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Carl Schmitt against World Unity and State Sovereignty Schmitt's Concept of International Law

Carl Schmitt contra a Unidade Mundial e a Soberania do Estado
O Conceito de Direito Internacional de Schmitt

Peter Techet*

Abstract: In my paper, I investigate the question of why Carl Schmitt rejected both universalistic International Law and state sovereignty (as an attempt of legitimizing the hegemonic goals of Nazi Germany), and what alternatives he offered instead of the state-based International Law. Schmitt's theory of great spaces originates in his anti-universalistic legal doctrine. This new category also meant the attempt of overcoming the sovereign statehood, which Schmitt no longer regarded as the decisive political unity. In the paper, I describe the great spaces – by contrasting the Schmittian International Law with Hans Kelsen's own legal concept, and by answering the question of how the statist Schmitt served German foreign interests with his new International Law theory.

Keywords: Carl Schmitt; International Law; Großraumlehre; National Socialism; Hans Kelsen.

Resumo: No presente artigo, investigo a razão pela qual Carl Schmitt rejeitou tanto o Direito Internacional universalista quanto a soberania do Estado (como uma tentativa de legitimar os objetivos hegemónicos da Alemanha nazi), bem como as alternativas apresentadas pelo autor em substituição do Direito Internacional baseado no Estado. A teoria dos grandes espaços de Schmitt tem origem na sua doutrina jurídica antiuniversalista. Essa nova categoria também significava a tentativa de superar o Estado soberano, que Schmitt não mais considerava a unidade política decisiva. Neste artigo, descrevo os grandes espaços – colocando em confronto o Direito Internacional schmittiano com o próprio conceito jurídico de Hans Kelsen e respondendo à questão de como o publicista Schmitt defendeu os interesses alemães no estrangeiro com a sua nova teoria do Direito Internacional.

Palavras-chave: Carl Schmitt; Lei internacional; Großraumlehre; Nacional Socialismo; Hans Kelsen.

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Summary: 1. Great spaces as new political unities: Primacy of the Political; 2. Great space as a post-International Law unity: Against a World Law; 3. Great space as a particular unity: For a spatial international law; 4. Great space as a post-state unit: Against state sovereignty; 5. Great space as a hegemonic unity: For the empire; 6. Great space as Theory of National Socialist Expansion?; Outlook: Who should still read Carl Schmitt?

After his temporary retirement from the public in 1936, Carl Schmitt turned to international law issues. However, his doctrine of International Law embedded in his earlier theories as well as in the Nazi discourses of the time. Schmitt attested the decline of statehood even during the Weimar Republic: He was interested more in the political than in the statehood, which he saw as one possible form of the political. In the Weimar Republic, he described the statehood as threatened by the pluralistic democracy whose interest groups and parties would have seized the state. That is why he welcomed the National Socialist turnaround as the elimination of pluralism – but it also meant an anti-statist turning because the National Socialism (at least according to its ideology) placed the people (*Volk*) in the foreground as new political category.[1] The Nazis abolished the pluralistic democracy in Germany – in the sense of Carl Schmitt –, and the new regime turned to foreign policy goals. Schmitt, whom an SS magazine attacked in 1936,[2] found later his way (back) into the regime with his International Law: Just as he had paved the way to Nazism with his Weimar writings, he underpinned Nazi war policy with his theory on great spaces (*Großräume*).

Schmitt perceived the changes of the global politics as the end of statehood – i.e. as a political form of world order that arose in early modern Europe. On the one hand, he feared a unified world in which the antagonistic contradictions – which his concept of the political based on – would disappear; on the other hand, he believed that sovereign statehood would have lost its power and significance due to the universalistic tendencies of the new International Law. Therefore, he developed a new category that could maintain the primacy of the political (1) in order to prevent a universalistic legal order (2). Schmitt's theory of "great spaces"

[1] Cf. Otto Koelreutter, *Der deutsche Führerstaat*, Mohr Siebeck, Tübingen,1934, p. 8, idem, Volk und Staat in der Verfassungskrise. Zugleich eine Auseinandersetzung mit der Verfassungslehre Carl Schmitts, in Fritz Berber (ed.), *Zum Neubau der Verfassung,* Junker und Dünnhaupt, Berlin, 1933, p. 12.

[2] Anonym, Es wird immer noch peinlicher! *Das Schwarze Korps*, 10. 12. 1936, p. 2.

originates in his anti-universalistic legal doctrine. (3) This new category also meant the attempt of overcoming the sovereign statehood (4), which Schmitt no longer regarded as the decisive political unity for the International Law becoming planetary. Schmitt attributed to the great spaces the task of shaping the world politically – as for the domestic politics, the empires (*Reiche*) were supposed to emerge as post-state political unity within the great spaces. (5)

In the following article, I describe the great spaces in these indicated "tasks" and properties – by contrasting the Schmittian International Law with Hans Kelsen's own legal concepts.

1. Great spaces as new political unities: Primacy of the Political

The disappearing of statehood Schmitt had forecast could lead either to a World State, or to new, political decisive unities. He categorically rejected a World State because, according to his definition of the political, it would no longer be political (*strictu sensu* also no state). The plurality of the political (in terms of foreign politics) presupposes at least two states (or other politically decisive units) in the world. While he supported the maintenance of the political in world politics, his own doctrine of the state directed against internal pluralism,[3] which he wanted to eliminate by sovereign decisions.[4] According to him, the political pluralism of the world corresponds to the anti-pluralistic unity of the single states.

After the Peace of Westphalia, the state prevailed as a decisive political unity in the Schmittian sense – i.e. as a unity capable of establishing internal homogeneity through the physical elimination of the internal enemies.[5] For him, the state was an anti-pluralistic unit, which was able and willing to create peace and security over one concrete territory by separating friend and enemy.[6] He understood statehood as internal homogeneity; pluralism does not prevail within states, but only between them.[7] That is why he perceived internal pluralism – as a result of liberal democracy – as a sign of decay of statehood.[8] First, he tried to hinder this 'decline' of the domestic power of the states by calling for a *qualitatively total state*,

[3] Carl Schmitt, *Begriff des Politischen*,3rd ed., Duncker und Humblot, Berlin, 1991, pp. 32, 54.
[4] Idem, Staatsethik und pluralistischer Staat, in *Kant-Studien* 35 (1930), p. 36.
[5] Idem, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 8th ed., Duncker und Humblot, Berlin, 1996, p. 13.
[6] Idem, *Begriff des Politischen*, p. 46.
[7] Idem, Staatsethik und pluralistischer Staat, p. 29 ff.
[8] *Ibid.*, p. 28.

i.e. a state that is superior to any social interests (groups).[9] Later, however, he turned to the question of whether statehood was the most suitable category for a political (plural) world order.

The description of Schmitt as a mere statist thinker overlooks that he perceived statehood as a historical (not a time- and spaceless) phenomenon.[10] Therefore, he did not mean that only states could form political units and establish a political world order.[11] In this respect, he did not ascribe absoluteness to the phenomenon of the state.[12] His idea of the state as being the decisive unit of the political, which is capable of eliminating pluralism by distinguishing between friends and enemies,[13] referred to a specific epoch and a specific space, i.e. to the post-Westphalian Europe. Because of global political changes – i.e. the supposed "decline" of a European dominated International Law –, Schmitt increasingly came to realize that even a qualitatively total state would no longer assert itself in the world order. Schmitt noticed changes in world politics from the end of the 19th century, which would have required new political units instead of the previous statehood.

His doctrine of the state therefore made a post-state political concept possible. Because he premised the political over the state,[14] he did not understand the state but the political as the eternal basic category of human coexistence. Accordingly, Schmitt tried to replace the state unity with new concepts from two directions. As for the foreign policy, more than one political unit are required in order to avoid a universalistic world order; as for the domestic politics, a strong new political unity should put an end to the pluralism of a democratic society. The end of the historical epoch of statehood should therefore not mean the end of the political.

2. Great space as a post-International Law unity: Against a World Law

Before examining Schmitt's anti-state turnaround (cf. chapter 4), I will address the question of why Schmitt rejected the establishment of a World Law, i.e. why he

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[9] Idem, Starker Staat und gesunde Wirtschaft, in idem, *Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, Duncker und Humblot, Berlin,1995, p. 74 ff.
[10] Idem, Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff, in idem, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Materialien zu einer Verfassungslehre*, Duncker und Humblot, Berlin,1985, pp. 375 ff.
[11] Adeel Hussain / Armin von Bogdandy, Carl Schmitt's International Thought and the State, *MPIL Research Paper Series*, 2018-34, p. 19.
[12] Carl Schmitt, Raum und Großraum im Völkerrecht, in idem, *Staat, Großraum, Nomos*, p. 240.
[13] Idem, *Begriff des Politischen*, pp. 54 ff.
[14] *Ibid.*, p. 20.

thought he had to develop another International Law. As already written above, Schmitt considered a World State – i.e. a political unit of the whole world – to be a *contradictio in adjecto*: The terms "world" and "state" are by definition mutually exclusive, unless new extra-planetary political orders appear next to the world. In the attempt of conceptualizing International Law as World Law, he saw the "danger" of a possible World State, which for him was a conceptual contradiction, but a hegemonic and political possibility to the erosion of the European International Law.

If one also considers that Hans Kelsen, as one of the best-known theorists of a monistic International Law, completely equated statehood with the legal system (*identity thesis*),[15] the establishment of a World Law actually means the establishment of a World State – especially in Kelsen's sense. As a liberal intellectual, Kelsen indeed supported a World State.[16] However, as a realistic scientist he rejected the probability of a World State due to the religious, linguistic, historical, economic (etc.) differences.[17] He emphasized the international organizations as forces able to build a peaceful community of the states.[18] The fact that Kelsen did not explicitly understand International Law as World State, however, violates his identity thesis, i.e. that the state would only be a synonym (a personification) for the legal order. On the other hand, that Kelsen excluded the normative category of a World State because of facts (i.e. because of the lack of probability and effectiveness) ran counter to his separation of "being" and "ought".

Kelsen had a monistic idea of law: Law is made and applied in stages (*Stufenbaulehre*);[19] the legal system represents a gradual structure in which national law is subordinated to International Law.[20] The fact that the world of states should develop more and more into a legal order under International Law results from the monistic view of International Law, in which International Law and state law belong to the same legal order. This idea was particularly present in the Viennese School of Legal Theory,[21] which corresponded to both the legal theoretical

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[15] Hans Kelsen, *Der soziologische und der juristische Staatsbegriff. Kritische Untersuchung des Verhältnisses von Staat und Recht*, Mohr Siebeck, Tübingen,1922, pp. 205 ff., 252; idem, *Allgemeine Staatslehre. Studienausgabe der Originalausgabe 1925*, 2nd ed., Mohr Siebeck, Tübingen, 2019, pp. 14, 59.
[16] Idem, *Peace through Law*, North Carolina UP, Chapel Hil,1944, pp. 4 ff.
[17] *Ibid.*, pp. 8 ff.
[18] *Ibid.*, p. 12.
[19] Idem, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*, 4th ed., Mohr Siebeck, Tübingen, 2008, pp. 84 ff.
[20] *Ibid.*, pp. 158 ff..
[21] Especially in Alfred Verdroß, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Mohr Siebeck, Tübingen,1923, pp. 119 ff., 126 ff.

foundations and the political goals of this school.[22] The monism, however, based on a cognitive reductionism that conceived all law like state law, as if the law could only be thought of as a logically consistent, structurally closed unity.[23] This epistemological position excludes a pluralistic perspective – for example the possibility of several legal systems that apply alongside, even against one another.[24] In this sense, Schmitt's particularist concept of law is more helpful for understanding legal pluralism.

Kelsen justified monism – i.e. the thesis that law can / should only be recognized as a unity – as an epistemological necessity.[25] A jurisprudence – for both International and Constitutional Law – therefore requires a uniform subject. The primacy of state law would lead to absurd results according to the logic of the Pure Theory of Law: an International Law subordinated to the state law would practically correspond to Hegel's idea of international law as merely "external constitutional law",[26] that is, International Law would depend on the absolute power of the state. In order to avoid this state-absolutist perspective, Kelsen affirmed the primacy of International Law[27] by deconstructing state sovereignty as incompatible with the primacy of International Law.[28] In this sense, he referred to state law as a partial legal order of the international legal order.[29]

The debate about monism and the primacy of International Law had practical consequences, for example, in the question of when a war is allowed: Does the decision on whether a war is waged legally lie with the states or with the International Law? The special International Law of the interwar period pursued the concept of the "bellum iustum", according to which the war can represent an illegal act of the state.[30] However, Kelsen was skeptical about the question of whether International

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[22] François Rigaux, Hans Kelsen on International Law, *European Journal of International Law* 9 (1998) p. 340.
[23] *Ibid.*, p. 334.
[24] Alexander Somek, Stateless Law: Kelsen's Conception and its Limits, *Oxford Journal of Legal Studies* 26 (2006), pp. 754 ff.
[25] Hans Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechtes. Ein Beitrag zu einer reinen Rechtslehre, in Matthias Jestaedt (ed.), *Hans Kelsen Werke. Vol. 4: Veröffentlichte Schriften 1918–1920*, Mohr Siebeck, Tübingen, 2013, p. 385.
[26] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, Suhrkamp, Frankfurt/M,1970, pp. 497 ff. (§ 330 ff.)
[27] Kelsen, Das Problem der Souveränität, p. 567.
[28] *Idem*, p. 367.
[29] Ibid., *Reine Rechtslehre (1934)*, p. 158.
[30] Peace Treaty of Versailles (1919), Art. 231; League of Nations Decision (1924), Art. 15; Kellog-Briand Pact (1928).

Law – at least at its stage of development at the time – could decide on the legality (and thus the permission) of a war.[31] Kelsen's skepticism related to the effectiveness of International Law. In contrast, Schmitt did not underestimate the International Law that would presume to dispose of war and peace beyond the will of the state. He feared, in accordance with his anti-universalist and anti-abstract understanding of law (cf. chapter 3), that a hegemonic power would answer the question of what war and peace is. In doing so, he exposed the universalistic World Law and its concept of peace – in the spirit of today's leftist and new right theories – as a concealment of the particular interests of certain powers: "[W]ho will bring about peace on earth? We all want peace; but unfortunately, the question is: who decides what is peace, who decides what is order and security, who decides what is a tolerable and what an unbearable state?"[32]

A world without war would have been a horror scenario for Schmitt,[33] because it would have lacked political conflicts (wars), or it would have degraded the states as decisive political units to simple partial legal systems (à la Kelsen). Schmitt thought both the world order and the state in terms of war: The task of the state is to end the (civil) war. However, the war should not disappear from world politics, because Schmitt – who did not spend a single day in his life on war front[34] – considered the war indispensable, unavoidable. War is indeed an exception, but Schmitt does not ignore the exception from the law, he rather places it in the foreground of his entire legal theory.[35] The exception as a sovereign decision serves to eliminate pluralism within the state, while the war (as exception) serves in world politics to prove pluralism. The exception guarantees, for Schmitt, an anti-pluralistic internal order and a pluralistic world order.

In this sense, he meant that a pacifist World Law would not abolish war – this would be a fundamental part of human nature and history – but would

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[31] Hans Kelsen, *Law and Peace in International Relations*, Harvard UP, Cambridge MA, 1948, p. 47 ff.

[32] Carl Schmitt, Völkerrechtliche Formen des modernen Imperialismus, in idem, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939*, Hanseatische, Hamburg, 1940, p. 176. [Translated by author.]

[33] Gerardo Tripolone, La doctrina de Carl Schmitt sobre el derecho internacional, *Anuario Mexicano de Derecho Internacional* 14 (2014) pp. 353. ff.

[34] Schmitt spent the First World War in Munich, where he first completed basic military training and then worked as a censor; in addition, he frequented the bohemian circles of Schwabing; at that time see Carl Schmitt, *Die Militärzeit 1915 bis 1919. Tagebuch Februar bis Dezember 1915, Aufsätze und Materialien*, Akademie, Berlin, 2005.

[35] Idem, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 10th ed., Duncker und Humblot, Berlin, 2015, p. 21.

disinhibit it through a legal condemnation / impossibility.[36] According to Schmitt, a morally charged concept of war also makes difficult the reintegration of the warring parties into the political world order after the war.[37] He therefore believed that International Law (and peace under International Law) should not condemn or punish war – and the warring parties – but rather establish a temporary peace order in which winners and losers can find their place, and in which further wars would remain possible.[38] These thoughts follow not only from Schmitt's bellicose political concept, but also from his anti-universalistic (particularistic) understanding of law. Because the law, as Schmitt claims, is something concrete, situational and has different meanings in every time and for every people (*Völker*), Schmitt concluded that universalism and pacifism would only camouflage certain *particular* interests.

3. Great space as a particular unity: For a spatial international law

In order to understand Schmitt's criticism of a new World Law, we must also consider his very concept of the law. In contrast to Hans Kelsen, Schmitt did not conceptualize law as an abstract system of norms. Kelsen understood the law as a system that was, on the one hand, independent of time and space and, on the other, not based on its content.[39] Schmitt rejected such a logical-rationalistic approach because "[a]ny rationalistic interpretation [of law] would falsify the directness of life".[40] By attacking the Pure Theory of Law, he asserted that "it buries his head in the sand of pure normativity"[41] instead of answering the question of *who* determines the law. Schmitt did not understand law as a generally describable, universal (everywhere valid) way of functioning, but as a *concrete order* that could only be valid in a certain time, in a certain place, for certain people (*Völker*). For him, the law is situational, so its meaning does not arise in general, but in specific situations.[42]

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[36] Idem, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 4th ed., Duncker und Humblot, Berlin, 1997, pp. 114 ff.
[37] *Ibid.*, p. 158.
[38] Idem, Die Raumrevolution. Durch den totalen Krieg zu einem totalen Frieden, in idem, *Staat, Großraum, Nomos*, p. 389.
[39] Kelsen, *Reine Rechtslehre (1934)*, pp. 74. ff.
[40] Carl Schmitt, Die politische Theorie des Mythus, in idem, *Positionen und Begriffe*, p. 13. [Translated by author.]
[41] Idem, Über die innere Logik der Allgemeinpakte auf gegenseitigen Bestand, in idem, *Positionen und Begriffe*, p. 206. [Translated by author.]
[42] Idem, *Politische Theologie*, p. 19.

He saw the diversity of peoples and their legal ideas as proof of his particular, anti-universal understanding of law.[43]

Schmitt was convinced that the normative and abstract universalism of the Pure Theory of Law conceal the particular interests of certain powers (namely the victorious powers after the First World War).[44] With his criticism of hegemony, Schmitt anticipated the postmodern legal critical approach. As Schmitt wrote: Whoever has power also dictates the terms – i.e. "Caesar dominus et supra grammaticam".[45] He wanted to illustrate this power-relatedness of all terms with the question of when a war is allowed. According to him, the particular interests of the only remaining hegemonic power would decide on this question.

> "Imperialism does not wage national wars, these are rather ostracized; at most he wages wars that serve an international policy; he wages no unjust wars, only just wars; yes, we shall still see that he does not wage war at all, even if he does with armed troops, tanks and armoured cruisers what would of course be war with another."[46]

As an alternative, Schmitt demanded the right of all peoples to determine their life and politics according to their own terms.

Schmitt took his anti-abstract, concrete understanding of law from the *nomos* concept of the classical philologist Hans Bogner.[47] Bogner used the *nomos* to describe the concrete way of life in the Hellenic world. Schmitt also referred to the folk nomology (*Volksnomologie*) of the Protestant theologian Wilhelm Stapel, who opposed abstract law to the *nomos* as a spatial concept of order.[48] According to Schmitt's *nomos* concept, the land acquisition represents the original act of law, which fixes the spatial limits of the law.[49] The *nomos* means the soil and people-bound order of a specific place.[50]

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[43] Idem, Die Auflösung der europäischen Ordnung im »International Law« (1890-1939), in idem, *Staat, Großraum, Nomos*, p. 382.
[44] Anthony Carty, Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945, *Leiden Journal of International Law* 14 (2001) p. 32.
[45] Schmitt, Völkerrechtliche Formen, p. 179.
[46] *Ibid.*, at 177. [Translated by author.]
[47] Raphael Gross, *Carl Schmitt und die Juden. Eine deutsche Rechtslehre*, Suhrkampf, Frankfurt/M, 2005, pp. 98 ff.
[48] Felix Blindow, *Carl Schmitts Reichsordnung. Strategie für einen europäischen Großraum*, Akademie, Berlin,1999, pp. 141 ff.; Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge UP, Cambridge, 2002, p. 415.
[49] Schmitt, *Der Nomos der Erde*, p. 16.
[50] *Ibid.,* p. 39. [Emphasis in original]

What the primal act of law meant in the *nomos* theory corresponds to the primal political act of differentiating between friend and enemy, which Schmitt regarded as a basic requirement for any political unity. The decision about who belongs to and who does not precedes the legal system.[51] Land acquisition is accordingly the definition of the area in which enemies are destroyed so that a concrete law can be established. The spatial-concrete concept also excludes universal World Law as International Law – the *nomos* enables a political (i.e. plural) world order of closed spaces with their respective *nomoi*. The *nomos* thus marks the boundary between peoples and between spaces.[52] It is of course not to forget that Wilhelm Stapel developed his *nomos* theory as an anti-Semitic concept: By assigning different *nomos* concepts to each people, he wanted to prove the alleged essential difference between the Christian peoples and the stateless Judaism.[53] In this sense, Schmitt also emphasized that the law is not a general function, but a space and people-bound way of thinking, which varies with all peoples.[54]

The National Socialist Law, to which Schmitt committed himself,[55] was for him a particularistic approach against the formalistic-positivistic legal theory.[56] He described spatial delimitation and concreteness of law as the essence of a National Socialist understanding of law (which he fully supported).[57] This legal concept directed against the abstract ideas:

> "For us, there are neither spaceless political ideas nor, reciprocally, spaces without ideas or principles of space without ideas. It is an important part of a determinable political idea that a certain nation carries it and that it has a certain opponent in mind, through which this political idea gains the quality of the political."[58]

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[51] Idem, *Verfassungslehre*, 11th ed., Duncker und Humblot, Berlin, 2017, pp. 23., 76.
[52] William Hooker, *Carl Schmitt's International Thought. Order and Orientation*, Cambridge UP, Cambridge,2009), p. 72.
[53] Wilhelm Stapel, *Sechs Kapitel über Christentum und Nationalsozialismus*, Hanseatische, Hamburg / Berlin, 1931, p. 14.
[54] Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, 2nd ed., Duncker und Humblot, Berlin, 1993, p. 9.
[55] Idem, Nationalsozialistisches Rechtsdenken, *Deutsches Recht* 4 (1934) p. 225.
[56] Idem, *Nationalsozialismus und Völkerrecht*, Junker und Dünnhaupt, Berlin, 1934, p. 11.
[57] Idem, Die nationalsozialistische Gesetzgebung und der Vorbehalt des »ordre public« im Internationalen Privatrecht, *Zeitschrift der Akademie für Deutsches Recht* 3 (1936) p. 206.
[58] Idem, The Großraum Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law (1939–1941), in idem, *Writings on war*, Polity, Cambridge, 2011, p. 87.

Schmitt therefore refused to develop the International Law, which had emerged in Europe, into a universalistic World Law.[59] He criticized the fact that World Law was not tied to space and people, which, on the one hand, removes the differences between peoples,[60] and, on the other hand (as he said), actually serves only Anglo-Saxon, hegemonic interests.[61] This kind of new International Law was for him a "juxtaposition of norms without system; otherwise a disordered, spatially and nationally disconnected juxtaposition [...] of states", i.e. "a leap into the nothingness of a bottomless generality".[62] Schmitt was concerned that a spaceless World Law would replace the space-bound International Law.[63] With his theory of great spaces he wanted to counteract this universalistic tendency by placing the space in the foreground.

Consequently, he proposed a spatial division of the international legal system: Each great space should therefore have its own International Law. He gave the term International Law a new, spatial and national meaning, because it was no longer a supranational law between (among) all peoples, but the law of the peoples living together in a great space. This internal large-scale International Law expresses the ruling will of the hegemonic people,[64] around whose realm the great space establishes.

In contrast to Kelsen, who took International Law seriously[65] – that is, he actually conceived it as the law of all peoples, which is superior to the state law –, it is not clear how Schmitt's concept actually would create a world order.[66] The National Socialist doctrine of International Law recognized this problem as well. Nevertheless, it radicalized Schmitt's great space to the point that a common International Law – due to the "racial" differences among the peoples – would not be at all possible or desirable. Because International Law itself should be racially determined, according to the SS law expert Norbert Gürke, "it could be doubted that there can be forms of intercourse under international law between peoples of different racial composition."[67]

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[59] Schmitt, however, had an idealized image of the Jus Publicum Europaeum as a European, internal International Law which would have inhibited and demoralized war, cf. Benno Gerhard Teschke, Fatal attraction: a critique of Carl Schmitt's international political and legal theory, *International Theory* 3 (2011) pp. 203 ff.

[60] Schmitt, Raum und Großraum im Völkerrecht, p. 249.

[61] *Ibid.*, p. 250.

[62] Idem, Die Auflösung der europäischen Ordnung, p. 377. [Translated by author.]

[63] *Ibid.*, p. 372.

[64] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Vol. 3: Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914-1945*, Beck, München, 1999, p. 383.

[65] Charles Leben, Hans Kelsen and the Advancement of International Law, *European Journal of International Law* 9 (1998) p. 289.

[66] Hussain / von Bogdandy, Carl Schmitt's International Thought, p. 27.

[67] Nobert Gürke, *Volk und Volkrecht*, Mohr Siebeck, Tübingen, 1935, p. 99. [Translated by author.]

4. Great space as a post-state unit: Against state sovereignty

Schmitt identified two tendencies in International and Constitutional Law: On the one hand, classical, European International Law had transformed into a universalistic World Law; on the other hand, the sovereignty of any state had become the basic principle of International Law.[68] A fragmented, closed, organized world of states corresponds to the emergence of a universalistic International Law.[69]

Schmitt dialectically abolished the dualism between Constitutional Law and World Law: He relativized the law of the individual states in order to establish a new, concrete, space-bound International Law. Therefore, he meant that the establishment of a World Law could only be stopped by overcoming the old world of states and their principle of state sovereignty. As an alternative to the World State as the new World Law, he developed his concept of great space. The great spaces would be the new decisive units which would save pluralism in the world (thus the political in the world order),[70] but at the same time guarantee domestic unity.[71] In this respect, his doctrine of great spaces represents a scientific attack on statehood as a political organizational principle.

Even if Schmitt and Kelsen wrote at the same time about the need to relativize state sovereignty, the direction (and the purpose) was completely different. Kelsen recognized the problem that the exclusivity of state sovereignty created a structural difficulty for a universal, monistic concept of International Law. Therefore, he questioned sovereignty. Kelsen believed that sovereignty was actually the property of the legal system personified as a state. He pointed out that the sovereignty of the state can no longer serve as basic concept because the absolute concept of sovereignty excludes other sovereignties. Kelsen rejected sovereignty because he viewed the absolute political power of states as an obstacle for the establishment of an international legal order.

In contrast to Kelsen, Schmitt no longer viewed state sovereignty as an obstacle for the World Law – which was more of a legal historical than a legal theoretical position –; that is why he endeavored to establish a new form of power instead of the old statehood. He denied sovereignty because sovereign states were no longer able to assert their absolute power in world politics. Schmitt therefore developed

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[68] Schmitt, Raum und Großraum im Völkerrecht, p. 251.
[69] Idem, *Politische Theologie*, p. 378.
[70] Cesare Pinelli, The Kelsen/Schmitt Controversy and the Evolving Relations between Constitutional and International Law, *Ratio Juris* 23 (2010) p. 495.
[71] Hooker, *Carl Schmitt's International Thought*, p. 49.

state sovereignty into a new concept, which should establish new powers instead of the statehood. Schmitt's doctrine of great space proves not only to be an anti-world-law and anti-state concept, but also a concept that preserves sovereignty: However, the sovereignty of the great area is not due to all peoples, but only to the great ones who would be able of building an empire (and around it to set up a great space). Schmitt's attempt to prevent a World Law complements his criticism of the small states (*Kleinstaaterei*).[72]

Nevertheless, why did Schmitt want to underpin the state in an authoritarian way during the Weimar Republic, than to relativize it during the Nazi era? Was it a radical turn in Schmitt's work? Not at all. By questioning sovereignty, Schmitt did not attack the sovereignty of the German Reich – which he wanted to strengthen in the Weimar Republic – but that of the other European states. That is why Schmitt welcomed the anti-statism of the National Socialist legal doctrine as a prerequisite for a state-relativistic, global political doctrine. "Yet with the victory of the National Socialist movement, an assault to overturn the concept of the state in international law turned out successfully in Germany."[73] By overcoming the concept of the state in International Law, Schmitt deprived the smaller states of their raison d'être. The loss of sovereignty of other states should go hand in hand with the empowering of the German Empire in Europe. In this respect, Schmitt's Weimar statism and his NS legal doctrine were two sides of the same coin: Strengthening the power of the German Reich – internally with statism, externally with attack against the statehood of other people. His doctrine of empires showed this purpose in a particularly clear way.

5. Great space as a hegemonic unity: For the empire

Schmitt no longer viewed statehood as the political unit that would be able to maintain the political differences in the world – i.e. the world as a *pluriverse*. Even if Schmitt considered the states to be space-bound, concrete orders, he no longer trusted them to be able to stop the establishment of a world unity. State sovereignty originated in the European International Law, which expressed the interests of the European states and reflected their balance of power. However, what was still large or medium-sized on the European continent appears only medium-sized and small in planetary scope – i.e., according to Schmitt, no European

[72] Schmitt, Raum und Großraum im Völkerrecht, p. 261.
[73] Idem, The Großraum Order of International Law, pp. 104 ff.

state would be able to stay powerful in the world order and to oppose world universalism. "European international law of the nineteenth century, with its weak European middle and the Western global powers in the background, seems to us today a miniature world standing in the shadow of giants."[74]

Because of the supposed (internal and external) decline of state power, Schmitt proposed new categories for International Law. In his theory of great space, Schmitt combined his basic principle about the spatial nature of the law with the aim of effectively preventing World Law. The great space therefore fulfilled both expectations, which, according to Schmitt, the sovereign state could no longer meet: The great space is *spatial and large enough*. The great space should establish itself as a new political unity around a hegemonic empire. Schmitt described the empires as "the leading and bearing powers whose political ideas radiate into a certain *Großraum* and which fundamentally exclude the interventions of spatially alien powers into this *Großraum*."[75]

The only universal principle that would remain is the ban of intervention for powers outside the great space, which is supposed to guarantee the hegemonic position of the empire (and its people) over the other peoples within. The imperial idea denies the balance of sovereign states and the equality of all peoples – this hegemonic turn presupposes the abolition of state sovereignty. While some states develop into empires – and conquer a great space –, the other states, which are subordinate to an empire, lose their sovereignty. The Nazi functionary, Franz Alfred Six summarized the imperial idea as a *hegemonic and hierarchical structure*.[76] The result of Schmitt's relativization of the state is the establishment of an *even larger, more powerful* space capable of preventing world unity and subordinating the smaller states and peoples to their own rule. The empire is actually the political unity of one people who purchases a great space around itself, where interference by other empires is excluded – which, conversely, means that all other peoples within the great space become mere subjects to the ruling imperial people.

Schmitt transferred his anti-pluralistic statism into the concept of the great space. The world should therefore no longer consist of several states, but of several great spaces. However, Antonino Scalone is right by asking how the nature of the great space actually differs from that of the state.[77] The Nazi lawyer Ernst Rudolf

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[74] *Ibid.*, p. 109.
[75] *Ibid.*, p. 101.
[76] Franz Alfred Six, *Das Reich und Europa. Eine politisch-historische Skizze*, Zentralverlag der NSDAP, Berlin, 1943, p. 28.
[77] Antonino Scalone, La teoria schmittiana del grande spazio: una prospettiva post-statuale? *Scienze e Politica* 29 (2017) p. 194.

Huber also criticized that the empire in Schmitt's great space actually had the function of a "superstate" or a "large state".[78] An essential break between the static and the great space thinking cannot be recognized, the difference between the empire and the state is not qualitative – such as Kelsen's distinction between the state as a partial legal order under International Law and the state as a sovereign power – but only quantitative. The purpose of the state and the empire is the same for Schmitt: Both should ensure a pluralistic world order through *authoritative, homogenous and hegemonic* world units and *homogenous, anti-pluralistic* internal structure.

The actual meaning of the great space and imperial doctrine or their difference to statism can only be explained from the historical context. In his Weimar writings, Schmitt referred to a strong state as a domestic, authoritarian concept against pluralistic democracy. After 1933, however, the German state regained its authoritarian character (in the sense of Carl Schmitt who supported the Nazi take-over), so he wanted to underpin expansionist goals of the state. While Schmitt's authoritarian statism aimed at strengthening the German state (till 1933), his state relativism concerned the other European states. In this respect, his state authoritarianism (as domestic idea) and state relativism (as international legal idea) served the same German nationalist goals.

6. Great space as Theory of National Socialist Expansion?

Schmitt's idea of the transformation of the sovereign states into great spaces fully corresponded to the National Socialist goals of subjecting the sovereign states in Europe. The historical context explains why Schmitt no longer placed the state in the foreground, but rather the empire. During the Weimar period, Schmitt's theories aimed at deconstructing the liberal constitutional state and legitimizing an authoritarian state. The victory of the Nazi regime in 1933 then overcame the liberal rule of law. After the end of a pluralistic democracy, Schmitt wanted to address the question of how the new German Reich could preserve world pluralism. Because the NS Germany eliminated the internal enemies, the conquest of Europe was on the agenda as the next step.[79] Schmitt himself put his doctrine at the service of this expansionist German politics:

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[78] Ernst Rudolf Huber, »Positionen und Begriffe«. Eine Auseinandersetzung mit Carl Schmitt, *Zeitschrift für die gesamte Staatswissenschaft* 101 (1941) p. 44.

[79] Carmelo Jiménez Segado, Carl Schmitt y el derecho internacional del Reich, *Revista de Estudios Políticos* 127 (2005) pp. 323 ff., 327.

> "The concept of a *Deutsches Reich* belonging to the upholders and designers of a new international law would earlier have been a utopian dream, an international law built upon the Reich but an empty legal fantasy. Today, however, a powerful German *Reich* has arisen. From what was only weak and impotent, there has emerged a strong center of Europe [...] with its radiation into the Middle and East European space, and to reject the interference of spatially alien and un*völkisch* powers."[80]

Albeit a SS magazine attacked Schmitt in 1936 (he had to withdraw from his public positions except for his professorship in Berlin and his position as Prussian State Councilor), he did not make an anti-Nazi U-turn.[81] He developed the great space theory after his supposed retreat, i.e. Schmitt did not break intellectually with the National Socialism even after 1936. After the Second World War, however, he tried to relativize his own importance. He claimed that he would have distanced himself from any political regime.[82] He asserted, for example, how small the circulation and the effect of his great space theory would have been during the Nazi era.[83] He made these statements as he was in prison as a witness in Nuremberg after the war and was hoping for a possible release. Therefore, the words served as self-protection, they do not necessarily correspond to a historical truth.

Schmitt's great space theory was, however, not only an opportunistic attempt of ingratiation. His involvement with the Nazis is not just a historical-biographical detail, as if there had otherwise been a break between his Weimar and Nazi writings.[84] His Nazi writings did not differ from his earlier main theses. Carl Schmitt's great space theory perfectly embedded in the whole of his oeuvre;[85] it based on his concept of the political, his anti-pluralistic statism, or his concrete-situational understanding of law[86] – the historical context merely explains why Schmitt turned to the International Law in the Nazi era. As a lawyer in a hegemonic empire, whose foreign and domestic goals he fully shared, he no longer dealt with questions of domestic law – Nazi takeover solved them in the sense of

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[80] Schmitt, The Großraum Order of International Law, p. 111.
[81] Jean-François Kervégan, *Que faire de Carl Schmitt?* Gallimard, Paris, 2011, pp. 36. ff.
[82] Carl Schmitt, *Antwort an Kempner*, in idem, *Staat, Großraum, Nomos*, p. 453.
[83] *Ibid.*, p. 456.
[84] William Scheuerman, After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, *Cardozo Law Review* 19 (1998) p. 1744.
[85] Ryan Mitchell, Hegemony in a Multipolar World Order: Global Constitutionalism and the Großraum, *Jus Cogens* 1 (2019) p. 132.
[86] Teschke, Fatal attraction, p. 182.

Schmitt[87] – but with International Law as the new terrain where the German Reich was emerging.

Outlook: Who should still read Carl Schmitt?

In this article, the main question was why Schmitt wanted to establish a new, post-state political world order, and why he turned to International Law during the Nazi era. His own legal theory provides an answer to the first question: Schmitt understood statehood as a political unity that prevented a unified (war-free) world order. Nevertheless, he recognized the historical relativity of statehood, which he replaced by a new concept of political unity, which could still guarantee world pluralism. The answer to the second question – i.e. why Schmitt came to these findings during the Nazi era – can remind us that he did not want to analyze world politics for pure theoretical purposes, but wanted to serve the expansionist German Reich. Schmitt wrote his International Law theory as a German nationalist who hoped for a Nazi victory by the end of the war.[88]

In any case, Schmitt's great space theory is more than a mere document from the Nazi era that may only be touched with archival interest.[89] Martti Koskenniemi is in some respects right when he writes: "[T]hough it undoubtedly served German foreign policy goals, its content was independent of them."[90] Or rather: The content is not at all free of the Nazi goals, but one can try to read Schmitt separated from them. With regard to the unipolar world order, Schmitt anticipated anti-globalist criticisms as well as post-nation-state approaches of current (mostly left wing) authors.[91] Here I can only briefly mention three aspects – without wanting to elaborate on them – that can explain Schmitt's ongoing topicality and attraction.[92]

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[87] Carl Schmitt, *Reichsstatthaltergesetz*, Heyman, Berlin, 1933, p. 3; idem, *Staatsgefüge und Zusammenbruch des zweiten Reiches*, Hanseatische, Hamburg, 1934, p. 49.

[88] Carty, Carl Schmitt's Critique of Liberal International Legal Order, p. 62.

[89] For the simplifying thesis that Schmitt should only be read as a historical document, see Charle Yves Zarka, Présentation: Carl Schmitt, le nazi, *Cités* 14 (2003), pp. 161-163; idem, Carl Schmitt, l'ennemi substantiel et la législation nazie, *Droits* 40 (2004), pp. 173-188.

[90] Koskenniemi, *The Gentle Civilizer of Nations*, p. 421.

[91] The left wing theories try to read Schmitt "against Schmitt"; for a critical reconstruction of this position see Guillermo Andrés Duque Silva, Con Schmitt y contra Schmitt: Crítica a la politica adversarial de Chantal Mouffe, in Delfin Ignacio Grueso (ed.), *Reconocimiento & Democracia desafíos de la Justicia. Reflexiones crítico-teóricas contemporáneas*, Editorial Universidad del Vale, Cali, 2015, pp. 201-220.

[92] As a very positive reception of Schmitt's ideas on International Law see Michael Salter, Law, Power and International Politics with Special Reference to East Asia: Carl Schmitt's Grossraum Analysis, *Chinese Journal of International Law* 11 (2012) pp. 421 ff.

Firstly, Schmitt recognized real events in world politics – such as the shifts in power in favor of a few larger spaces.[93] Therefore, Schmitt brought the aspect of space and power back into International Law. In contrast to Kelsen, who adhered to a naive idea of a peacemaking, abstract, unified, non-hegemonic World Law, Schmitt analyzed International Law as a hegemonic structure of competing regional blocs. The actual development of International Law (and especially world politics) proved Schmitt's (and not Kelsen's) predictions to be correct: regional great powers emerged (USA, Germany, Russia, Turkey, China, Australia etc.) with whose influences on other states in their neighborhood.[94]

Secondly, Schmitt's realistic description is useful as critique of a (possible or existing) unipolar world order.[95] The anti-globalist idea that the end of the Westphalian state order would lead to world anarchy[96] or to the establishment of hidden hegemony structure[97] also testifies to Schmitt's influence. Ryan Mitchell even wrote of the "Third World-ism of Schmitt".[98] On the other side of the same anti-globalist camp, the anti-universalist Right also makes use of Schmitt's theorems. The racial (*völkisch*) element of Schmitt's thought is popular especially in the French *Nouvelle Droite* around Alain de Benoist.[99] Benoist propagates – in the spirit of Carl Schmitt – a world in which the peoples – possibly around some regional superpower – live separated from one another (ethno-pluralism), or in which Europe should become a counterpoint to the USA.[100] The New Right and the left wing critical theories agree in their anti-liberal aversion – and *in concreto*: in their rejection of an Anglo-Saxon / US-American dominated world order.

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[93] Horst Dreier, Wirtschaftsraum – Großraum – Lebensraum. Facetten eines belasteten Begriffs, in idem et al. (eds.), *Raum und Recht. FS 600 Jahre Würzburger Juristenfakultät*, Duncker und Humblot, Berlin, 2002, p. 69.

[94] Mitchell, Hegemony in a Multipolar World Order, p. 138.

[95] That is why Schmitt also serves as reference for an alterglobalist criticism of International Law. As an example see, inter alia, Chantal Mouffe, Schmitt's vision of a multipolar world order, *South Atlantic Quarterly* 104 (2005), pp. 245-251. As critic to this her Schmitt-reading see David Chandler, The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists? *Millenium: Journal of International Studies* 37 (2008), pp. 27-48.

[96] Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (1977); Alessandro Colombo, La società anarchica tra continuità e crisi. La scuola inglese e le istituzioni internazionali, *Rassegna Italiana di Sociologia* 44 (2003), pp. 237-255.

[97] Micheal Hardt / Antonio Negri, *Empire*, Harvard UP, Cambridge MA, 2000, pp. 15 ff.

[98] Mitchell, Hegemony in a Multipolar World Order, p. 131.

[99] Alain de Benoist, *Carl Schmitt actuel. Guerre juste, terrorisme, état d'urgence*, Krisis, Paris, 2007.

[100] Idem, *Europe, Tiers monde, même combat*, Laffont, Paris, 1986.

Thirdly, Schmitt also serves as analysis of the European Union in its political realities and possibilities.[101] Kelsen's theories would not grasp the reality but a possible ideal of the European Union as a supranational legal community,[102] as if the EU could only arise on legal bases (regardless of political, social, economic, cultural, etc. circumstances and differences). Schmitt's theories emphasize the aspects of hegemony even in debates on European politics and law. As an example of possible subject areas, I can mention the question of a "German hegemony",[103] which manifests itself primarily in economic terms.

To answer the question of who should read Schmitt: Authors who refer to Schmitt often have the same enemy in mind as the National Socialists: a universalistic world order under the primacy of International Law. In this sense, Schmitt's great space theory remains topical especially for those who still believe they are in the same constellation in view of which Schmitt wrote his work – i.e. in the fight against abstract universalism and a US-American "hegemony".

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[101] Christian Joerges, Europe as Großraum? Shifting legal conceptualisations of the integration project, in: idem / Navraj Singh Ghaleigh (eds.), *Darker Legacies of Law in Europe. The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Hart, Oxford / Portland, 2003, pp. 186 ff.; Massimo Fichera, Schmitt and the New World Order: A View from Europe, *Helsinki Legal Studies Research Paper*, 2013-26, pp. 16 ff.

[102] For a Kelsenian justification of the European Union see Jürgen Busch / Tamara Ehs, Nachwort: EUropa als Rechtsgemeinschaft, in idem (eds.), *Hans Kelsen und die Europäische Union. Erörterungen moderner (Nicht-) Staatlichkeit*, Nomos, Baden-Baden, 2008, pp. 95-109.

[103] For different aspects of a (supposed) German hegemony in the EU, see William E. Peterson, The Reluctant Hegemon? Germany Moves Center Stage in the European Union, *Journal of Common Market Studies* 49 (2011), pp. 57-75.; Paolo Savona, *Lettera agli amici tedeschi e italiani. Come funziona il meccanismo economico europeo*, Il mio libro, Roma, 2012; Simon Bulmer, Germany and the Eurozone Crisis: Between Hegemony and Domestic Politics, *West European Politics* 37 (2014) pp. 1250 ff.; Ubaldo Villani-Lubelli, Il ritorno della questione tedesca: l'inevitabile egemonia della Germania in Europa, *Rivista di Studi Politici Internazionali* 83 (2016) pp. 212 ff.; Paolo Savona, *La rivoluzione democratica di Heine e la Costituzione per la pace perpetua di Kant. Una seconda lettera agli amici tedeschi*, Rubettino, Soveria Mannelli, 2017; Armin von Bogdandy, German Legal Hegemony? *MPIL Research Paper Series*, 2020-43, pp. 2-4.