

## The New *Nomos* of Europe

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*According to Carl Schmitt, in his late work *The Nomos of the Earth*, published in 1950, the long evolution in the relation between humans and the earth has been decisive for the nature of traditional legal order. The historical links to European international jurisprudence (*ius publicum Europaeum*) have decayed with the old world order that supported them. Territoriality, once the foundation of the nation-state has evolved, causing a parallel change in the nation-state paradigm of sovereignty and the fabric of international law which has its basis in that paradigm. If Schmitt is correct in his prognoses about the end of a global era and the rise of a new yet uncharted world order in the mid-1940s, then the architects of the nascent European Coal and Steel Community face the same conditions, and must carry out their work with the same cultural, social and juridical raw materials, against the backdrop of the same concrete historical experience. This article will attempt to continue the trajectory of Schmitt's historical analysis of the *ius publicum Europeum*, suggesting how its central concepts and theses map onto the grand geopolitical and civilisational project of European construction from 1950 to 2004 and beyond. It will explore the applicability of the concept of *nomos* for the nature of EU evolution, and interpret general elements of the European legal system in terms of the concept of *nomos*.*

### INTRODUCTION

On 9 May 1950 at the Quai d'Orsay, the French Ministry of Foreign Affairs, Robert Schuman held a press conference and pronounced what would come to be known as the *Schuman Declaration*. The *Declaration* is widely

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considered the origin of European construction in its twenty-first-century incarnation, both in spiritual and political terms. It explicitly proposes the creation of a community whose members share an interest in peace and a High Authority under which French and German coal and steel production should be placed. The *Declaration* led quickly to the adoption of the Treaty of Paris one year later, effectively creating the European Coal and Steel Community, the forerunner of today's European Union. The treaty, which was signed by the founding members of the European Union, had as its core principle a functionalist philosophy of peace. Instead of reproducing the complex coordination of national interests with the aim of ending conflict with one another, it sought to fuse national interests. The integration of the coal and steel industries was seen as the first and most obvious step toward such a fusion. European peace was thus to be assured not by diplomatic scrambling between nation-states, but by weakening or dismantling of the political-economic sovereignty of nation-states, albeit gradually and only in selected areas. The Treaty was envisaged as the first step in a long and continuing process of building-down of sovereign national borders, based on the notion that the true values of European nation-states are European, and no longer map onto those nation-states, but rather both exceed and precede them.

Only a few months after the release of the *Schuman Declaration* another engaged European, the controversial Weimar jurist Carl Schmitt, published his paradigm-rattling *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*. Both in style and approach Schmitt's book widened the scope of the kind of juridical scepticism developed in his previous work. By turning his attention from domestic legal matters to the historical evolution of international relations he seeks to situate European jurisprudence with respect to its origins and speculates on its destiny.

For many years leading up to the publication of *Nomos* he had argued that European jurisprudence was all but obsolete, cut off from its sources and under the negative influences of an increasingly technological culture.<sup>1</sup> This way of thematising European intellectual evolution converges with the array of political positions that mark Schmitt's intellectual career. He is by and large indifferent to traditional left-right oppositions of traditional politics, seeing them as secondary to his project of re-founding contemporary jurisprudence. Through his career he adamantly argued for the autonomy of the sovereign state, seeing in its decline the loss of legitimacy, the weakening of economic integrity, and the detachment of law from its historical roots. In the *Nomos* book he focuses on the relation between European and international jurisprudence, and what he calls the 'spatial order' that has always supported it. In his analysis Schmitt describes the end of a global era and the rise of a new era, starting in the mid-1940s, that is approximately simultaneously with the origins of the European Coal and Steel Community.

This article investigates the degree to which the historical confluence of European construction and the Schmittian European *nomos* bears any deeper, more substantive, links. It will advance the hypothesis that Schmitt's critique of what he called *European International Law* reflects to a compelling degree the complex geometry of the emerging European legal system. By examining the architecture of the European law in the light of Schmitt's concept of *nomos* it attempts to contribute to clarifying the unique logic of legitimacy and authorisation that make up the European juridical space.

### SCHMITT, THE EUROPEAN

Schmitt's own philosophical relation to the idea of Europe varies vastly in the course of his career. From a certain point of view one might say that his career consisted of nothing less than an ongoing critique of the premises and consequences of the "European project". Schmitt bursts what he sees as the conceptual and political limitations of the nation-state in an original way that has consequences both for our understanding of the national and the European.<sup>2</sup> John P. McCormick has charted the conceptual contours of four distinct relations to Europe through the course of Schmitt's career.<sup>3</sup> According to McCormick these phases are: (1) Europe as a form of neo-Christendom, a position set out in *Roman Catholicism and Political Form* (1925); (2) Europe as Central European political-cultural anchorage, primarily in the essay "The Age of Neutralizations and Depoliticization" (1929); (3) Europe as interwoven with a German dominated *Grossraum*; and (4) Europe situated in the evolution of law, space and sovereignty in *The Nomos of the Earth* (1950).

Schmitt's earliest consideration of the notion of Europe and its contribution to contemporary European ideas is a critique of the political function of Catholicism. This function is expressed both as the political form of the catholic tradition and as its substantive values. In terms of the formal characteristics, which give the book its title, Schmitt advances a critique of modernity as the rise of instrumental rationality. "In almost every discussion one can observe the extent to which the methodology of the natural-technical sciences dominates contemporary thinking. For example, the god of traditional theological evidence – the god who governs the worlds as the king governs state – subconsciously is made the motor impelling the cosmic machine. The chimera of modern big-city dwellers is filled to the last atom with technological and industrial conceptions, which are projected into cosmological or metaphysical realms. In this naïve mechanistic and mathematical mythology, the world becomes a gigantic dynamo wherein there is even no distinction of classes".<sup>4</sup> The instrumental rational course taken by the European cultural evolution consequently threatens the transmission of the substantive values of European religious culture, including the central tenets

of authority, collectivity and individuality. Yet for Schmitt what is in the end more decisive for the cultural trajectory of Europe is not the *theological* content of Roman Catholicism, but rather the shifting nature of *the political*. Catholicism is “eminently political” in contrast to the superficiality of political rationality of our time.<sup>5</sup> To the newly evolved “political mechanics” of economic and military means of power in Europe Schmitt opposes the Catholic Church as the “the consummate agency of the juridical spirit and the true heir of Roman jurisprudence”.<sup>6</sup>

In Schmitt’s second phase of European orientation the “Age of Neutralization” essay positions Germany and Central Europe relative to Russia under the sign of the technology.<sup>7</sup> Schmitt sees European culture in general as structured and marked by a “neutralization process” whereby the centre of European spiritual heritage transitions from a more theological to metaphysical and moral, and finally to an economical rationality. In this phase of Schmitt’s understanding of Europe, the axis of analysis shifts to the German-Russia dimension, the role of France in European intellectual affairs is toned down and the spectre of unbridled technological development is put in the foreground. Schmitt’s earlier emphasis on the need for a historical awareness of the intellectual status quo of Europe takes, in the “Neutralization” essay, the form of a renewed emphasis of the present and coming mutations in the nature and understanding of technology and the unique form rationality it embodies: “technicity (*Technizität*)”.

“The process of continuous neutralization of various spheres of cultural life has reached its end because technology is at hand. Technology is no longer neutral ground in the sense of the process of neutralization; every strong politics will make use of it”.<sup>8</sup> Schmitt’s analysis of European intellectual history focuses here on the notion of neutralisation brought about by the influx of technology in European life.

The Central European emphasis of the “Neutralizations” essay is continued in the following phase of Schmitt’s European trajectory, covering his association with National Socialism and represented by the lectures and writings on *Grossraum*. The *Grossraum* concept points toward Schmitt’s later analysis of the European *nomos Grossraum* to the degree that it builds upon the need for a general re-evaluation of the notion of international legal order in terms of its concrete spatial determinations. In this sense the concept represents the basis for the spatially oriented legal analysis of the *nomos* book. “International law (*Völkerrecht*) as *jus gentium*, is, as a law of peoples, first and foremost a *personal*, order, that is, it is a concrete order determined by the one’s belonging to a people or a state. [It is, however] not only personally determined, but it is also simultaneously a concrete *spatial order*.”<sup>9</sup> *Grossraum*, in Schmitt’s European vision, is thus not only a geopolitical concept, so often the object of reproach, but a *metaphysical* one, linking the spatiality of geopolitics to international law to the earth. International and European law are without doubt *about* space, they *refer*

primarily to space. According to Schmitt, they must also be conceptualised as being spatially determined themselves.

The *Nomos* book represents the fourth and final phase of the evolution of Schmitt's thinking on Europe.<sup>10</sup> It widens the scope of Schmitt's juridical pessimism from the main themes of his career, sovereignty and legitimacy on the German national level, to questions surrounding the status of international law. In the 1963 Foreword to *The Concept of the Political* (1932), Schmitt sums up the constellation of the writings that aimed to fully analyse this new situation: the Hugo Preuss book (1930) *The Protector of the Constitution* (1931) and *Legality and Legitimacy* (1932) concern the new challenges surrounding domestic politics, *The Concept of the Political* deals with the evolution in inter-state relations, and *The Nomos of the Earth* deals with the same set of mutations as they play out on the macro-historical world level.<sup>11</sup> In keeping with his claims about the withdrawal of jurisprudence in the national framework, Schmitt develops an extended historical analysis of the decline of the Eurocentric order of international law, beginning with Hellenism and reaching its nadir in the post-war institutions of international law, first and foremost, but not exclusively, the universe of international jurisprudence surrounding the League of Nations, though its roots extend all the way back to the post-Napoleonic Monroe Doctrine (1823).

What is innovative about Schmitt's historical demonstration of the decline of the European jurisprudence is its correlation with the decline of a certain European *spatial* order. According to Schmitt, the long evolution in the relation between humans and the earth has been decisive for the nature of traditional legal order. The historical links to European international jurisprudence (*ius publicum Europaeum*) have decayed with the old world order that supported them. The modern conception of territoriality is a Cartesian one: it maps according to a linear logic, a fixed set of principles or concepts (sovereignty, deed, ownership, belonging, rights, etc., onto a fixed spatial template). Space is in effect a given, universal and ubiquitous. This conception accompanies the evolution of the concept of nation and the nation-state paradigm of sovereignty, the very fabric of international law. Schmitt's insight, as we will see, evolves from a critique of the fixed-ness of the spatial linking of international law.<sup>12</sup>

If Schmitt is correct in his prognoses about the end of a global era and the rise of a new yet uncharted world order in the mid-1940s, then the architects of the nascent European Coal and Steel Community face the same conditions, and must carry out their work with the same cultural, social and juridical raw materials, against the backdrop of the same concrete historical experience. The fundamental insight of the era, for observers as different as Schmitt and Schuman, was that the essential values of our time are trans-national and extra-territorial, and that they defy for structural reasons (Schmitt) or by historical contingency (Schuman) the political and legal institutions of our time.

This article will attempt to continue the trajectory of Schmitt's historical analysis of the *ius publicum Europeum*, suggesting how its central concepts and theses map onto the grand geopolitical and civilisational project of European construction from 1950 to 2004. It will explore the applicability of the concept of *Nomos* for the nature of EU evolution, and interpret both general and specific elements of the European legal system in terms of the concept of *Nomos*.

## THE NOMOS OF THE EARTH

The *nomos* book thus lies at the intersection of a number of concerns that preoccupy Schmitt throughout his career. Schmitt looks to gather the threads of a certain interpretation of world history, both in unitary and unifying Hegelian sense, but also in a specific sense. Europe's history, from Schmitt's perspective, is inseparable from a certain experience of *space* and *place*. History, and its correlates, politics and law, is spatially determined. For this reason, *The nomos of the Earth*, is as much a theory of historiography as it is political or legal theory. If the work is to be understood in its empirical dimensions, it is by identifying the concrete specificity of international law and mapping these specific determinations onto the large movement of world history. The *nomos* book in this sense is an attempt to historically link fundamental changes in the nature of international jurisprudence with changes in the cultural, social, political and *spatial* order of the world.

Conceptually Schmitt hooks his builds upon the multivalency of the historical concept of *nomos*. In ancient Greek, *nomos* is defined as 'that which is in habitual practice, use or possession'. From this basis the term is thus variously translated as 'law' in general, as 'ordinance', 'custom', derived from customary behaviour, from the law of God, from the authority of established deities, or simple public ordinance.<sup>13</sup> *Nomos* also means 'law' understood in the sense of rationality, the 'reigning' order of things, or what we would today call 'discourse'. Finally, *nomos* is linked to the word *neimō*, meaning 'to deal out', 'distribute' or 'dispense'. The concept is thus also associated with being a hub or distributor of meaning or of rationality, both in the physical and metaphysical sense of the word, the logical organisation of things in space and time. This component of its meaning is what links it to the notion of *extension*, the spatialisation of rationality. (In modern Greek a *nomos* is a prefecture or county in the sense of a distribution of legitimate authority in a given place. *Nomos* thus implicitly links to the deployment or application of power across a given territory.<sup>14</sup>

*Nomos* thus refers to both spatial territory and the political or legal rationality that is valid for that space. It points to the *order* established through an appropriation of delimited territory. To Schmitt's reading, a land seizure (*Landnahme*) is a seizure of land, which not only constitutes a shift

of property but which simultaneously orders the earth rationally and thus posits a distinct and ordered relationship between the political subject of power, ownership and political action. It also designates the act of establishing order, of logic or rational discourse through the original partitioning of land.<sup>15</sup>

The most significant aspect of *nomos* for our purposes is however the way in which it gives a certain kind of reality and meaning to pure emptiness of what is sometimes called “Cartesian space”; that is purely formal, empty or meaningless spaces. When territory is partitioned or divided through acts of war or politics its rational organisation is not simply changed along spatial lines, its administration crystallised in terms of formal laws or rules. Rather, the land seizure productively shapes the dynamics in and above and all around it. Like the shift from Cartesian space in the field of political geography, Schmitt intends the concept of *nomos* as a polemical alternative to the positivistic understanding of legal order that he sees as bureaucratically encroaching on European jurisprudence in his own time, the ‘*situation établie* of those constituted dominates all customs, as well as all thought and speech’, reiterates Schmitt in the *nomos* book. ‘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*’.<sup>16</sup>

*Nomos* is thus to be understood as a kind of antidote to the instrumental prescription of law, which somehow pre-exists it or which somehow pre-exists the territory over which it has jurisdiction. On the contrary, the meaning of territory, of inhabited or uninhabited space, the *territoriality* of the territory arises with its *nomos*. This is what Schmitt understands when he calls *nomos* “constitutive”. *Nomos* makes out the very territoriality of territory by organising the meaning of its space, by organising its spatiality of it. It is indeed an ordering of reality, but one which orders reality by constituting it. As we will see, this constitution of the territoriality of territory simultaneously institutes a relation to international law, its meaning in space and the meaning of space for it.

## THE NEW TERRITORIALITY AND THE BIRTH OF INTERNATIONAL LAW

Schmitt draws his understanding of the term *nomos* from a distinct period in history, corresponding to the transition from wanderer society to the society of fixed and land-based households, from the *nomad* existence to the *oikonomiein*, the land-based order of the household. In these terms Schmitt marks off three distinctive historical-spatial *nomoi*, or “orders” of the earth. The first is the mythological stage, from pre-history to the fifteenth-century age of discovery; the second is the period from the fifteenth century to the

early years of the twentieth century; the last is the last period, still unconceptualised, according to Schmitt, extending from the Treaty of Versailles and forward. In the era before the planet was conceptualised as a finite totality, space was ultimately free. The question of organising it in terms of international law never occurred since it was never conceptualised as a thing in itself. It *was* reality itself, the ultimate and transcendental backdrop of all things. According to Schmitt, this situation began to evolve in the fifteenth century. The 'Age of Discovery' opened the face of the earth to apparently infinite land appropriation, thus transforming the essence of space itself. Instead of the geopolitics of discrete and finite territory, a geopolitics of open territory began. Land appropriation throughout the fifteenth to seventeenth centuries went effectively unopposed.

This change in spatial and thus geo-political consciousness was, in Schmitt's view, decisive. Even the pre-Renaissance spatial consciousness which saw Rome or Jerusalem as its centre knew that such a religious or political geography related to an enemy other, be it invading Germanic tribes or Islam. The Renaissance period, on the other hand, was characterised by a lack of opposition to spatial appropriation.<sup>17</sup>

During the Middle Ages Europe was of course not divided into states in the modern sense. For this reason and others international law in the modern sense was not possible. Today we think of states as having undisputed political control over their own territory, independent of external political control. Indeed, it is the foundational notion of international law. By contrast, medieval kings shared power across a number of axes: internally, with their barons each of whom had a private army; externally, they were obligated to show some sort of allegiance to the Pope and to Rome. With the discovery of sea routes to the Far East and the (re)discovery of America, the European sea powers transcended the Medieval political limits on their power, disrupting the political order and leading to the emergence of the concept of the sovereign state in the modern sense, first in theory, in the sixteenth century by Bodin, then in effect in Spain, the France. The Treaty of Westphalia inaugurated *ius foederationis*, a federative legal system, giving approximately three hundred political entities, essentially made up of the remains of the Roman Empire, the right to enter into alliances with other political entities under certain conditions.<sup>18</sup> Although the number of European states emerged as dominate (France, Sweden, Netherlands) in terms of the right to form alliances and engage in state-to-state diplomacy, they were approximately equivalent in juridical terms. A legal order emerged based on the diplomatic and political structure of these equivalencies: the *ius publicum Europaeum*, European public law understood as international law.<sup>19</sup>

The fundamental consequence of this evolution was the re-casting of *war* as *secular*. The complex mix of religious, sectarian, inner political power struggles was replaced by a system in which territory became the primary demarcation of political power, and where the logic of inside/outside



took hold.<sup>20</sup> The ‘humanisation of war’ was the direct consequence of the redrawing of political lines in terms of nation-state territory. Modern international law was founded upon the codification of the new norms of war as interstate instead of religious.<sup>21</sup>

The new international law, *ius publicum Europaeum*, was in essence a formalisation of the rules of war which made sovereign states its distinct and territorially anchored moral subjects. Wars were henceforth fought between *justi hostes*, just or correct enemies, specified as legal personalities in terms of a common European code of conduct, based on the partition of lands and the identity of moral personality, justice, and territory. In moral terms, wars were henceforth only waged between equals. The European continent, controlled by the *ius publicum Europeaeum* became a homogeneous moral space in which the rules of war, the forms of opposition were specified in advance by the codes of interstate activities. *Ius gentium* (law of nations) and *ius inter gentes* (law among nations, inter-national law) mapped directly onto each other. Indeed, they were indistinguishable.<sup>22</sup>

In Schmitt’s view the reality of the world order has left this legal order far behind. In *The Concept of the Political*, for example, he describes the end-point of this long process of decline in which “the entire structure of state-based concepts, that the Eurocentric political and legal sciences had built up through 400 years intellectual labors. The state as model of political unity, the state as bearer of the most astonishing of all monopolies, namely that of the monopoly of political decision, that glimmering work of European form and occidental rationality, has been dethroned”.<sup>23</sup> By all evidence the era of the grand European legal order is behind us. And yet the quandary that characterises our time, according to Schmitt, is that we seem unable to dispense with the ‘classical’ political and legal concepts forged in the sixteenth and seventeenth century and developed without imagination through the centuries since then. According to the classical model, he argues, one differentiates clearly between the interior relations of the state and external relations, domestic affairs and international affairs. Once upon a time, the state was the privileged arena for exercising the political, it was the site where ‘the political’ was understood as determining interstate relations. According to the classical model, the state was an integral political actor, turned toward the outside, toward relations with other states. Domestic order and security were the responsibility of state-controlled police. The ‘criminal’ was understood as a domestic, civil, legal category while the ‘enemy’ was understood as a category of international relations, and peace was understood as absence of war. In Schmitt’s radical re-conceptualisation of ‘the political’, particularly in his 1929 essay ‘The Concept of the Political’, he refers to a primordial entity of human existence, based on the relation of self to other. In Schmitt’s terms this appears as ‘friend’ and ‘enemy’, though this must be understood as preceding individuality, personality, and any political institutions of the state.<sup>24</sup> The concepts of ‘friend’ and ‘enemy’ refer far more to the way that legal and political categories are dialectically structured.

In *The Concept of the Political*, Schmitt underscores that the concept of the political presupposes a *plurality* of political units. There can be no political unity without the opposition of that unity to another.<sup>25</sup> This essentially Hegelian insight is the basis for Schmitt's understanding of the situation of the international system. The political world is a 'pluriverse', not a 'universe': no state represents humanity. Indeed, in Schmitt's notorious formulation, 'Whoever says 'humanity' is deceiving'.<sup>26</sup> Does the European Union, with its institutional make-up and trans-national *acquis communautaire*, simply extend the trend of *ius gentium* as distinct from *ius inter gentes*, which Schmitt decries in the two twentieth-century attempts to establish a new global *nomos*? Does the system of European Union law offer something new?

### THE EUROPEAN UNION AND THE *IUS PUBLICUM EUROPEAUM*

Before turning to our analysis of the EU legal system, we linger at another late text in which Schmitt considers the notion of a European legal order after the League of Nations: "The Plight of the European Legal Sciences" from 1943.<sup>27</sup> In this essay, written at approximately the same time as *The Nomos of the Earth*, Schmitt evaluates what he sees as the state of the art of the European jurisprudence and, in doing so, comments on the nature of European community in terms of actual and possible legal framework. The article is both an evaluation of the relationship between the centuries-old European jurisprudence and the European scholarly traditions into which it is situated, and a diatribe, typical for this period in Schmitt's life, against legal positivism.<sup>28</sup>

For Schmitt it is, again, burgeoning legal positivism, which has shaped and determined the evolution of the informal European legal community. According to this model, which Schmitt sees spreading and developing throughout Europe, the formal validity of laws lies exclusively in its propositions, combined with a state that is willing to enforce them. According to the positivist position laws are by and large instrumental: their validity is identical to the force of their implementation. For Europe, politically torn and tattered after two world wars, no substantive foundation for law seems available. Here Schmitt is referring to individual European nation-states and the aspects of a shared legal order they manifest. The prospect of a common European legal system in the sense we see it today in the institutionalisation of EU law is distant since, as he explains, there is precisely no common political will to enforce a European law if there were one. This is of course true for the state of European solidarity in 1943.

Schmitt then unites his critique of the state of jurisprudence in Europe with a parallel attack (in the *nomos* book and elsewhere) on the destitute tradition of *ius publicum europeaum*, European law of nations.<sup>29</sup> From the

perspective of legal positivism state law and international law have fallen completely from one another. They have, according to Schmitt, two distinct sources of law and procedural principles. The internal and the external are thus alienated from each other and a kind of political realism has become the abiding theory of politics.<sup>30</sup> The domestic and international belong to two utterly different spheres, and have no conceptual or even practical communication with each other. Contracts and agreements made between European states have, for the positivist, formally speaking, nothing at all distinct in comparison with contracts and agreements made with non-European states. The fact that two European states might enjoy an international agreement, as opposed to having one with a non-European state is strictly a matter of coincidence.<sup>31</sup>

Here the assumption upon which Schmitt bases his lament over the absence of a coherent (non-positivist) legal order is essentially the same as the standpoint from which he is critical in his assessment of the international legal order at large (League of Nations and UN), namely that it is a heterogeneous, even mechanical, combination of legal systems, instead of an interconnected, organic legal system. The strange reality, however, as Schmitt underscores, is that the European states share similar or identical legal systems to form the basis of a legal community. The more or less absolute juridical equivalence of the individual state international legal systems, the identical ethical, political and cultural status of their legal personalities, renders *ius publicum europaeum* obsolete but also uninteresting for the present.<sup>32</sup>

In Schmitt's view the new European *nomos* will not be a legal order in which all European nation-states adopt one and the same parallel legal system, thus sharing a single tradition that is unaffected by national particularity. Not like a re-transmission of Roman law as a 'spiritual and intellectual Common Law of Europe'<sup>33</sup>. This would be the opposite of the 'atomisation' of the nation-states which Schmitt so vehemently attacks in his evaluation of the League of Nations and the UN. Yet a true *ius publicum Europaeum* will need to be both more and less than a shared tradition, passively adopted. It will need to repose upon *both* shared traditions *and* national, individual and case-based particularity. As it happens something like a trans-sectorial legal order has indeed begun to emerge in Europe and continues to develop.

#### EUROPEAN JURISPRUDENCE IN THE FLUX OF EUROPEAN SOVEREIGNTY

Even despite the recent rejections of the draft European Constitution by France and the Netherlands in 2005, and, more recently, its revised version by Ireland the process of European integration has advanced farther than

any of the historical European utopians had dreamed. Both the original presentation in Thessaloniki on 20 June 2003 of the draft Constitutional Treaty and the most recent Eastern Enlargement undertaken on 1 May 2004 constitute bold and decisive steps toward the creation of a sturdy institutional unity. Yet what does it mean for a given institutional setup to be European? Just how European is the European Union legal system?<sup>34</sup> The question of the fundamental sense of Europe and what kind of institutional setup it calls for is far from resolved.<sup>35</sup> European unity remains something other than the unity of Europeans. Nor is it constituted by the unity of its political institutions, government, legislatures or courts. It is something more, though clearly something less as well.

Schmitt's stand-or-fall criterion for the validity of an international organisation is precisely that it *not* be *international*, but rather *inter-national*. From a juridical perspective it must re-attach the wayward fellows *ius inter gentes* and *ius gentium*, while at the same time recognising the pragmatic, post-Hegelian impossibility of cultural, political and legal universality in any institution, be it local, national, or supra-national. The defunct League of Nations was for Schmitt doomed to failure since it permitted the international law to crumble into an formalistic consolidation of national actors in an era when both politics and jurisprudence played the strings in a different register of meaning and power, a simple, particularistic link between a finite number of nation-state entities, whose political substance remained to be unpacked in order for it to participate in the cultural organisation of the continent.

As we will see, however, European Union Law occupies a strange and complex position between an international law model and a federal model. European construction has developed a kind of jurisprudence, which communicates with national legal traditions in the tradition of Common Law, based in culturally determined norms and customs. It thereby appeals to universal principles and the formalism of international civil code. Where international law has four interrelated types: a) treaties and conventions, b) customary law, c) general principles, and d) standing court decisions.<sup>36</sup> European jurisprudence, as well shall see, has an even more complex set of sources. The recurring challenge for the European Court of Justice (EJC) has been to navigate the terrain between the general scope of international law, law established between member states, law established between member states and non-member states, and the growing corpus of law established *sui generis* between the EU and member states.

This is not the place to rehearse the many utopian histories of European construction, some more viable than others. A unique chronology can be charted according to whether one is concerned with the geographical conceptualisation of the European continent, the ebb and flow of something called the European spirit, the seemingly unavoidable economic nature of its institutions or the contours of its legal institutions. Each is constructed

upon a myth of origin and shared destiny, of *alpha* and *omega*; each is teleological in design, aiming, with varying degrees of pragmatic fulfilment, for an integral 'Europeanization'.<sup>37</sup>

European history has never been a chronicle of facts and events that unfolded in a place called Europe. The history of Europe is a cosmology, a myth of foundation that unites heaven and earth, the geographical continent and the people who have inhabited it.<sup>38</sup> It is narrative bound together as system of ideas, constituted through traditional, physical, moral and encyclopedic history. It has never simply been the story of politics played out on a continent already constituted, already shaped. The history of Europe is the history of the interpretations of the myth of Europe, including the geographical one. Though no less indeterminate than other narratives, the geographical narrative of Europe is primeval among narratives. The 'great events' of European history, that is, those deemed worthy of inclusion into the canon of histories, official or unofficial, of Europe are both trans-national and trans-territorial.<sup>39</sup>

#### THE EUROPEAN *NOMOS* AS A TOPOLOGY OF VALUES

The new geo-political configuration that emerged from the Treaty of Westphalia was based on the concern for security. Even though the political landscape was considered a thing apart, European culture has been at pains to see itself in terms of particularity. Indeed the European cultural self-understanding is anything but particular; it is the very invention of universal pretension. Shadowing the intricate trans-territorial character of European jurisprudential thought, the newly forged European Constitution sets out a conceptualisation of The European, which, like the logic of value itself, defies the territorial confines of the European continent. As the Preamble to the draft Constitution states:

Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law, Believing that Europe, recruited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest, most deprived, that it wishes to remain a continent open to culture, learning and social progress, and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity through the world, Convinced that, while remain proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely, to forge a common destiny.<sup>40</sup>

Europe's past is conceived of as the foundation for the values of its present and its future. There is, according to the Preamble, inspiration to be found in the past, inspiration that also contributed to developing the inviolable and inalienable 'universal values' of our present. Those values, though universal, must be posited again as the basis of the Europe of today, in order to both overcome the divisions of the past and forge together the common 'destiny', which, even though it is the destiny of Europe, appears to be sufficiently threatened to require inspiration from the past in order to safeguard it. An insistent though fundamentally unstable notion of universality inhabits these opening aspirations. On the one hand, the cultural inheritance of Europe's past is the origin of the universal values of the present, the basic political principles that guide the European construction of our time. On the other hand, however, that past is one of division and clashes, division which must be overcome in order to deploy the values, which nonetheless were valued before, toward the uniting of our present, which finds itself under the inspiration of the past. Thus the strange logic of universal value: Universalism of the past is fissured and must be transcended in order to achieve universalism.

This is the tension between a transcendental notion of universality, a notion whose origin and destiny are doomed to remain invisible like Schmitt's mystical origin of international law, and a kind of normative universalism, a universalism-to-be, a universalism understood as in some sense already here, but nonetheless necessary to effectuate and operationalise in and through European construction. Despite its 'bitter experience', and with no implicit knowledge of the future, Europe will continue along its path, choosing its unavoidable destiny.

The universalism of European cultural history thus obeys a conceptual topography that we are at pains to map onto its physical geography. This is so for two reasons: First, because geography is never purely physical geography; it is always made conceivable, understandable, communicable by a network of ideas about place, space, emptiness, etc., which do not collapse onto it. Second, conceptual topography of any kind contains an implicit reference to the materiality of things in space and in time. One does not precede the other; both render transcendence *strictu sensu* meaningless. In the eyes of the Constitutional convention, Europe is both a place and a transcendental, extra-spatial entity, a set of ideas and values, which by their very nature are trans-national and inter-national.

Thus the themes of 'territoriality' and 'territorial cohesion' recur again and again in the Constitution's provisions. Despite the fact that the European Union remains a geopolitical entity whose physical boundaries are beyond dispute, the cohesion of its territoriality is explicitly posited as codified and institutionalised, something *to be reinforced*. Among the EU's objectives formulated in Title 1 is the promotion of 'economic, social and territorial cohesion'.<sup>41</sup> At the same time the Union will seek to maintain and

respect the ‘territorial integrity’ of the member states, ‘maintaining law and order and safeguarding national security.’<sup>42</sup> EU citizenship includes the right to work and reside freely within the territory of member states<sup>43</sup>, to enjoy rights of EU citizens in the ‘territory’ of third states. It becomes evident that, on the one hand, the classical notions of nation-state self-constitution and relation to others is clearly valid and in vigour; on other hand, the repeated reaffirmation of the notion of territoriality nearly reads like a throwback to a time when the notion had far less anchorage in time and tradition. The notion of territoriality is reiterated precisely because the Draft EU Constitution came to the fore in a moment when territoriality has never been so precarious, never so distant from its own self-evidence.

In this sense it is also remarkable that a new figure of spatiality emerges from the draft constitution, equally marking the *nomos* of the EU. The value abstractions announced and confirmed in the draft constitution are repeatedly associated with an *area* or *zone* with “soft” or variable borders. Thus, ‘the Union shall offer its citizens an area of freedom, security and justice without internal frontiers’.<sup>44</sup>

In terms of its neighbouring states the European Union shall ‘also promote an amorphous space of influence, an area of prosperity and good neighborliness, found on the values of the Union and characterized by close and peaceful relations based on cooperation’.<sup>45</sup> It shall also ‘constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’.<sup>46</sup> The values of the European Union are not positively and indistinguishably attached to singular individuals or institutions, not even to particular determinations of space such as borders and walls. The European values to be institutionalised in the Constitution of the EU correspond to semi-amorphous areas, to a zone of value, non-linear and non-discrete.

The Charter of Fundamental Rights, contained within the Constitution, lays out an un-surprising set of traditional European values, based on the UDHR tradition of humanist principles, supplemented by global capitalist notions of free movement of goods and market liberalism. *Values*, moreover, is a central theme through the text. Most significant for our purposes is that despite the distinct European tradition, geographically discreet and territorially sovereign, nonetheless constitutes and amorphous ‘zone’ of values and rights.<sup>47</sup> This ‘*area* of freedom, security and justice, without internal frontiers, and an internal market where competition is free and undistorted’ does not map onto the political geography of Europe, rather it draws its own value-topology in a Heideggerian fashion. Simultaneously the draft Constitution insists on one of the primary inter-national values, namely the maintenance of ‘territorial cohesion and solidarity’ amongst member states.

This is only one form of the great paradox of our time, cooked down to the term ‘glocalisation’: globalisation opens the horizon for ubiquitous experience of ideas, which by the reverse-awareness of the particularity of

the local, are overturned in their universality. This is the truly Hegelian moment of global society: the universality of universal precepts is overturned by the universally valid experience of their specific application and applicability in particular settings. Market liberalism, to take the most prominent example and a central tenet in European construction, is only universal to the extent it can be applied in the individual global settings that were completely unforeseen by those who first formulated the principle. In terms of the Preamble, the European values will be spread to all Europeans; all who fall under the same umbrella of European-ness will be respected for their difference, precisely because they are different, weak, deprived.

By the same token, national individuality is not opposed to European identity. The national schisms that brought the European wars of the past are not in some sense exceptions of history, a temporary derailment of the true European history. Nor are they inferior moments in the construction of a higher order of civilisation. The dialectical experience of conflict-in-unity is the very essence of European thought, both on the political level and in the domain of jurisprudence. Without the geographically based cultural heterogeneity on this otherwise homogeneous peninsula, the notion of a European unity would be unthinkable.<sup>48</sup>

This set of ideas stands in contrast to what Schmitt rejects in the League of Nations model of international organisation, namely that it homogenises the member states, reducing their political subjectivity and legal personality to mere straw men. They become mere political and juridical atoms, with no internal politics or interpretive jurisprudence. The far more dialectical self-understanding of the draft EU Constitution conceives of the political subject and legal personality of member states and the EU as a whole at large as *permeable*.

## THE EUROPEAN LEGAL ORDER

A similar evolution can be observed in the unique evolution of the European legal order. International law in Europe (distinguished for the moment from the European legal order) is spatially determined and this determination in space has varied widely since the rise of notion of international law at the beginning of the twentieth century. Just as Europe has been continuously politically re-ordered and re-structured in the course of the last century so has this spatialisation reproduced itself in the conceptualisation of Europe in international law. Schmitt sees the most prominent illustration of this phenomenon in the lateral incision across the geographical East-West line. This bifurcation of the geographical, political, cultural and even spiritual Europe is only the most visible of the spatial re-ordering that marks Europe's historical transitions. These changes have significant consequences for the spatial character of international law. This is particularly the



case during the Cold War, when a variety of different planes, zones and spheres of political and legal influence were simultaneously operative. An international law was at once universal and bipolar, homogeneous and heterogeneous.

Europe is also divided along a North-South axis, separating Greece, Portugal, Spain, Southern Italy and Ireland from the “rest” of Europe, both in terms of economic welfare and in terms of cultural, social and spiritual values. The European system of norms is also torn in two across the trans-Atlantic axis. After 1990 the abiding bifurcation dissolves, the fall of the Berlin wall brings with it the end of communism, the unification of Germany, the collapse of East-West European multilateralism, and fresh Eastern European aspirations to join the economic development of the rest of Europe.<sup>49</sup>

The *Wende* of 1989 brought about a new shift in this spatio-cultural constellation. Among many other macro- and micro-political changes, the development of inter- and non-governmental organisations exerting influence in Europe and elsewhere, took on greater geopolitical and geo-cultural importance. The dismemberment of the former Soviet Union into a number of states, and the re-structuring of former Yugoslavia and Czechoslovakia, created new states and new constellations of norms, laws, rights, and values, making more or less unequal transitions to both market rules and legal norms at differing speeds. Juridical questions related to borders, monetary zones, trade and taxes, armaments, security, and rights of individuals and citizens become suddenly more complex.

By the same token a new kind of juridical *cosmos* has evolved linked to the institutional evolution of the European Union. On the most general level, the multiple enlargements of the Union (or earlier, Communities) itself has widened and transformed the juridical horizon of national law, including not only European member states, but also non-European states and the framework and parameters that determine their relationship to the EU at large and the EU member states in particular. To this can be added the expanding spheres of influence of the Council of Europe, the OSCE and OECD. Each of these institutional matrices carries its own political and legal sub-structures, which interact with and influence the political and legal structures of the states they concern. The synthesis of these new legal and political frameworks makes up what we call the new *nomos* of European jurisprudence.

## ANTHROPOLOGY OF THE NEW EUROPEAN *NOMOS*

Though debate among political scientists surrounding the question of what kind of political entity the European Union actually is has not abated, there is consensus among legal experts that it constitutes a *sui generis* phenomenon of jurisprudence. EU jurisprudence distinguishes itself from both classical

international law and all types of federal jurisprudence. As the Court of Justice of the European Communities stated in the oft-cited 1963 judgments by ECJ Van Gend & Loos,

The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations in individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.<sup>50</sup>

Even before the advent of the Treaty of European Union in 1997 in which the notion of Europe as a community of shared values first comes arises, the Court of Justice was struggling to draw the consequences of a system of legal ties without precedent. Also in the well-travelled *Costa vs. ENEL* case, the judgment makes visible the way in which social and political systems of legitimacy struggle to find their anchoring point legal system:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.<sup>51</sup>

Yet instead of one axis of comparison in the political sphere – an assembly of nation-state-like structures – the question of the status of the EU system is an inevitable one that moves between the norms of national law and the categories of international law.

## THE SOURCES OF EUROPEAN LAW

One way of studying the nature of changes in European Law is to begin by plotting its “origins”. When legal scholars speak of European law, however, they do not presume that law is a purely theoretical construction or that it has a distinct beginning or end. Rather, it is understood as emerging out of a concrete political, cultural, social setting. Moreover they presume that legal systems build from a heterogeneous field of sources, ranging from customs to both formal and informal rules and regulations.<sup>52</sup>

In formal terms European law is conventionally divided into three layers: primary sources, secondary sources or legislation and tertiary sources.

The *primary* sources are derived from two basic sources. First, there is law stemming from formal treaties signed in the name of Europe and which designate the conditions of the adherence to the treaties. Second, there are the treaties entered into by the European Union (or Community) with third parties, whereby the EU (or EC) is presumed to be a sovereign unit. The formal framework of European law itself makes up the *secondary* source. It is commonly distinguished by three levels of legislation: (1) regulations, (2) directives, and (3) decisions. Finally, the *tertiary* sources of European law link to the basic practices of jurisprudence such as they emerge from the work of the European Court of Justice. These include the actual case-law of the European Court of Justice, the basic legal principles that are adopted in the ECJ, the general principles of public international law, in addition to the acts of law adopted by representatives of member-state governments.<sup>53</sup>

These three layers are structured in order of descending level of abstraction. The primary sources articulate the most general level of abstraction, linking to most general principles of rights and philosophical traditions. They express the historical identity and design of the European project. This is the level of international politics in its meeting with European law. The secondary level is more concrete and context specific, incorporating the more technical elements of regulation and governance. The tertiary level is the sphere of legal communication between member-state institutions and between legal and regulatory institutions across nation-states. To these can be added the national law and international public law.

### THE NEW *NOMOS* OF EUROPE AND THE TOPOGRAPHY OF EUROPEAN LEGAL *COSMOS*

The scientific response to this complex cosmos of legal substances is the theory of competences. The theory of competence has emerged and developed as a kind of legal regulation of the hierarchies and sub-hierarchies of power and legitimacy. The concept of “competence” replaces in some sense the notion of authority in the unique sphere of European law. Competence is the fundamental attribution of law. It designates the foundation or source of jurisdiction and the basis of legitimacy for any given field of legal issues. Competence only emerges as the result of an attribution of competence by a competent authority. Competence gives rise to competence. In this way a kind of meta-competence is the precondition for competence, commonly called the “Kompetenz-Kompetenz” question.<sup>54</sup> However, though the competence-competence feedback displaces by one level the question of the origin of legitimacy (Schmitt would say, and Derrida after him, the “mystical origin of competence”), it simply displaces it by one level, replacing the original competence by an original attribution of competence (also known as the “transfer of sovereign rights”).<sup>55</sup>

The European legal system thus has a kind of porosity; it is, not by chance but necessity, contaminated by what is outside it. The sovereign border of EU law, the distinguishing line between what belongs to and what does not, is traversed by flows of cultural meaning, of legitimacy and competence, both nourishing the system and taking nourishment from it. Thus in contrast to a federal law model according to which competence springs from a substantive foundation, the European system seeks a kind of organic organisation along lines of varying intensity, unstable geometries, sources of varying depths. In certain situations the EU even possess competencies drawn from substantive, un-questioned member-state sources, which leave it susceptible to the degrees of coordination of authorities (competences) that are outside itself.<sup>56</sup>

The European legal order bends and stretches the traditional concept of legal personality and does not a little mischief to the notion of the political subject. At the moment of Schmitt's *caesura* at the end of the Second World War, the sanctity and autonomy of the individual is set for epiphany in the Universal Declaration of Human Rights (UDHR). In other words, the *individual* is constituted on the international scene in terms of his/her rights. The document is also the inaugural use of the term 'human rights' in an international setting, adopted by the General Assembly of the United Nations. The individual and the human rights attributed to it thus acquire the legal force of international law. Although international law does not come close to exercising universal jurisdiction, there hardly exists a more encompassing expression of universality in the sense Schmitt wishes to construe it in the new *nomos* of the earth than the notion of human rights. Few dispute its validity, though interpretations of its precepts are *legio*. The Declaration refers both to rights of nations and individuals. Nations are guaranteed the right to self-determination and to property; individuals are guaranteed the rights to life, liberty, freedom, freedom of thought, expression and assembly in addition to a wide set of rights involving access to legal process.<sup>57</sup>

The self-evidence of the formal validity of a fixed set of principles of human rights has been tested with increasing frequency. End of millennium multi-culturalism has put into question the special version of universalism embodied by the UDHR.<sup>58</sup> At the same time, political disdain for the UN and the impracticality of human rights have grown in kind with the US global hegemony and the increasing isolationism of a series of US administrations.

In Schmitt's eyes the United Nations suffers from the same untimeliness as the defunct League of Nations. It is essentially the institutionalisation of a covenant regulating the relationships between sovereign states, one which remains incapable of conceptualising their porosity. Though it is clear that the UDHR concerns most directly individuals, its mode of application has typically been through the authority of the nation-state.

In terms of European Union politics the UDHR provided the inspiration for the drafting of the European Convention on Human Rights, which was adopted in 1950, less than two years later.<sup>59</sup> It plays a central role in both the Treaty of Rome (establishing the European Community) (1957). Article 13 specifies that the European Community and European Council will seek to 'combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Article 177 mentions 'human rights' explicitly, admonishing that 'Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'.<sup>60</sup> The Treaty of Amsterdam (1997) reaffirms these general notions of human rights in the foundation of the European Union, stipulating it as 'founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States' (1992: Article 11). The notion of human rights is also object of a wide array of legislation in force and in preparation.

The Treaty of European Union also plays the role of bringing the Common Foreign and Security Policy (CFSP) into formal existence. Remarkable in this context is that object of securitisation is not only to assure the security of Europe in a conventional sense, but also 'to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter'. Lastly, the TEU sets out the conditions of membership to the Union, which include an acceptance of the principles of human rights as set out by the UN Charter.<sup>61</sup>

The extra-territoriality of EU human rights politics is coordinated by an essential *ius gentium* in the sense that it comprises both a politics of *internal* and *external* human rights. The explosion of migration across and on the periphery of European space re-opens issues of racial, religious and cultural discrimination in the European Union. Global migration patterns have transformed cultural unities into patterns of flow, mingling and imbricating traditions of ethnic and cultural identity within and outside of the EU.

Three other recurring principles have marked the singularity of the European legal order: direct effect, supremacy and subsidiarity. *Direct effect* can be defined in broad terms as the mechanism whereby a European citizen can rely upon a provision of EU law before his or her national courts. The national courts are required to acknowledge, protect and enforce the rights conferred by the provision.<sup>62</sup> The notion of direct effect thus sets EU law aside from other international institutions in the sense that relates directly to the individual. Whereas international law and international organisations confer rights and obligations on nation-states, EU law has the ability to exercise jurisprudence in an individual capacity. Individuals have a set of transnational European rights, which at the same time are protected by the jurisdiction of the national courts. *Supremacy* assures the precedence of EU law in cases where it comes into conflict with national law.

These structural principles are not formally assured in EU treaties. On the contrary, they have grown informally through the corpus of case material that has developed throughout the construction of the European system. The principles of supremacy and direct effect have a clear impetus: they move the centre of gravity of European jurisprudence away from the nation-state level, and toward the EU level. This shift was perceptible throughout the 1980s and woke the concerns of the European public sphere, yet most were convinced that its national institutions would not be threatened by EU construction.<sup>63</sup> In this atmosphere the concept of *subsidiarity* was developed, both in legal cases and in the political discourse surrounding the Delors presidency in the European Commission. It was codified in EU law through Single European Act (1986). The Act stipulates that the European Community should act only to realise the objectives of its environmental policy when these objectives could not be attained better the level of the national authorities it was later. The principle was later codified in the TEU in terms of *competence*, specifying that 'in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community'.

The triple mechanisms of direct effect, supremacy and subsidiarity thus put into place a regulation of the porosity of nation-state sovereignty. They organise an international legal order in which the currents of universality are supplemented and supplanted by those of particular rights and obligations. It thus transcends the classical 'monist'-'dualist' dilemma that Schmitt bemoans in the 'Plight' essay of 1943. That controversy pits those who, like Kelsen, see national legal orders as 'creatures' of international law (monists) against those who, like Triepel and Anzilotti argue that national legal orders were separate legal orders that resisted the penetration of international norms.<sup>64</sup> The European legal system, if only by default, resists both poles of the debate.

## CONCLUSION

To the extent that the evolving European legal system is not at present, nor aspires to be, a global legal system, a new global *nomos* (in the sense of a world order based on the appropriation, dis-appropriation and distribution of the earth) it cannot fill the void left by the collapse of the *ius publicum Europeum* bemoaned by Schmitt. This impossibility lies in the far more modest aspirations of European construction, in the nature of the concept of *nomos*, in the finitude of the history of global expansion and in our experience of the finitude of our planet. The decline of the universal legal order, including international law is not the fault of the UN and other global organisations. This decline and uncertainty of conventional legal categories

produces a certain insecurity all on its own: While it is difficult to present decisive evidence it might be suggested that a component of the scepticism to the project of European construction shown by the French and Dutch in the 2005 referenda on the European constitution and the Irish in 2008 can be attributed to a missing certainty as to the structure of sovereignty within the porous architecture of the EU institutions.

Four correlations can be made with Schmitt's theoretical perspective relevant to the recently frustrated but ongoing process of European construction. First, the blurring processes that Schmitt observed early in the twentieth century have continued. The basic oppositions that Schmitt diagnoses in a number of his writings (inside/outside, war/peace, combatant/criminal) hold true, more so in our day. Based on observations of the evolution of historical political and legal culture, this binary conceptual structure continues to organize geopolitical thought. Second, there will never again be a global legal order. This is the consequence of the conceptual of universality itself. Both experience and the logic of universality teach us that a universal system is only universal in opposition to another. As Schmitt admonishes in *The Nomos of the Earth*, until outer space becomes a true space for conquest and appropriation on a grand scale, the global state will remain a fiction. Third, on formal legal grounds, the European legal system, with its dialectical mix of "limited" universality and local particularity, the variety of its sources on different levels of European life, is in some sense one answer to the problem posed by Schmitt. The European legal sciences have already survived their own fissuring into legitimacy and legality. Moreover the breakdown of international law into international politics is not a menace to European civilisation, as Schmitt might see it, but rather inherent in the system of European law. Fourth, the extension of Schmitt's analysis beyond the 1950s into the era of European construction confirms Schmitt's diagnosis, while at the same time suggesting that he was too pessimistic in his characterisation of the European legal order. A kind of new *nomos* is emerging to respond to the challenges he perceived. It is characterised by a multi-cultural flux of values, which have a systematically blurry connection to territory, function in global economy and are protected by a security agenda that reaches beyond the 'traditional' inter-national space of Europe.

This is the new European *nomos*: a new spatial order, based not upon space ordaining law, but rather based upon law evolving through a new ordering of peoples, culture and value in space.

## NOTES

1. For example, C. Schmitt 'Raum und Großraum im Völkerrecht' in Günter Maschke (ed.) in *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916–1969* (Berlin: Duncker & Humblot) pp. 234–268; 'Die Auflösung der europäischen Ordnung im "International Law" (1890–1939) in *ibid.*, pp. 234–268; 'Meer gegen das Land' in *ibid.*, pp. 395–400; 'Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte. Ein Beitrag zum Reichsbegriff im Völkerrecht' in *ibid.*, pp. 269–371; Die Lage

der europäischen Rechtswissenschaft (1943/44). Verfassungsrechtliche Aufsätze (Berlin, Duncker & Humblot 1957); Land und Meer (Stuttgart: Klett-Cotta 1954); Über die drei Arten des rechtswissenschaftlichen Denkens Berlin Duncker & Humblot 1932); G. Balakrishnan, *Gopal, The Enemy: An Intellectual Portrait of Carl Schmitt* (London and New York: Verso 2000) p. 5; cf. also David Dyzenhaus, *Law as Politics. Carl Schmitt's Critique of Liberalism* (Durham: Duke University Press 1998).

2. Useful analysis of the background of Schmitt's European perspective can be found in the Telos group's analysis and debate surrounding Schmitt. A selection includes Alain de Benoist, 'What is Sovereignty?', *Telos* 116 (1999) pp. 99–118; Alain de Benoist, 'Schmitt in France', *Telos* 126 (2003) pp. 133–152; Alain de Benoist, 'On Identity', *Telos* 128 (2004) pp. 9–64; Teodoro Klitsche de la Grange, 'On The Postmodern Nomos' *Telos* 125 (2002) pp. 140–151; Teodoro Klitsche de la Grange, 'The Theory of the Partisan Today', *Telos* 127 (2004) pp. 169–175; Michael Marder, 'Carl Schmitt's 'Cosmopolitan Restaurant': Culture, Multiculturalism, and Complexio Oppositorum', *Telos* 142 (2008); Carl Schmitt, 'Cosmopolitan Restaurant: Culture, Multiculturalism, and Complexio Oppositorum', *Telos* 142 (2008) pp. 29–47; Benjamin Ardit, 'On the Political: Schmitt contra Schmitt', *Telos* 142 (2008) pp. 7–28; Paul Gottfried, 'Modern Liberalism and the 'Fascist' Comeback', *Telos* 111 (1998) pp. 173–179; Paul Gottfried, 'Gloomy Observations about the Political Present', *Telos* 142 (2008) pp. 185–192; Arran Gare, 'Narratives and Culture: The Role of Stories in Self-Creation', *Telos* 122 (2002) pp. 80–100.

3. J. P. McCormick, 'Carl Schmitt's Europe: Cultural, Imperial and Spatial Proposals for the European Integration, 1923–1955', in Christian Joerges and Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford and Portland: Hart Publishing 2003) pp. 133–141.

4. C. Schmitt, *Roman Catholicism and Political Form*, Gary L. Ulmen (trans.) (Wesport: Greenwood Press) pp. 12–13.

5. *Ibid.*, p. 16.

6. *Ibid.*, p. 18.

7. C. Schmitt, 'The Age of Neutralisations and Depoliticizations', Matthias Konzen and John P. McCormick (trans.), *Telos* 96 (1993) pp. 130–142.

8. *Ibid.*, p. 141.

9. C. Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für Reichsbegriff im Völkerrecht* (Berlin: Duncker & Humblot 1991 [orig. 1941]) p. 270.

10. C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press 2003).

11. C. Schmitt, *The Concept of the Political*, George Schwab (trans.) (Chicago: University of Chicago Press 2007 [orig. 1932]); Hugo Preuss, *Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: J.C.B. 1930); Hugo Preuss, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot 1931); Hugo Preuss, *Legality and Legitimacy*, Jeffery Seitzer (trans.) (Durham: Duke University Press 2004 [orig. 1932]).

12. Cf. Vincent Varga, *Cartographia: Mapping Civilisations* (New York: Little Brown & Co. 2007).

13. H. G. Liddel, Henry George, and R. Schott, *A Greek-English Lexicon* (Oxford: Clarendon Press 1940).

14. Schmitt, *The Nomos* (note 10) p. 338.

15. *Ibid.*, p. 341.

16. *Ibid.*, p. 341.

17. *Ibid.*, p. 87.

18. A. Cassese, *International Law* (Oxford: Oxford University Press 2001) pp. 20–21; P. Malanczuk, *Modern Introduction to International Law* (London/New York: Routledge 1977) pp. 10–11.

19. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge and New York: Cambridge University Press 2002) pp. 418–425.

20. For a critique of the logic of inside/outside in the Westphalian period cf. B. Teschke, *The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations* (London and New York: Verso 2003); R. B. J. Walker, *Inside/outside: International Relations as Political Theory* (Cambridge: Cambridge University Press 1993).

21. Schmitt (note 10) p. 141.

22. For the link between Schmitt's European vision and the question of a European identity, cf. Alain de Benoist, 'On Identity', *Telos* 128 (2004) pp. 9–64.

23. Schmitt, *The Concept* (note 11).



24. In the earlier essay, 'The Problem of the Domestic Neutrality of the State', Schmitt explains how the already dominant practices of economic laissez-faire liberalism were not adequate to insure the non-politicisation of domestic life. The state today – meaning above all, but not exclusively, Germany – is an 'economy state', but it is not equipped with an 'economic constitution'. C. Schmitt, 'Das Problem der innerpolitischen Neutralität des Staates', in *Verfassungsrechtliche Aufsätze* (Berlin: Duncker & Humblot) pp. 41–59. The way out of this predicament is, in true Schmitt form, to strengthen the state sovereign, and dampen the party-political pressures.

25. Schmitt, *The Concept* (note 11) p. 54.

26. *Ibid.*, p. 55.

27. C. Schmitt, 'The Plight of European Jurisprudence', Gary L. Ulmen (trans.), *Telos* 83 (1990 [orig. 1943]) pp. 35–70.

28. A. Carrino, 'Carl Schmitt and European Juridical Science', in Chantal Mouffe, *The Challenge of Carl Schmitt* (London: Verso) pp. 180–194.

29. Schmitt, *The Nomos* (note 10) p. 386.

30. Cf. Koskeniemi (note 19); de la Grange, 'On the Postmodern Nomos' (note 2) p. 141.

31. Schmitt, *The Nomos* (note 10) p. 388; A.-M. Slaughter, 'International Law in a World of Liberal States', *European Journal of International Law* 6 (1995); A.-M. Slaughter, 'The Real New World Order', *Foreign Affairs* 176 (1997) pp. 183–197.

32. This interpretation is in line with the one that sees Schmitt's rejection of legal positivism as due to the conviction that it inherently negates the conflictual nature of the political. Cf. W. Rasch, *Sovereignty and its Discontents. On the Primacy of Conflict and the Structure of the Political* (London: Birkbeck Law Press). Cf. also S. Prozorov, 'Three Theses on 'Governance' and the Political', *Journal of International Relations and Development* 7/3 (2004) pp. 267–293 and A. Behnke, '911 und die Grenzen des Politischen', *Zeitschrift für internationale Beziehungen* 12/ 1 (2005) pp. 117–140.

33. Schmitt, *The Nomos* (note 10) pp. 392–392.

34. F. Niess, *Die europäische Idee. Aus dem Geist des Widerstands* (Frankfurt: Suhrkamp 2001) pp. 9–10; J. P. Burgess, 'What's so European about the European Union? Legitimacy between Institution and Identity', *European Journal of Social Theory* 5/4 (2002) pp. 467–481.

35. A. Pageden, 'Europe: Conceptualizing a Continent', in A. Pageden (ed.), *The Idea of Europe from Antiquity to the Europe Union* (Cambridge: Cambridge University Press 2002) pp. 33–54; L. Passerini, 'From Ironies of Identity to the Identities of Irony', in A. Pageden (ed.), *The Idea of Europe from Antiquity to the Europe Union* (Cambridge: Cambridge University Press 2002) pp. 191–208.

36. W. Cairns, *Introduction to European Union Law* (London: Cavendish Publishers 1977) p. 71.

37. J. P. Burgess, 'The Abduction of "The Abduction of Europe"', in J. P. Burgess (ed.), *Museum Europa: The European Cultural Heritage between Economics and Politics* (Kristiansand: Norwegian Academic Press 2003) pp. 83–99.

38. L. Passerini, *Il mito d'europa: Radici antiche per nuovi simboli* (Firenze: Giunto Gruppo Editoriale 2002) p. 21.

39. F. Delouche, *Illustrated History of Europe* (Paris: Hachette 1992); J.-B. Duroselle, *L'Europe: Histoire de ses peuples* (Paris: Perrin 1990); D. Venner, *Histoire et Traditions des Européens* (Paris: Éditions du Rocher 2002) pp. 11–14.

40. European Communities, *Treaty Establishing a Constitution for Europe* (Luxembourg Office for Official Publications of the European Commission 2005) p. 9.

41. *Ibid.*, p. 17.

42. *Ibid.*, p. 18.

43. *Ibid.*, p. 19.

44. *Ibid.*, p. 17.

45. *Ibid.*, p. 44.

46. *Ibid.*, p. 119.

47. *Ibid.*, p. 48.

48. de la Grange, 'On the Postmodern Nomos' (note 2) p. 147.

49. J.-C. Gautron, *Droit européen* (Paris: Éditions Dalloz 1999) pp. 6–7.

50. Van Gend & Loos was a postal and transportation company that on occasion imported certain industrial chemicals from Germany to the Netherlands. When Dutch customs authorities charged the company a tariff on the import the company claimed that the charge was contrary to European Community Law. The case was referred to the European Court of Justice which rendered a historical verdict, coining the notion of 'direct effect', saying that Article 12 of the Treaty of Rome, and not national import

laws, should have jurisdiction in this case: 'Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage'. Van Gend en Loos, European Court of Justice. aff. 26/62 (1962), available at <[http://www.europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb\\_docs=25&domain=Caselaw&in\\_force=NO&type\\_doc=CaseLaw&an\\_doc=1962&nu\\_doc=26](http://www.europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb_docs=25&domain=Caselaw&in_force=NO&type_doc=CaseLaw&an_doc=1962&nu_doc=26)>, accessed 15 Aug. 2008.

51. Costa/ENEL (1964). European Court of Justice. aff. 6/64 (1964), available at <[http://www.europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb\\_docs=25&domain=Caselaw&in\\_force=NO&type\\_doc=CaseLaw&an\\_doc=1964&nu\\_doc=6](http://www.europa.eu.int/servlet/portail/RenderServlet?search=DocNumber&lg=en&nb_docs=25&domain=Caselaw&in_force=NO&type_doc=CaseLaw&an_doc=1964&nu_doc=6)>, accessed 15 Aug. 2008.

52. Cairns (note 36); D. Chalmers and E. M. Szyszczak, *European Union Law* (Aldershot/Brookfield, VT: Ashgate/Dartmouth 1998); A. Evans, *A Textbook on EU Law* (Oxford: Hart Pub 1998); N. M. Hunnings, *Encyclopedia of European Union Law. Constitutional texts* (London: Sweet & Maxwell, 1996); G. Winter, *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Baden-Baden: Nomos 1996).

53. R. M. MacLean, *Law of the European Union* (London: Old Bailey Press 2000).

54. 'Competence', in the language of the European legal system, denotes the authority of a person or institution to make certain kinds of decisions.

55. J. Derrida, *Force de loi: Le 'Fondement mystique de l'autorité'* (Paris: Galilée 1994); Schmitt, 'Cosmopolitan Restaurant' (note 2).

56. Gautron (note 49).

57. General Assembly of the United Nations (1948), *Universal Declaration of Human Rights*, available at <<http://www.hrweb.org/legal/udhr.html>>, accessed 6 July 2005.

58. U. Beck, 'Die "Warum-nicht-Gesellschaft"', *Die Zeit* 48 (1999); D. Grimm, 'Das Andere darf anders bleiben. Wieviel Toleranz gegenüber fremder Lebensart verlangt das Grundgesetz?', *Die Zeit* 8.

59. P. Alston and J. H. H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston, M. R. Bustelo, and J. Heenan, *The EU and Human Rights* (Oxford: Oxford University Press 1999); G. Cohen-Johanthan, *La Convention européenne des droits de l'homme* (Paris: Hamaritain 1989).

60. *European Communities Treaty of European Union* (Luxembourg: Office of Official Publications of the European Union 1992) Articles 13 and 17.

61. European Communities (note 40) Article 49.

62. Cairns (note 36) p. 84.

63. *Ibid.*, pp. 96–97.

64. B. de Witte, 'Direct Effect, Supremacy, and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press 1999) p. 178.