sequence and evaluation of them have followed changes in historical situations and world history as a whole, in methods of production and manufacture, even changes in the image people have of themselves, of their world, and of their historical situation.[9]

Until the 18th century industrial revolution, the order and sequence of these processes were unequivocal, in that any appropriation was recognized as the precondition and foundation for any further distribution and production. Consequently, for centuries, this remained the typical sequence. Land was the precondition of all subsequent economy and law. Even Kant's legal theory takes as a principle of legal philosophy and of natural law that the first substantive acquisition must be land.[10] This land, the foundation of all productivity, at some time must have been appropriated by the legal predecessors of the present owners. Thus, in the beginning, there is the "distributive law of mine and thine in terms of land for everyone" (Kant), i.e., *nomos* in the sense of *Nahme*. Concretely speaking, this is land-appropriation. Only in this connection can there be any distribution and, beyond that, any subsequent cultivation.

The history of peoples, with their migrations, colonizations, and conquests, is a history of land-appropriation. Either this is the appropriation of free land, with no claim to ownership, or it is the conquest of alien land, which has been appropriated under legal titles of foreign-political warfare or by domestic-political means, such as the proscription, deprivation, and forfeiture of newly divided territory. Land-appropriation is always the ultimate legal title for all further division and distribution, thus for all further production. It is what John Locke called *radical title*. As a 17th century Englishman, Locke had in mind the land-appropriation of England by William the Conqueror (1066).

All known and famous appropriations in history, all great conquests — wars and occupations, colonizations, migrations, and discoveries —

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9. Even the meek who, according to the Sermon on the Mount, will inherit the earth (Matthew 5:5), will not obtain this ownership without land-appropriation and land-distribution. The word for this type of ownership is *kleronomesousin* [literally, they will inherit].

10. Cf. Part I, Ch. 1, pp. 42ff.

have evidenced the fundamental precedence of appropriation before distribution and production. The biblical story of the Israelites' land-appropriation of Canaan (Deuteronomy 4:4 and Joshua 11:23) is a classic example. Understandably, in an economic and social order that has arisen through such a land-appropriation, distribution once completed is emphasized more strongly than is the original appropriation. The distribution remains stronger in memory than does the appropriation, even though the latter was the precondition of the former and of the concrete allotment: the *kleros* [literally, the inheritor]. All concrete orders and legal relations on land are derived first and foremost from distribution, through which the mine and thine of individual clans, families, or groups, as well as of solitary individuals is allotted. Understandably, within such a framework, as a rule only the result of the distribution of appropriated land is considered, i.e., the concretely acquired allotment of land, the share (the *kleros*), but not the process and procedure of distribution as such. Distribution, i.e., the measures and procedures inherent in the process, is an important problem.

Before what has been appropriated through conquest, discovery, expropriation, or some other way can be distributed, it must be numbered and weighed, as in the ancient sequence: numbered/weighed/divided. The mysterious writing on the wall in the Book of Daniel[11] — the inscription MENE, TEKEL, UPHARSIN — announces an immediate and present appropriation and distribution of the land (of the Chaldeans) by the Medes and the Persians.[12] When the numbering and weighing of what has been appropriated is completed, the process of distribution raises new and further questions. At all times, at the origin and foundation of a legal and economic order, this process has been decided by lot, i.e., by divine providence, such as war and conquest. Plato adumbrated the classical model in *Nomoi* (Laws).[13] An

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11. [Tr. Daniel 5:25.]

12. [Tr. Daniel 5:26-28: "This is the interpretation of the thing: MENE, God hath numbered thy kingdom, and finished it. TEKEL, Thou art weighed in the balances, and art found wanting. PERES, Thy kingdom is divided, and given to the Medes and Persians." *The Holy Bible, op. cit.*, p. 907.]

13. [Tr. "The legislator must take it as a general principle that there is a universal usefulness in the subdivisions and complications of numbers, whether these complications are exhibited in pure numbers, in lengths and depths, or again in musical notes and motions, whether of rectilinear ascent and descent or of revolution. All must be kept in view by the legislator in his injunction to all citizens, never, so far as they can help it, to rest short of this numerical standardization. For alike in domestic and public life and in all the arts and crafts there is no other single branch of education which has the same potent efficacy as the theory of numbers . . . ." Cf. *The Collected Dialogues of Plato, op. cit., Laws* V, lines 746-755, pp. 1330-1331.]

Enlightenment thinker such as Hobbes,[14] in cases such as the primary division, still could claim that decision by lot assumes the character of natural law.[15]

III

One of the strongest impressions, perhaps the most decisive on the Russian immigrant and professional revolutionary Lenin during his sojourn in England, was not the result of an economic analysis of production relations, but of a late 19th century formulation of the international political program of the English imperialist Joseph Chamberlain. Lenin had heard Chamberlain's speeches, and the deep impression Chamberlain made on him is clear in Lenin's pamphlet on imperialism.[16]

Imperialism, said Chamberlain, is the solution to the social question. At that time, this meant a program of colonial expansion and the precedence of appropriation before distribution and production. Of course, it was consistent with the historical view of a politics that had lasted for centuries. In Lenin's view, this was precisely the historical death sentence of imperialism in general and English imperialism in

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14. [Tr. "We said in the twelfth place, that it was a law of nature, that where things could neither be divided nor possessed in common, they should be disposed by lot. Which is confirmed, as by the example of Moses, who, by God's command (Numb. xxvi. 55), divided the several parts of the land of promise unto the tribes by lot: so (Acts i. 24) by the example of the Apostles, who received Matthias before Justus into their number, by casting lots, and saying, *Thou Lord, who knowest the hearts of all men, show whether of these two thou hast chosen, etc.* (Prov. xvi. 33): *The lot is cast into the lap, but the whole disposing thereof is of the Lord.* And, which is the thirteenth law, the succession was due unto Esau, as being the first-born of Isaac; if himself had not sold it (Gen. xxv. 33), or that the father had not otherwise appointed." Thomas Hobbes, *De Cive*, the first edition of *Philosophical Rudiments Concerning Government and Society*, in *The English Works of Thomas Hobbes*, *op. cit.*, Ch. IV, 15, p. 58.]

15. Even modern laws occasionally leave the decision to lot; not, of course, in the sense of a judgment, but either as an escape from an otherwise inescapable situation, as a deliberate or unconscious form of lottery, or for other reasons. Consideration of these questions would constitute a separate problem for jurisprudence and social science. As merely a way out, a decision is made by lot, as in elections, when the votes (such as those frequently found in the age of narrow majorities) tip the scales. Here, one should not speak of the "chance" of lots, because a common democratic homogeneity is presupposed. The basis of this homogeneity is consent to every result of the democratic process of integration. By contrast, the inclusion of a paragraph to allow decisions by lot (in the federal law of January 7, 1952, concerning investment aid for commercial enterprises, *Bundesgesetzblatt* Vol. I, p. 7, §32) has more the character of a lottery: the lot decides the procedure of how to distribute the shares. Ipsen rightly recognizes this as a regulation of the indemnity policy that is contrary to the constitution. See Hans Ipsen, "Rechtsfragen der Investitionshilfe," in *Archiv des öffentlichen Rechts*, Vol. 78 (1953), p. 330.

16. [Tr. V. I. Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular Outline* (New York: International Publishers, 1939).]

particular. The reason was that this Anglo-Saxon imperialism was nothing more than theft and plunder, and the word "plunder" already was sufficient for moral condemnation. For a socialist like Lenin, the idea that imperialistic expansion, i.e., appropriation, especially land-appropriation, should precede distribution and production was medieval, even atavistic, reactionary, opposed to progress, and, ultimately, inhuman. In Lenin's moral outrage, he had no difficulty finding in the arsenal of the progressivist and Marxist philosophy of history several destructive arguments against such a reactionary opponent, who would take something away from other people, while Lenin's own efforts were directed at unchaining the powers of production and electrifying the earth.

Here is where socialism falls in with classical political economy and its liberalism. The core of liberalism, both as a science of society and as a philosophy of history, also is concerned with the sequence of production and distribution. Progress and economic freedom consist of freeing productive powers, whereby such an increase in production and in the mass of consumer goods brings appropriation to an end, so that even distribution becomes an independent problem. Apparently, technological progress leads to an unlimited increase in production. If, however, there is enough or even more than enough at hand, then, in an epoch of scarcity, to view appropriation as the first and fundamental precondition of economic and social orders appears to be atavistic and repressive, even to be a reversion to the primitive right of plunder. When the standard of living continues to rise, distribution becomes increasingly easier and less precarious, and appropriation ultimately becomes not only immoral, but even economically irrational and absurd.

Liberalism is a doctrine of freedom, freedom of economic production, freedom of the market, and, above all, the queen of all economic freedoms, freedom of consumption. Liberalism also solves the social question with reference to increases in production and consumption, both of which should follow from economic freedom and economic laws. However, socialism poses the social question as such, and wants to answer it as such. What, then, is the social question? In which sequence of the three basic categories of *nomos* does it move? Is it fundamentally a question of appropriation, distribution, or production? It is fundamentally a question of proper division and distribution, and, accordingly and above all, socialism is a doctrine of redistribution.

Not only radical socialism or communism, but also the concept of the "social" that all political parties in contemporary European democracies

have adopted in some way, at least as an adjective, is dedicated to a program of distribution and redistribution. There is now in Germany a lively discussion not only about the social market economy, but also about the constitutional question with respect to the precise meaning of the social federal state [*Bundesstaat*] and of the social liberal state [*Rechtsstaat* or *Sozialstaat*] prefigured in the Constitution of the German Federal Republic.[17] Also, in juridical attempts to define the ambiguous word "social," concepts of distribution and redistribution appear to be decisive. A prominent German constitutional jurist, Hans Peter Ipsen, said the following in a now famous speech on expropriation and socialization: "With reference to the constitutional guarantee of property, which here is being discussed as part of the social order, my understanding of the formation of the social order is the reformation and transformation of property ownership *to the point of its redistribution*."[18]

Concerning the concept of socialization, Ipsen said that "in its uncorrupted, true revolutionary sense, i.e., before being tied up and juridically regulated by constitutional norms, socialization postulated the systematic transformation of the economic order with respect to property by making *future owners of former non-owners*."[19] Furthermore: "If the juridically

17. Cf. Christian Friedrich Menger, *Der Begriff des sozialen Rechtsstaates im Bonner Grundgesetz* (Tübingen: J. C. B. Mohr, Recht und Staat, 1953), No. 173, and Günter Dürig, "Verfassung und Verwaltung im Wohlfahrtsstaat," in *Juristenzeitung*, No. 7/8 (April 15, 1953), p. 196. Menger seeks to reduce the concept of the "social" to mere "mutual respect," because the fathers of the Constitution "consciously rejected the Welfare State". In Huber's opinion, the *Sozialstaat* clause in Articles 20 and 28 of the Constitution contains only the "general social proviso" that economic freedom is subject to the principle of social justice, i.e., the guarantee of a dignified existence for all. See Ernst Rudolf Huber, *Wirtschaftsverwaltungsrecht*, 2nd ed. (Tübingen: J. C. B. Mohr, 1953), p. 37. See also Ernst Forsthoff's lecture, "Begriff und Wesen des sozialen Rechtsstaates," in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Vol. 12 (1954), pp. 8-36. One should not forget that "social" is a foreign word in German, but not in the romance languages or in English. In these languages, it is easier to keep in mind the word's general, not specifically socialist relation to *societas, société*, and society than it is in German. Let someone try to translate Disraeli's "social sorcery" into German! Yet, a remark by a prominent French jurist, Georges Ripert, warrants mention. Ripert said that the expression *socialisation du droit* [socialization of law] was senseless; he then added: but such linguistic usages have their own meaning: the word "social" refers to a party, a politics, a doctrine, a literature, an appeals court, and even to a section of the Privy Council; it also can indicate a *droit social* [social law]. In fact, it serves *de protéger les uns et de désarmer les autres* [to protect one and disarm the other]. See Georges Ripert, *Le déclin du droit: Études sur législation contemporaine* (Paris: Librairie de droit et de jurisprudence, 1949), p. 39.

18. Hans Peter Ipsen, "Enteignung und Sozialisierung," speech at the Göttingen Conference of the Vereinigung der Deutschen Staatsrechtslehrer (October 1951), p. 75.

19. *Ibid.*

indifferent concept of nationalization (considered from the dogmatic viewpoint of our prevailing economic constitution) were to acquire a meaning consistent with the historical and economic-political postulate of socialization, then it would demand the settlement of individual property ownership based on self-interest and subject only to general, public, and legal ties to property, at least through a surplus (plural-, joint-) ownership, by which *social groups that have hitherto been excluded from ownership will share in it in the future.*"[20]

Yet, precisely because socialism raised the question of the social order as one of division and distribution, it once again raised the old problem of the sequence and evaluation of the three original processes of social and economic life. Even socialism cannot escape the fundamental question of the problematic sequence of appropriation, distribution, and production. This question reveals substantial divergences, even contradictions among the numerous doctrines and systems, which, despite their differences, collectively are called "socialist" and are said to fly the socialist flag.

A socialist like Charles Fourier is a good example. He subsumed all problems of appropriation and distribution under a fantastic increase in production. This is why he is considered to be utopian. But it should not be forgotten that it was precisely this alleged utopianism that allowed him to formulate a clear position with respect to basic questions, and, thereby, to affirm the contemporary tie of socialism to the historical vision of technical progress and its unlimited increase in production. It was different with Pierre-Joseph Proudhon, who argued terms of right and justice with a strong moral pathos. His socialism is essentially a doctrine of division and distribution. The elevation of producers over consumers, workers over mere eaters is coined in moral value judgments. Humanity is not divided, at least not yet, into friend and enemy, into producers and mere consumers, as was the case later for Georges Sorel. Proudhon is a moralist in the specific French sense. For him, appropriation becomes the consequence and attendant phenomenon of just division and distribution, whereby true producers strip mere consumers of their ill-gotten gains.

Karl Marx, on the contrary, did not argue for socialism on moral grounds, but rather in terms of a philosophical and historical dialectic. Of course, he liked to prove his enemies wrong, and adopted a position of moral outrage with respect to the exposed exploiters of early capitalism in the age of piracy and veiled forms of appropriation, whereby the workers' surplus value is seized by capitalists. Yet, from the standpoint of the

20. *Ibid.*, p. 106.

philosophy of history, Marx portrayed the development of the bourgeois social order as increasingly inimical to distribution, given the constant growth of production, and as standing in the way of the dialectic of history, given the existing economic absurdity. Ultimately, the bourgeois social order would suspend and destroy itself.[21]

The sharp distinction between a socialism whose core idea is the philosophy of history and one that is essentially a moral argument will become obvious in the sequence and evaluation of appropriators, distributors, and producers. The philosophical dialectic of the development of world history is the same as that which provides the side of coming things with the great historical right to appropriate what, in theory, they already have. Distribution and production are questions that need not be addressed until the great appropriation has been completed.

Marx adopted and emphasized the progressivist claim to the unlimited increase in production essential to progressive liberalism. Thus, he was able to treat the question of division and distribution as a later concern. He concentrated the whole weight of his attack on the expropriation of the expropriators, i.e., on the procedure of appropriation. In place of the old right of plunder and of the primitive land-appropriations of pre-industrial times, he substituted appropriation of the total means of production: the great modern industry-appropriation [*Industrie-Nahme*]. This raised the obvious question of how to proceed with the concrete division and distribution of new chances of appropriation, because expropriation of the old owners opens up new and enormous possibilities of appropriation. Although extremely interesting, this obvious question no longer is being answered concretely. It simply is rejected as "unscientific," even as the concrete question of the continuation and form of the unlimited increase in production following the great industry-appropriation is left unanswered. Of course, plundering should stop, but appropriation as a precondition of new distributions does not. If the essence of imperialism lies in the precedence of appropriation before distribution and production, then a doctrine such as expropriation of the expropriators is obviously the strongest imperialism, because it is the most modern.

We should abolish all appropriation, because it is inhuman and historically obsolete. We also should limit problems of distribution, because it is

21. Max Weber, in a well-known passage famous for its reference to the term "communal economy" [*Gemeinwirtschaft*], distinguished between a "rationing type" of socialism — one that, according to Weber, is consistent with the "workers' councils" [*Betriebsräte*] type of socialism — and an evolutionary type of socialism. See Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. by Guenther Roth and Claus Wittich (Berkeley, CA: University of California Press, 1978), Vol. 1, pp. 111-112.

too difficult to find not only general principles, but persuasive measures and legally viable procedures. There remains only production. Ingeniously, many doctrinaire thinkers have shifted attention away from appropriation and distribution to production. However, there is clearly something utopian about construing social and economic systems in terms of mere production. If there were only problems of production, and if mere production created such wealth and unlimited possibilities of consumption that both appropriation and distribution no longer were problematic, then economic systems would cease to exist, because they always presuppose a certain scarcity.

These remarks on socialism and imperialism are intended only to indicate the usefulness of the three basic meanings of *nomos* and the problem of their sequence. In view of the vast literature on both socialism and imperialism, it would appear all too simplistic to emphasize only the appropriating aspect of imperialism. It would be superfluous and nothing but a repetition of Carl Brinkmann's claim that "[f]or the most part, imperialism in the widest sense is a technical struggle with these laws (i.e., the laws of classical political economy concerning population and profit), and not only the struggle for the feeding grounds underlying them. But never should it be forgotten that this second, primitive struggle is at the forefront of the world economy."[22]

No doubt, that is true. However, there is something more to consider. Despite differences in weight and sequence, the close proximity, sequence, and changing evaluation of appropriation, distribution, and production inherent in every concrete *nomos* and latent in all legal, economic, and social systems can become relevant again in a surprising change.

Perhaps scholarly concern with this question can be grasped best by bringing the three categories of *nomos* in line with the very real and comprehensive question raised in every juridical consideration: world unity. Has humanity today actually "appropriated" the earth as a unity, so that there is nothing more to be appropriated? Has appropriation really ceased? Is there now only division and distribution? Or does only production remain? If so, we must ask further: Who is the great appropriator, the great divider and distributor of our planet, the manager and planner of unified world production? This question should warn us against ideological short-circuits. At work here are widespread and generally forceful, although scientifically superfluous simplifications. They suggest fictional unities. Their simplifications can be overcome only by the deeper simplicity of original concepts.

22. Carl Brinkmann, "Imperialismus als Wirtschaftspolitik," in *Die Wirtschaftswissenschaft nach dem Kriege: Festgabe für Lujo Brentano zum 80. Geburtstag*, ed. by Moritz Julius Bonn and Melchior Palyi (Munich and Leipzig: Duncker & Humblot, 1925), Vol. I, pp. 87-88.

Chapter 2

Nomos — Nahme — *Name*[1]

My article refers to the chapter on power in P. Erich Przywara's[2] great book *Humanitas*,[3] a chapter of inexhaustible profundity. From the abundance of themes and key words, I have chosen *NOMOS*, a discussion of which may make the overpowering wealth of this chapter accessible to many jurists, political economists, and sociologists.

I

The world of ideas in this chapter is based on three powerful statements about power. The first is that power is the "secret sinister end." The impulse to secrecy and to learn the secret is the first tendency of any power, whatever form of government or method of administration it serves. No ruler can escape this impulse, which becomes greater and more intense the stronger and more effective power becomes. In an almost numinous phrase, Carl Joachim Friedrich says: "All power hides." Hannah Arendt wrote: "Real power begins where secrecy begins."[4] Numerous exegeses and commentaries on the biblical story of the temptations of Christ[5]

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1. [Tr. "Nomos-Nahme-Name," in *Der Beständige Aufbruch: Festschrift für Erich Przywara*, ed. by Siegfried Behn (Nuremberg: Glock und Lutz, 1957), pp. 92-105. In the title, the word *Nahme* has been left in German to indicate the relation among the three terms. It is the root word of the verb *Nehmen* in the title of the previous corollary, "Nehmen-Teilen-Weiden," which has been translated as "appropriation," since the verb is less suitable in the English title.]

2. [Tr. On the theologian Przywara (1889-1972), see Siegfried Behn, "Wer Ist's?: Zur Gestalt von Erich Przywara," in *ibid.*, pp. 7-17.]

3. Erich Przywara, *Humanitas: der Mensch gestern und morgen* (Nuremberg: Glock und Lutz, 1952).

4. *The Origins of Totalitarianism* (New York: Harcourt Brace & Co., 1951), p. 386. [Tr. Schmitt used the English edition, titled *The Burden of Our Time*.]

5. Matthew 4:1-11 and Luke 4:1-13, in *The Holy Bible*, *op. cit.*, pp. 997-998 and 1076-1077.

say that one temptation, offering all the riches of this world, took place on a secluded mountain top. As Max Weber said, according to the secrets of the worldly asceticism of the Puritans, the idea of predestination could be changed into the idea of probation, and, in the stillness of this process, could find the way to domination of the world. Every asceticism flows toward power, even as every ruler can be compelled by his power to unexpected forms of worldly asceticism.

The second statement Przywara mentions is the "implicit centrality" of all power. From its compulsion to self-affirmation, daily and hourly power seeks to secure, to justify, and to consolidate its position anew. This creates a dialectic, whereby the ruler, in order to maintain this position, is compelled to organize new security systems around himself and to create new anterooms, corridors, and accesses to power. The inescapable dialectic consists in the fact that, through such security measures, he distances and isolates himself from the world he rules. His surroundings thrust him into a stratosphere, wherein only he has access to those over whom he rules indirectly, while he no longer has access to all the others over whom he exercises power, and they no longer have access to him.[6]

We will begin with the third statement on power. The tendency of power to secrecy corresponds to a counter-tendency, which is to visibility and publicity. Przywara speaks of a "Platonic" necessity that culminates in *Politeia* [Statesman] and *Nomoi* [Laws]. Power thus appears in many forms as *archy* and *cracy*. *Archy* means from the source, while *cracy* means power through superior force and occupation. Przywara knows that Plato's aristocracy and democracy — two *cracy* words — indicate an anthropological power through the appropriation of power, while the two *archy* words — monarchy and oligarchy — have a theological foundation, namely monotheistic or polytheistic power originating in God. With his late book, "Laws," Plato reached a median between monarchy and democracy. The result was the *polis*, a commonwealth that guarantees an existential minimum to everyone. (I prefer to avoid the word "state," because it gives rise to too many projections from a specifically modern entity.) It was not just any type of modern, cradle-to-grave social welfare administration for the masses, whose legitimacy is based on the guarantee of a comfortable living standard with a high level of consumption.

Together with *archy* and *cracy*, there is still a third category, *nomos*, which will be the focus of our discussion.

6. I have elaborated on this dialectic of human power and powerlessness in *Gespräch über die Macht und den Zugang zum Machthaber* (Pfullingen: Günther Neske: 1954).

II

Nomos penetrates *archy* and *cracy*. Neither can exist without *nomos*. When Herodotus, Xenophon, and Plato speak of tyranny, and characterize these as *a-nomia*, the intent is somewhat propagandistic, because these friends of Laconia [Sparta]) mean, above all, that the tyrant has destroyed a specific *nomos*.

Word combinations with *nomos* have a different linguistic and ideational structure than do those with *archy* or *cracy*. Monarchy, for example, is the form of domination by which one rules; this one, *monos,* is the subject and bearer of domination or power. In democracy, *demos* is the subject and bearer of *cracy*. By comparison, in the word "economy" the *oikos* is not the subject and bearer of public housekeeping and administration, but rather the object and even the material. That is true for most, and certainly for all older *nomien*. Gyneco-nomy, for example, does not mean administration by women, as does gynecracy or matriarchy, but rather administration and management of the women's residence and of the part of the household that concerns women. A word bound to *nomos* is measured by *nomos* and subject to it; astronomy, geonomy,[7] and gastronomy obviously have this structure. We can ignore such individual characteristics as patronomy, because their singularity is recognized.[8]

A certain confusion can arise from the fact that one can personalize *nomos* and that it can become the subject. This occurred with the *nomos basileus*, about which I will have a few things to say. With due consideration, there is no confusion, because the inner contradiction of a personalization of *nomos* consists in the fact that the *nomos*, even if it were to be raised to the level of a personalized ruler, is something impersonal. It is the same contradiction found in the formula "in the name of the law," which we still will discuss. From the linguistic side, adverbial combinations like eunomy[9] and isonomy[10] confirm a certain connection with the social, economic, and property situation of a community. Since the rise of socialism, the word has referred specifically to what one calls the class situation.[11]

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7. [Tr. The science of the physical laws of the earth.]

8. Laroche, *Histoire de la racine nem- en grec ancien*, *op. cit.*, p. 140; Hans Schaefer, "Patronomos," in *Paulys Realencyclopädie der Deutschen Altertumswissenschaft*, *op cit.*, Vol. 36, No. 3, pp. 2295-2306.

9. [Tr. *Eunomia*: Efficient and well-ordered law.]

10. [Tr. *Isonomia*: Equality of rights or laws.]

11. Hans Schaefer has elaborated on the historical significance of the words *eunomia* and *isonomia* in his masterful and still very useful volume, *Staatsform und Politik: Untersuchungen zur griechischen Geschichte des 5. und 6. Jahrhunderts* (Leipzig: Dieterich, 1932), pp. 144f.

Eunomy appeared in the Solonian age of Athens; initially, it referred polemically to the preservation of the conventional social constitution within one's own *polis*. But it became a common Hellenic slogan when Sparta assumed the role of protector of the aristocratic order against tyranny and democracy. Beginning in the 5th century, isonomy supplanted the old eunomy. The bearer and champion of this democratic "international" was Athens; the enemy and opponent of this principle (which meant the liberation of the Helots and the Perioecians) was Sparta under the leadership of the ephors. In modern terms, the internal, political class situation became, as Hans Schaefer says, "the regulator of interstate relations." The oath, which had to be taken by all those allied to democratic Athens, is obvious. "With the Athenians, friend and enemy had to be divided," and in this case "to divide" means literally "not being together."

Among the numerous word combinations with *nomos*, none is more frequent and more familiar than *oiko-nomia* and *oiko-nomos*.[12] Schaefer is particularly detailed in his treatment of the compound *oikonomos*, because this formulation presents a synopsis of such concepts as organization, order, and economy that are important for the whole semantics of the root *nem*. *Oikonomos* appeared in the 6th century, when the verb for *nomos* was *nemein*, which customarily meant to administer or to govern. Until the end of the 4th century, Xenophon, Plato, and Aristotle reserved the word for the domestic economy and household, including such moral qualities as prudence, circumspect planning, thrift, and honesty.[13] The modern antithesis of production and consumption still was far from the *oikos*.

Obviously, a special relation exists between *nomos* and what today we call *Daseinsvorsorge* [cradle-to-grave social welfare], i.e., Ernst Forsthoff's generally accepted key word for modern administrative law. The *nomy* [*nomos*] apparently belonged more to the *oikos* than to the *polis*. Strangely enough, even after further developments, when spaces and measures were expanded, the word *oikos* was retained. At the end of the 18th century, a new scholarly discipline arose in Europe, a kind of science of economics, which was called either "national economy" or "political economy." How extraordinary that, in the expansion of *nomos* from the house to the *polis*, it retained its linguistic relation to the old "house" — it was not called national- or polito-nomy, but eco-nomy. The same is true for the national budget, which still is tied to the *oikos*. When the household

12. Laroche's profound book, *ibid.*, provides a comprehensive overview of word combinations with *nomos*. Cf. *Histoire de la racine nem- en grec ancien, op. cit.*

13. *Ibid.*, p. 141.

was expanded to the state and the national market, and when national states and national markets were expanded to *Großräume* (household and planning thus far have not arrived at One World), they appear to have retained the memory of *oikos* and *oikonomie*. Human planning and the order of modern administrative law have their immanent measures as long as they remain concrete, as long as the earth and mankind have not become the mere raw material of spaceless planning.

In the nomadic age, the shepherd (*nomeus*) was the typical symbol of rule. In *Statesman*, Plato distinguishes the shepherd from the statesman: the *nemein* of the shepherd is concerned with the nourishment (*trophe*) of his flock, and the shepherd is a kind of god in relation to the animals he herds.[14] In contrast, the statesman does not stand as far above the people he governs as does the shepherd above his flock. Thus, the image of the shepherd is applicable only when an illustration of the relation of a god to human beings is intended. The statesman does not nourish; he only tends to, provides for, looks after, takes care of. The apparently materialistic viewpoint of nourishment is based more on the concept of a god than on the political viewpoint separated from him, which leads to secularization. The separation of economics and politics, of private and public law, still today is considered by noted teachers of law to be an essential guarantee of freedom.

The nomadic way of life was overcome with the linking of house and *nomos*. The rule of the patriarchal father over the house and family was a totality in that it united religious and moral authority, juridical *potestas* and dispositional economic rights. For this reason, in addition to his four types of monarchy (the heroic age with willing subjects, barbarian despotism, elective tyranny, and the generalship of the limited monarchy of the Laconians), Aristotle added a fifth type of unlimited monarchy in which "one has the disposal of all."[15] This monarchy, he said, corresponds to a household, because, in a manner of speaking, the house-father is a king, and an unlimited king, in a manner of speaking, is a house-father. Here, too, there is the problem of the unity or division of economics and politics. The transformation of the community into an administrative state responsible for total social welfare leads to a paternal totality without a house-father when it fails to find any *archy* or *cracy* that is more than a mere *nomos* of distribution and production.

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14. Plato, *Statesman*, 274e-276e, in *The Collected Dialogues of Plato*, *op. cit.*, pp. 1040-1042.

15. Aristotle, *Politics*, in *The Basic Works of Aristotle*, *op. cit.*, Book III, Ch. 14, 1285, 29-30, p. 1199.

I consider it to be a utopia when Friedrich Engels promises that one day all power of men over men will cease, that there will be only production and consumption with no problems, and that "things will govern themselves." This things-governing-themselves will make every *archy* and *cracy* superfluous, and demonstrate that mankind at last has found its formula, just as, according to Dostoyevsky, the bees found their formula in the beehive, because animals, too, have their *nomos*. Most of those who swarm around a *nomos basileus* fail to notice that, in reality, they propagate just such a formula. That will become clearer when we grasp *nomos* in its entirety.

III

The word *nomos* has undergone many changes in its more than three-thousand-year history, and it often is difficult to retain the big picture, given the etymological and semantic assessments at any particular time. The most important period was the transition from the nomadic age to the fixed household: the *oikos*. This transition presupposed a land-appropriation which, by its finality, distinguished itself from the perennially provisional appropriations and divisions of the nomads. Land-appropriation is a presupposition of land-division, which determines the broader stable order. In no way is the *nomos* limited to the stable and lasting order established by the land-appropriation. On the contrary, it demonstrates its constitutive power in the strongest way possible in the processes that establish order in the original division, the *divisio primaeva*, as noted legal thinkers call it. However, after the land-appropriation and land-division have been completed, when the problems of founding anew and of transition have been surpassed, and some degree of calculability and security have been achieved, the word *nomos* acquires another meaning. The epoch of constituting quickly is forgotten or, more often, becomes a semi-conscious matter. The *situation établie* of those constituted dominates all customs, as well as all thought and speech. Normativism and positivism then become the most plausible and self-evident matters in the world, especially where there is no longer any horizon other than the *status quo*.

The *nomos* of an age of migrations and land-appropriations was established on the new foundation, first with customs and traditions, then with statutes and laws. *Nomos* became a substitute word for *thesmos*.[16] The sophistic way of discussion incited conflicts to ever sharper antitheses, apparently in the service of progress and refinement, but actually in

16. Cf. Ernst Risch's review of Laroche's book, *op. cit.*, in *Gnomon: Kritische Zeitschrift für die gesamte klassische Altertumswissenschaft*, Vol. 24 (1932), pp. 81-83.

the service of an ideological play of artificial divisions that served to promote civil war. *Nomos* became the antithesis of *physis* — not as thesis, but as valid means, normative measures, and mere dictates. This antithesis of "natural" *physis* and "artificial" *nomos* was dominant with Democritus. To a conservative man like Sophocles, resistance to the antithesis of *nomos* and *physis* was useless. The objective property of *nomie* now was used to raise the impersonal norm of validity above everything personal.

The connection between *logos* and *nomos* meant that the *logos,* as something lacking passion and thus reason, was placed above the instinctive and emotional character of the human individual. The logical postulate "not men, but laws should rule" arose accordingly, because the law, the *nomos*, said Aristotle, is without passion (*patheticon*), whereas any human soul is necessarily "subject . . . to the accidents of human passion."[17] Thus, one understands Pindar's *nomos basileus*[18] in a completely different way.[19] The intellectual trick of the postulate "not men, but laws" is easy to see through, if one knows the linguistic history of *nomos*: *nomos* was turned into a mere *thesmos*, but still retained the content of the old word *nomos*. In this way, one could play endlessly on the antithesis of right and power, and could combine the pretention of a mere ought with the normative power of the factual.

IV

Together with the sophistic arithmetic of pure ought and mere fact, in our case we also are confronted with the problem of translation, which we will keep to a few brief remarks. Cicero translated the word *nomos* as *lex*. *Lex* belongs completely to the world of Roman law. But the consequences of this fusion with a Roman legal concept are still with us. A first-rate expert, the Spanish Romanist Alvaro d'Ors, rightly stated that the translation of *nomos* with *lex* is one of the heaviest burdens that the conceptual and linguistic culture of the Occident has had to bear. Anyone familiar with the further development of the law-state and with the present crisis of legality knows this to be true.

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17. Aristotle, *Politics*, in *The Basic Works of Aristotle*, *op. cit.*, Book III, Ch. 10, 34-35, p. 1190.

18. Pindar, *Carmina cum Frangmentis*, *op. cit.*, fr. 169.

19. Pindar speaks of the theft of Geryon's cattle, which occurred in the nomadic world. Geryon was an ogre with three heads; Heracles is the mythical founder of order. Given that he "appropriated" the cattle of the three-headed giant, he created law; the *Nahme* — the *nomos* — transformed power into law. That is the significance of the often cited Pindar fragment *nomos basileus*.

The confusion reached its pinnacle in the theological sphere, where it can be detected in the history of one of Philo of Alexandria's successful claims. *Nomos* became the Greek translation of the "law" of the Old Testament, and simultaneously the counter-concept to the gospel of the New Testament and of grace. In the Old Testament, most people did not distinguish any further, and the generally concrete order of the Pentateuch, based on land-appropriation and land-division, likewise was called "law," along with the post-exile normativism and even with the pharisaism of the zealous persecutors of Saul before his conversion. Philo claimed, as did Josephus (contra Appion) and the pseudo-Plutarch (of the life and poetry of Homer), that the Greeks, otherwise such an educated people, never once noticed what "law" is, and that Homer never used the word *nomos*.

The content and course of the claim that Homer never used the word *nomos* is one of the most extraordinary phenomena in the intellectual history of mankind. For one and a half millennia, it was considered to be dogma. Jean Bodin, the founder of modern public law, repeats it with reference to Flavius Josephus, in his *Methodus ad facilem historiarum recognitionem* (1572), as does Pascal with reference to Philo and Josephus in his *Pensées*. Laroche's excellent history of the root *nem*, which we have cited, still begins its chapter on *nomos* and Homer[20] with the lapidary sentence: "*Nomos* does not appear in the poems of Homer," and follows with "Homer ignores *nomos*, which is why he does not consider the idea of law."[21]

The word *nomos* appears very often in Homer. The claim to the contrary is based only on *nómos* (accent on the first syllable). But *nomós* (accent on the last syllable) indicates something entirely different, namely pasture, a parcel of land, or a dwelling place. Everyone knows that Greek accents are the work of Alexandrian scholars, and that they were added centuries after Homer, who used no accents. Plato and Aristotle were very liberal in this respect. Thus, it is a later caprice and an *ex post facto*, retrospective view from later centuries to claim that *nómos* (accent on the first syllable) does not appear in Homer, and that *nomós* (accent on the last syllable), which is a very different word, appears very often in Homer. A young historian, Focke-Tannen Hinrichs, has found an illuminating parallel for this extraordinary contention. It would be like asserting that the word *Arbeit* (work) does not appear in the *Niebelungenlied*, although the poem begins with a discourse on the *arebeit* (work) of the hero. Since the *arebeit*

20. Laroche, *Histoire de la racine nem- en grec ancien*, *op. cit.*, p. 164.

21. "Nómos n'apparaît pas dans les poèmes homériques"; "Homer mère ignore nómos parce qu'il ne conçoit pas l'idée loi."

of a Niebelungen hero differs from the *Arbeit* of a laborer in the present-day social welfare state, the word in the *Niebelungenlied* must be different.

It no longer is recognized that the accent, which has played such a fantastic role in the history of Philo's claim, thus becomes unimportant. In his article on *nomos*, Max Pohlenz says: "Ethnography demonstrates just how close *nómos* and *nomós* are to each other."[22] Most important for Pohlenz is the purely vocal meaning of the word. He is not surprised by the fact that the same word was used later for the regionally limited life-style of the inhabitants, and that, for this reason, it gradually acquired another emphasis, so that now "oxytone" and "barytone" exist side-by-side. Walter Porzig, the author of a book important for our problem,[23] wrote to me in January 1954: "The accent difference between *nómos* and *nomós* (pasture) is insignificant."

Philo, however, identified *nomos* with post-exilic law, and, with the aid of such flashbacks and accents established *ex post facto*, was able to claim *bona fide* that Homer did not know what law is. With such reasoning, he also was able to claim that Moses did not know what law is, because the thoroughly concrete order of the Pentateuch, based on land-appropriation and land-division, was as far removed from the law of the Pharisees as was the concrete order of life of Homer's heros from a simply "established" post-sophistic norm (as opposed to *physis*) and its purely normative ought.

We must follow Philo's equally astounding and successful assertion about *nomos* because, in another passage especially important for us in his *Humanitas*,[24] Przywara indicates that Philo's claim was decisive in what would become the Occident. In so doing, Philo reduced Plato's *logos* to the Heraclitan *logos*. This *logos* was identified with the wisdom of the Old Testament books of knowledge, and it turned up again in Jewish-Hellenic literature. Thus, Philo made the *intelligible in sensibilibus* [the intelligible is in the perceivable] (according to Przywara, an expression originating with St. Thomas Aquinas) into a provision of Hegel and Schelling. With *Origines*, however, the relation of the pneumatic *logos* has a dual form: first, it is *oikonomia* with reference to the first chapter of the letter to the Ephesians, i.e., it is the material for the objective relation

22. Max Pohlenz, "Nomos," in *Philologus: Zeitschrift für das klassische Altertum und sein Nachleben*, Vol. 97 (1948), p. 140.

23. Walter Porzig, *Die Namen für Satzinhalte im Griechischen und im Indogermanischen* (Berlin: Walter de Gruyter, 1942).

24. Przywara, *Humanitas*, *op. cit.*, p. 369.

of *logos*, so to speak; and second, it is the relation of the uplifting of the heart. For us, the connection with *oikonomia* is essential, because *Origines*, as Przywara emphasizes, includes all the writings of the Old and New Testaments in the unity of an *oikos*: the house of God. Thus, the unity of *nomos* is only the unity of *oikos*.

V

Nomos is a *nomen actionis* of *nemein* [to appropriate]. By common consent, *nemein* means both *teilen* [to divide] and *verteilen* [to distribute]. Oddly enough, it also means *weiden* [to pasture]. Thus, *nemein* can be used both intransitively and transitively. The fact that *weiden*, *teilen*, and *verteilen* were expressed by one and the same word (*nemein*) demonstrates two things: an inherent relation between them, and, semantically, a deeper unity between two completely different processes that was established and supported linguistically even after memory of it long had been forgotten.

In other words, this *weiden* does not mean feeding or drinking, but rather producing, which expresses a preliminary distribution. It proceeds in an allocation of mine and thine, which is recognized as law, i.e., an allocation that can result only from division and distribution. This is the source of every distributive justice and *suum cuique*. Thus, it is natural that all noted teachers of law speak first in some way of division and distribution, of *divisio primaeva*. It is the original constitution, the concrete primal norm, the beginning of law and property. No legal attribution or allocation is possible without the *divisio primaeva*. The idea of time immemorial or the legal proponents of prescriptive right and negative prescription alone were unable to establish a legal order. Progressive redivisions and distributions are normal with nomadic tribes. Peoples who have become settled and live in houses cannot continuously redistribute. We will not broach the question of how this works in the atomic age and in technologically and industrially developed areas.

However, just as division precedes production, so appropriation precedes division; it opens the way to apportionment. It is not division — not the *divisio primaeva* — but appropriation that comes first. Initially, there was no basic norm, but a basic appropriation. No man can give, divide, and distribute without taking. Only a god, who created the world from nothing, can give and distribute without taking. It is noteworthy that the Greek *nemein*, after its meaning was broadened by good linguists to include distribution and production, even came to mean, first and foremost, appropriation, and to have the same linguistic root as the German word *nehmen*. *Nomos* then

became a *nomen actionis* also for *nehmen*, and meant "appropriation."[25]

One could cite many noted authors for this root parity of *nemein* and *nehmen*. It certainly would not be futile to refute rejected opinions, and, in particular, to reduce Laroche's strongly contested position[26] to semantic impressionism. Jost Trier's linguistic history apparently remains unknown to him. But it is enough for me to take this root parity as a hypothesis in legal history; its fruitfulness is evident, and it can provide a purely linguistic-semantic researcher with food for thought. I am old enough to know the abyss that, in an age of extreme specialization, has separated the two disciplines, despite all the affinities of linguistic and legal history. Yet, if both stages of *nemein* — *teilen* and *weiden* — are contained within the unity of a linguistic root, and if they are developed further, then as soon as many and sufficient phonetic, morphological, and semantic criteria exist, as is the case here, it is not meaningless to find in that root the preceding first stage: the *Nahme*. In this way, language traces the effective and successive constituting processes and events, even when men have forgotten them. In such cases, "language knows it still," says the linguistic philosopher Johann Arnold Kanne, a predecessor of the Brothers Grimm.[27]

It is not safe, even today, only to remember that *nehmen* and *Nahme* comprise a substantive problem, and not to mention that they also mean brutal imperialism, atavistic criminality, and a sadistic opposition to progress. Despite all the remaining ideological antitheses, the leading world powers of the West and the East are united in their rejection of colonialism. *In concreto*, colonialism here means the land- and sea-appropriations of the age of great discoveries of the four hundred years of Eurocentric international law. The odium of colonialism today concerns the European nations. At its core, it is nothing other than the odium of appropriation. In this repudiation, progressive liberalism and Marxist communism agree completely.

Allegedly, no longer is anything taken, but only divided and developed. An important representative of political science at a leading university in

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25. Heinimann speaks of "the verb *nemein* [as] originally related to the German *Nehmen*," in *Nomos und Physis*, *op. cit.*, p. 59.

26. Laroche, *Histoire de la racine nem- en grec ancien*, *op. cit.*, p. 264.

27. Jacob Grimm praised Kanne's *Pantheum* and *Urkunden der Geschichte* in a letter to Görres dated December 5, 1811. Kanne's *Erste Urkunden der Geschichte oder allgemeine Mythologie*, with a preface by Jean Paul, appeared in 1808. The copy in the University Library in Berlin (Dy 12 690) contains numerous entries by Jacob Grimm. Cf. the autobiography of Johann Arnold Kanne, *Aus meinem Leben: Aufzeichnungen des deutschen Pietisten* (1816), republished with an epilogue by me (Berlin: Verlag W. Keiper, 1940).

the United States recently wrote me: "Land-appropriation is over and done with." I replied that it has become even more serious with the appropriation of space. We have no right to close our eyes to the problem of appropriation, and to refuse to think any more about it, because what one today calls world history in the West and the East is the history of development in the objects, means, and forms of appropriation interpreted as progress. This development proceeds from the *land-appropriations* of nomadic and agrarian-feudal times to the *sea-appropriations* of the 16th to the 19th century, over the *industry-appropriations* of the industrial-technical age and its distinction between developed and underdeveloped areas, and, finally, to the *air-appropriations* and *space-appropriations* of the present.

Everything on earth based on progress and development, in both East and West, now contains at its core a concrete and precise creed, whose principles of belief proclaim that the industrial revolution leads to an immeasurable increase in production. As a consequence, appropriation becomes outmoded, even criminal, and division is no longer a problem, given the abundance. There is only production, only the problem-less fortune of pure consumption. No longer are there wars and crises, because unchained production no longer is partial and unilateral, but has become total and global. In other words, like the bees, mankind finally has found its formula in the beehive. Things govern themselves; man confronts himself; wandering in the wilderness of alienation has ended. In a world created by man for himself — a world of men for men (and unfortunately sometimes against men) — man can *give* without *taking*.

VI

In conclusion, we will take one last look, so to speak, at the past ages of appropriation. I will mention two examples to illustrate those past ages, when there remained an ongoing appropriation: one, from the legal history of institutions; the other, from the sphere of pure mysticism.

The legal-historical example concerns the institution of marriage and of family based on marriage. In those times, man *took* a wife. The wife *recognized* the husband, and subjected herself to his name. This taking of the wife was neither theft nor rape, nor a holiday affair, nor what today one calls an erotic adventure. On the contrary, of the many types of encounters between men and women, and of the numerous possibilities that men and women have to interact, either casually or intensively, every *Nahme* is distinguished by its unequivocal publicity. The man, who in this special way takes a wife, gives her his name; the woman takes the man's

name, and their children are born with the man's name. Today, everything is completely different, and, what is more, is disavowed legally and constitutionally. According to Bonn's Basic Law, husband and wife automatically have equal rights. The fact that with us [Germans] a legally married woman still must use the man's name is a customary vestige of times past. Nevertheless, it serves our purpose to consider the deeper relation between *Nahme* and name, so that we understand how the marriage of our fathers, from whom we sprang and whose names we carry, was instituted. If the unity of *Nahme* and name were to be forgotten completely, we would lose any understanding of how we got our own names.

The second example I found in Simone Weil's book, *Attente de Dieu*.[28] She writes that while she was reciting a beautiful poem with the power of a prayer, Christ descended and took her: *il m'a prise*. Friedhelm Kemp, whom I respect and admire as a translator and an editor, renders this decisive passage with the words: *er hat mich ergriffen* [he touched me deeply].[29] This overlooks the powerful precision of *Nehmen*. In his book on Simone Weil, Karl Epting translates this passage as *er hat mich genommen* [he took me].[30] That is it! Simone Weil refused to be baptised. She found the idea of the *corpus mysticum* to be offensive. But if the complete absence of any *analogia* should be explained, which Pzrywara affirms with respect to her, then attention should be paid to every part of *Attente de Dieu*.[31]

I will leave aside the linguistic-historical question of whether both words, *Nahme* and name, might have an etymological connection. I will say only a few words about the general problem of human thought that is indicated by appropriation, apprehension, perception, understanding, and comprehension. We are concerned with the legal-historical meaning of the relation between *Nahme* and name, power and name-giving, and, in particular, with the formative, even festive processes of many land-appropriations that are able to make *Nahme* a sacred act. A land-appropriation is constituted only if the appropriator is able to give the land a name.

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28. Simone Weil, *Attente de Dieu*, Introduction and Notes by J. M. Perrin (Paris: La Colombe, 1950).

29. In the German edition, *Das Unglück und die Gottesliebe* (Munich: Kosel Verlag, 1953), p. 50.

30. Karl Epting, *Der geistliche Weg der Simone Weil* (Stuttgart: Friedrich Vorwerk Verlag: 1955), p. 48.

31. Erich Przywara, "Edith Stein et Simone Weil: essentialisme, existentialisme, analogie," in *Les études philosophiques* (1956), No. 3 (July-Sept.), p. 465.

VII

With this, we return to the beginning of our exposition. In a name and in name-giving, a third orientation of power takes effect: the tendency to visibility, publicity, and ceremony. It overpowered the satanic attempt to keep power invisible, anonymous, and secret. As soon as a true name appears, the solely economic *nomos* ceases to exist, having been exhausted in economy and administration. The beehive has no *Nahme*. No more can *archy* and *cracy* exist without *nomos*, than can a human *nomos* exist without *archy* and *cracy*. Even the elevation of impersonal laws to general norms, even the rationalistic claim to pure legality, which, as the expression of reason, every legitimacy wants to surpass, even this classical human creation of 1789 did not abandon the name, and sought to rule "in the name of the law." But what is most phenomenal about *Nahme* and name is that with them abstractions cease, and the situation becomes concrete. What then is the name of the law? Is it Jean-Jacques [Rousseau] or Napoleon? Or perhaps Louis Philippe or De Gaulle? Law is certainly power and appropriation, but as pure law it is only pure appropriation, as long as its authors remain anonymous, and the true sovereigns remain hidden in darkness.

We have experienced the fate of legality and the purely legalistic state (*Gesetzestaat*). What began as the message of the gods of reason has ended in the gangster slogan of Bertolt Brecht. Law is still not a name. Humanity and reason are not names. Immanuel Kant cried: "Duty, you noble name." In reality, duty is not noble and, in general, has no name. Has the power to name and give names disappeared? Has even what that means, what a name is, disappeared? The last great, heroic act of the European peoples — the land-appropriation of a new world and of an unknown continent — was not accomplished by the heroes of the *conquista* as a mission of the *jus commercii,* but in the name of their Christian redeemer and his holy mother Mary. That is the unique iconographic reality of this process, without parallel. Nevertheless, the new continent acquired a completely different name, that of a cartographer, Amerigo Vespucci. In my book on the *nomos* of the earth, in a chapter on Francisco Vitoria, the moral-theological critic of the *conquista*, I recalled the Marian image of the *conquista.* In vain. A German specialist in international law immediately sought to make out of that "something like a Christian trimming," and scorned it.

Where today are there still names? The great work of the Spanish conquistadors has become a judgment of condemnation that is true of European colonialism as a whole. As we have seen, this odium is universal; it is dominant in America, Asia, Africa, and even in Europe. It is

based on a profound transformation in social and economic-ethical concepts. However, it began with the centuries of propaganda against the Spanish *conquista*. The "black legends" by which the *conquista* should be deprecated have fallen to its originators and exploiters. Today, there are Europeans who are asking to be forgiven for the heroic acts of their forefathers, in order to remove the burden of guilt for the odium of colonialism. At the same time, there are new names, such as Leningrad, Stalingrad, and Kaliningrad, which demonstrate the actuality of the relation between *Nahme* and name. If a German jurist thinks about the reality of his contemporary situation, then he need consider only the fact that the building that once housed the former German Supreme Court in Leipzig now is called Dimitrov House.[32]

With this expression of the relation between *Nahme* and name, I conclude my remarks on *nomos*. If my article has focused explicitly only on those passages in Przywara's book that are especially illustrative and amenable for me as a jurist, they nevertheless can be read and understood for what they are, and can act as a guide to the enormous riches of his thinking. This great body of work has yet to be explored fully. It contains one of the most magnificent answers that the German spirit has to offer to the enormous challenge of an epoch characterized by two world wars.

32. [Tr. When Schmitt wrote these lines, the Soviet Union and the East German communist state still existed. But the fact that the names were changed again after the collapse of the Soviet Union (with the exception of Kaliningrad, which was political only in the geographic sense of no longer being part of Germany, but of having become Russian after World War II) and the reunification of Germany is indicative as well of Schmitt's point.]

Chapter 3

The New Nomos *of the Earth*[1]

I speak of a new *nomos* of the earth. That means that I consider the earth, the planet on which we live, as a whole, as a globe, and seek to understand its global division and order. The Greek word *nomos*, which I use for this division and order, stems from the Greek verb *νέμειν*. *Νέμειν* is the same word as the German *nehmen* [to take]. First, *nomos* means *Nahme* [appropriation]; second, it also means division and distribution of what is taken; and third, utilization, management, and usage of what has been obtained as a result of the division, i.e., production and consumption. Appropriation, distribution, and production are the primal processes of human history, three acts of the primal drama. Each of these three acts has its own structure and process. Division, for example, precedes the measuring, registering, and weighing of distribution. The prophetic words numbered, weighed, divided — MENE, TEKEL, UPHARSIN in the fifth chapter of the Old Testament book of Daniel — relate to this second act of the tripartite original drama: the *nomos* of the earth.[2]

There always has been some kind of *nomos* of the earth. In all the ages of mankind, the earth has been appropriated, divided, and cultivated. But before the age of the great discoveries, before the 16th century of our system of dating, men had no global concept of the planet on which they lived. Certainly, they had a mythical image of heaven and earth, and of land and sea, but the earth still was not measured as a globe, and men still had not ventured onto the great oceans. Their world was purely terrestrial. Every powerful people considered themselves to be the center of the earth and their dominion to be the domicile of freedom,

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1. "Der neue Nomos der Erde," in *Gemeinschaft und Gesellschaft: Zeitschrift für soziale und politische Gestalt*, Vol. 3 (1955), pp. 7-10.

2. Cf. "Appropriation/Distribution/Production: An Attempt to Determine from *Nomos* the Basic Questions of Every Social and Economic Order," Part V, Ch. 1, pp. 324ff.

beyond which war, barbarism, and chaos ruled. Practically, this meant that in the outer world and with good conscience one could conquer and plunder to a certain boundary. Then they built a fence, a line, a Chinese wall, or considered the pillars of Hercules or the sea to be the end of the world. By the occupied earth (in Greek, the so-called *oikonome*), they understood only their own empire. That was the *nomos* of the earth in the first stage, when men as yet had no global concept of their planet and the great oceans of the world were inaccessible to human power.

This first *nomos* of the earth was destroyed about 500 years ago, when the great oceans of the world were opened up. The earth was circumnavigated; America, a completely new, unknown, not even suspected continent was discovered. A second *nomos* of the earth arose from such discoveries of land and sea. The discoveries were not invited. They were made without visas issued by the discovered peoples. The discoverers were Europeans, who appropriated, divided, and utilized the planet. Thus, the second *nomos* of the earth became Eurocentric. The newly discovered continent of America first was utilized in the form of colonies. The Asian land masses could not be appropriated in the same way. The Eurocentric structure of *nomos* extended only partially, as open land-appropriation, and otherwise in the form of protectorates, leases, trade agreements, and spheres of interest; in short, in more elastic forms of utilization. Only in the 19th century did the land-appropriating European powers divide up Africa.

The main characteristics of this second *nomos* of the earth lay first in its Eurocentric structure and second in that, different from the first, still mythical image of the world, it encompassed the oceans. Thus, it already was global, but it still distinguished between land and sea. The firm land was divided into states, colonies, protectorates, and spheres of influence. By contrast, the sea was free. It could be freely exploited by all states (for fishing, salt procurement, pearl fishing, etc.); it had no borders and was open. Naturally, it was decisive that the freedom of the sea also meant the freedom to pursue wars. Consequently, the strongest sea power appropriated the oceans of the world. Next to the great land powers, a great sea power appeared. England vanquished all of its European rivals for the sea: Spain, Holland, France, and Germany.

The Eurocentric *nomos* of the earth lasted until World War I (1914-18). It was based on a dual balance; first, the balance of land and sea. England alone dominated the sea, and allowed no balance of sea powers. By contrast, on the European continent there existed a balance of land

powers. Its guarantor was the sea power England. The balance of land and sea constituted the foundation upon which the land again was balanced conversely by a further and special balance.

Land and sea were completely different orders. There was an international law of the land and a different international law of the sea. In international law, land war was distinguished completely from sea war. In land war, not the civil population, but only the adversarial army was the enemy. Land war was not conducted between peoples, but only between the armies of European states. The private property of civil populations was not booty according to international law. Sea war was trade war. In sea war, the enemy was any state with which the opponent had commercial dealings. The private property of civil populations of warring states and even of neutrals with whom they had trade relations was fair booty, according to blockade and prize law. Land and sea confronted each other as two separate worlds with completely different concepts of war, enemy, and booty.

As a result of World War I, this Eurocentric *nomos* of the earth was destroyed. Today (1954), the world in which we live is divided into two parts, East and West, which confront each other in a cold war and, occasionally, also in hot wars. That is the present division of the earth. Above all, East and West are geographical concepts. In terms of the planet, they are also fluid and indeterminate concepts. The earth has two poles — North and South; it has no East or West poles. In relation to Europe, America is the West; in relation to America, China and Russia are the West; in relation to China and Russia, Europe is again the West. In purely geographical terms, it is impossible to find either an established border or a declaration of mutual enmity. But behind the geographical antithesis, a deeper and more elemental antithesis is visible. It is enough to look at a globe to see that what today we call the East is an enormous land mass. By contrast, the vast reaches of the western half of the earth are covered by the world's oceans — the Atlantic and the Pacific. Consequently, behind the antithesis of East and West is the deeper antithesis of a continental and a maritime world — the antithesis of land and sea.

In moments of high tension, the history of mankind turns into an antithesis of elements pure and simple. A great German poet composed an astounding verse for just such a world-historical moment. It was the summer of 1812, when Napoleon I, emperor of France, at the height of his military and political power, invaded Russia and marched on Moscow. Goethe composed a panegyrical poem in which he said the following about Napoleon:

On matters pondered for centuries,
He saw things with the clearest mind,
All petty things have trickled away,
Only sea and land count here.[3]

Goethe sided with Napoleon; he expressed the hope that Napoleon's power and wisdom would be victorious over England, that the firm land again would "come into all its rights." We know that Napoleon was defeated not by England, but by the land powers of Russia, Austria, and Prussia. This showed that the contemporary *nomos* of the earth still was based on an equilibrium of land and sea.

Where do we stand today? The earlier balance, based on the separation of land and sea, has been destroyed. Development of modern technology has robbed the sea of its elemental character. A new, third dimension — air-space — has become the force-field of human power and activity. Today, many believe that the whole world, our planet, is now only a landing field or an airport, a storehouse of raw materials, and a mother ship for travel in outer space. That certainly is fantastic. But it demonstrates the power with which the question of a new *nomos* of the earth is being posed.

What might be the form of this new *nomos*? There are three possibilities. The first, and apparently the simplest, would be that one of the two partners in the present global antithesis would be victorious. The dualism of East and West then would become only the last stage before an ultimate, complete unity of the world — the last round, the final step, so to speak, in the terrible rings to a new *nomos* of the earth. The victor would be the world's sole sovereign. He would appropriate the whole earth — land, sea, and air — and would divide and manage it in accord with his plans and ideas.

A widespread, purely technical manner of current thinking knows no other possibility, because, for it, the world has become so small that it can be overseen and managed easily. Given the effectiveness of modern technology, the complete unity of the world appears to be a foregone conclusion. But no matter how effective modern technical means may be, they can destroy completely neither the nature of man nor the power of

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3. [Tr. This poem, which Schmitt also quotes in the introduction to this book, is from "Im Namen der Bürgerschaft von Karlsbad: Ihro der Kaiserin von Frankreich Majestät," which can be found in *Goethes Werke*, Hamburg ed. in 14 vols, 5th ed., *Gedichte und Epen*, textkritisch durchgesehen und mit Anmerkungen von Erich Trunz (Hamburg: Wegner Verlag, 1960), p. 262.]

land and sea without simultaneously destroying themselves. The existence of modern technology should neither make us drunk nor lead us to despair. We need neither abandon human reason nor cease to consider rationally all the possibilities of a new *nomos* of the earth.

A second possibility might be an attempt to retain the balance structure of the previous *nomos*, and to maintain it in a way consistent with contemporary technical means and dimensions. That would mean that England's former domination of the oceans be expanded to a joint domination of sea and air, which only the United States is capable of doing. America is, so to speak, the greater island that could administer and guarantee the balance of the rest of the world.

The third possibility also is based on the concept of a balance, but not one sustained and controlled by a hegemonic combination of sea and air power. A combination of several independent *Großräume* or blocs could constitute a balance, and thereby could precipitate a new order of the earth.

It would be well if the global perspectives of these three possibilities were to become generally known. Most of those considering this frightful problem rush blindly toward a single sovereign of the world. That idea certainly has a primitive simplicity, but it must not be permitted to displace other possibilities. The second possibility, continuation of the former hegemonic balance structure, has the greatest chance of accepted tradition and custom on its side. The third possibility, an equilibrium of several independent *Großräume*, is rational, if the *Großräume* are differentiated meaningfully and are homogeneous internally.

The new *nomos* of our planet is growing irresistibly. Many see therein only death and destruction. Some believe that they are experiencing the end of the world. In reality, we are experiencing only the end of the former relations of land and sea. To be sure, the old *nomos* has collapsed, and with it a whole system of accepted measures, concepts, and customs. But what is coming is not therefore boundlessness or a nothingness hostile to *nomos*. Also in the timorous rings of old and new forces, right measures and meaningful proportions can originate.

> Also here are gods and rules,
> Great is their mass.

Name Index

Subject Index

Glossary of Foreign Terms

Adjudicatio (lat) — adjudication
Aequalitas (lat) — equality
Aequalitas amicitiae (lat) — equality of friend
Aequalitas hostium (lat) — equality of enemies
Anadaslmoi (lat) — redistributions
Arcanum (lat) — secret
Auctoritas (lat) — authority
Autorité établie (fr) — established authority
Bellum intestinum (lat) — internal war
Bellum justum (lat) — just war
Bellum omnium contra omnes (lat) — war of everyone against everyone
Bellum utrimque justum (lat) — just war on both sides
Bene sufficienterque vivere (lat) — to live sufficiently well
Beneficium (lat) — benefaction
Charassein (lat) — to engrave, to scratch, to imprint
Civitates (lat) — commonwealth
Civitates superiorem non recognoscentes (lat) — commonwealths not recognizing a superior
Communitas (lat) — community
Communitates perfectae (lat) — perfect communities
Communitas perfectissima (lat) — most perfect form of human community
Connubium (lat) — marriage
Conquista (sp) — the Spanish conquest of the Americas
Corpus juris (lat) — body of law
Cosmopolis (gr) — world state
Cujus regio, ejus economia (lat) — whose is the territory, his is the economy
Cujus regio, ejus religio (lat) — whose is the territory, his is the religion
Diversi ordines (lat) — diverse orders
Divisio primaeva (lat) — original division
Dominatio (lat) — dominion
Dominium (lat) — property
Droit commun européen (fr) — common European law
Fata libellorum (lat) — fate of libels
Foederati (lat) — federations
Foedus (lat) — covenant or federation
Foedus aquum (lat) — equitable federation
Foedus iniquum (lat) — inequitable federation
Gehorsams-Erzwingungs-Chance (ger) — chance to compel obedience
Gesetz (ger) — law
Gesetzestaat (ger) — *lit.*, lawstate; *fig.*, the liberal state
Grossraum (ger) — *lit.*, large space; *fig.*, large spatial sphere
Homo homini deus (lat) — man is a god to man
Homo homini homo (lat) — man is a man to man
Homo homini lupus (lat) — man is a wolf to man
Hospitalitas (lat) — military quartering
Hospitum (lat) — hospitality
Hostes perpetui (lat) — perpetual enemies
Hostis (lat) — enemy
Hostis generes humani (lat) — enemy of the human race
Imperator (lat) — emperor
Imperium (lat) — empire
Inimici (lat) — enemies
Inter alius (lat) — among others
Interdictum uti possidetis (lat) — prohibition of change of possession
Jus civile (lat) — civil law
Jus gentium (lat) — international law
Jus peregrinandi (lat) — right to travel
Jus postliminii (lat) — right of restoration
Jus Publicum Europaeum (lat) — European public law
Justa causa belli (lat) — just cause of war

Justissima tellus (lat) — the just earth
Justum matrimonium (lat) — law of marriage
Justus hostis (lat) — just enemy
Katechon (lat) — restrainer
Kulturkampf (ger) — *lit.*, a cultural struggle; *fig.*, the struggle between Bismarck and the Catholic Church
Landnahme (ger) — land-appropriation
Landteilung (ger) — land-division
Leben (ger) — life, to live
Lex terrae (lat) — law of the land
Libera mercatura (lat) — free trade
Liberum commercium (lat) — freedom of commerce
Locus communis (lat) — commonplace
Magni homines (lat) — great men
Nemein (gr) — to divide or to pasture
Nomomachy (gr) — acts and legal technicalities of a strictly state legality
Nomos (gr) — order
Nomos basileus (lat) — nomos as ruler or king
Nomothet (gr) — a creator of nomos
Noos (gr) — mind
Nullem crimen, nulla poena sine lege (lat) — no crime, no penalty without law
Ontonome (lat) — in accord with the *nomos* of being
Orbis (lat) — orb, circular surface, spherical body, world
Ordo ordinans (lat) — order of ordering
Ordo ordinatus (lat) — order of the ordered
Ordre public (fr) — public order
Pacta sunt servanda (lat) — pacts are observed
Par in parem non habet jurisdictionem (lat) — equals have no jurisdiction over each other
Patrocinium (lat) — patronage
Peiran (lat) — pirate
Personae morales (lat) — moral persons
Personae publicae (lat) — public persons
Petito principii (lat) — begging the question
Petitorium (lat) — of the petitioners
Physis (gr) — nature
Polis (gr) — city-state
Politeia (gr) — polity
Populus Christianus (lat) — Christian people
Possessoriums (lat) — of the possessors
Postestas indirecta (lat) — indirect power
Postestas spiritualis (lat) — spiritual power
Potamic (gr) — river
Potestas (lat) — power
Pouvoir constituant (fr) — power to constitute
Pouvoir constitue (fr) — power to be constituted
Praepotentia (lat) — superior power
Psephismata (gr) — plebiscites
Rayas (pg) — Portuguese lines of demarcation
Regnum (lat) — polity
Relectiones (lat) — *lit.* rereadings, but actually lectures
Res communis omnium (lat) — things common to all
Res nullius (lat) — things belonging to nobody
Res omnium (lat) — things belonging to everybody
Respublica Christiana (lat) — Christian republic
Sacerdotium (lat) — priesthood
Schedon (gr) — a rule
Seinsgerechte (ger) — in accord with the nature of being
Sileamus in munere aliena (lat) — remain silent within foreign walls
Silete theologie in munere alieno! (lat) — *lit.*, theologians should remain silent within foreign walls; *fig.*, theologians should mind their own business
Societas sceleris (lat) — morally bad society
Societates (lat) — societies
Societates perfecti (lat) — perfect societies
Tantum licet in bello justo (lat) — to the degree possible in just war
Terra firma (lat) — firm land
Thalassic (gr) — sea, see *thalassocracies*
Thalassocracies (gr) — sea or maritime nations
Theatrum belli (lat) — theater of war
Tituli legitimi (lat) — legitimate titles
Tituli non idonei nec legitimi (lat) — titles neither suitable nor legitimate
Topos (gr) — orientation
Tyrannen (gr) — tyranny
Urwort (ger) — source word
Uti possidetis (lat) — change of possession
Vis armorum (lat) — strength of arms
Völkerwanderung (ger) — migration of peoples