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Carl Schmitt on Francisco de Vitoria's Just War Theory

In memory of Franco Volpi and Merio Scattola

1. Carl Schmitt and the doctrine of Just War

“Compared to the brutality of religious and factional wars, which by nature are wars of annihilation wherein the enemy is treated as a criminal and a pirate, and compared to colonial wars, which are pursued against "wild" peoples, European "war in form" signified the strongest possible rationalization and humanization of war. Both belligerents had the same political character and the same rights; both recognized each other as States. As a result, it was possible to distinguish an enemy from a criminal. Not only was the concept of enemy able to assume a legal form, but the enemy ceased to be someone "who must be annihilated".

Carl Schmitt

Carl Schmitt, one of the most prominent philosophers of law of the 20th century, contends that the peace of Westphalia of 1648, ending the Thirty Year War and the Wars of Religion, marked a crucial moment in the creation of modern international law in his *The Nomos of the Earth in the International Law of Jus publicum europæum*. In fact, from that moment on, autonomous and sovereign countries were the only subjects of the law and ceased to recognise other entities above them. Schmitt calls this type of legislation *jus publicum europæum* and identifies in the end of the Medieval doctrine of Just War one of its main precursors.

In line with a very old tradition, the doctrine of Just War (*justum bellum*) affirms that war needs to be declared by a legitimate authority, to be justified by the good intentions of its promoter, to be fair in its execution, and to be inspired by just causes; such as the reparation for a suffered injustice (*repellere iniuriam*), the recovery of stolen goods, or the infliction of a just punishment on an offender. Without one of such causes, war ought to be regarded as a crime (*latrocinium*), as already affirmed by Saint Augustine in his *The City of God*, making him one of the first Church fathers to elaborate a Just War doctrine, with important repercussions during the Middles Ages.¹

¹ For a historical reconstruction of the concept of Just War refer to A.A. Cassi, *Santa, giusta, umanitaria: la guerra nella civiltà occidentale* (Rome: Salerno Editore, 2015). J. Verhoeven, *Les grandes étapes de l'évolution du droit de la guerre, in 500 anni di solitudine. La conquista dell'America e il diritto Internazionale* (Verona: Bertani, 1994), 143-177.

Furthermore, wars acquired more or less legitimacy depending on the type of enemy that they are set to defeat. For instance, the Muslim infidels, who had invaded the Christendom and who did not recognize the Christian faith, were regarded as “perpetual enemies” (*perpetui hostes*) of Christianity and thus any war against them was naturally just, *eo ipso*. The natives of the New World who had inhabited those lands since time immemorial, unaware of the Christian faith, could not have willingly infringed any of its principles, and could thus not be considered as equally perilous enemies: a war against them had thus to find new justifications.

Law’s role was thus not only that of justifying and ritualizing war, but also that of promoting justice. In fact, war was seen as an instrument, albeit an extreme one (*extrema ratio*), to ensure justice and peace.² The theory of Just War also presupposed the existence of a higher authority that functions as arbiter and judge over the legitimacy of war, which might in the end, expose only one of the two contenders as just.

Schmitt sees the dismissal of the Just War doctrine as a watershed moment, in which a war’s justification comes to rely only on whether it derives from a legitimate authority. According to this new paradigm, the right to declare a war by a recognized authority (*jus ad bellum*) is not to be questioned. Only the sovereign state has this privilege, putting an end to the feuds and intestine wars of the Middle Ages. The only other thing that needs regulation is the behaviour that is considered acceptable in war (*jus in bello*). War is only legal and legitimate when it abides by the parameters and conventions of the new international law adopted by the sovereign States, which no longer need any authorization by higher authorities to engage in war (*non expectata auctoritate principis superioris*). This is another important aspect to consider, as under the Just War theory, one of the two contenders had to be right, and the other wrong, except in the case of invincible ignorance (*ignorantia invincibilis*).³

According to Schmitt, the main difference between the theories that understood war as both *jus ad bellum* and *jus in bello*, and modern theories that only account for *jus in bello* is that, in the latter, the legitimacy of war is no longer questioned: war is not a matter of right and wrong. Both factions have adequate reasons to go to war, even if this reason is simply a desire for conquest.

For Schmitt, the demise of the Just War Theory marked the passage from medieval international law to modern *jus publicum europæum*. He states:

² For an excursus on the various historical interpretations of just war from antiquity to our times, refer to A. Calore (ed.), *Guerra Giusta? Le metamorfosi di un concetto antico* (Milan: Giuffrè, 2003).

³ See C. Schmitt, *The Nomos of the Earth in the International Law of Jus public europæum*. Translated and Annotated by G. L. Ulmen, (New York: Telos Press Publishing, 2006).

Despite many internal anomalies, the medieval doctrine of just war at least was grounded in the framework of a *respublica Christiana* [...] It had to distinguish among feuds, wars between Christian belligerents (those subject to the church's authority), and other wars. Crusades, and missionary wars authorized by the church were *eo ipso* just wars, without any distinction between aggression or defence. Princes and peoples who obstinately evaded the church's authority, such as Jews and Saracens, by definition were *hostes perpetui* [perpetual enemies]. All this presupposed the authority of a *potestas spiritualis* in international law. [...] Based on relations between states, post-medieval European international law from the 16th to the 20th century sought to repress the *justa causa*. The formal reference point for determining just war no longer was the church's authority in international law, but rather the equal sovereignty of states. Instead of *justa causa*, international law among states was based on *justus hostis*.⁴

According to Schmitt, such change had three main consequences, the first being the secularization of the doctrine of war, which no longer falls under the jurisdiction of theologians. On this regard, Schmitt sees as paradigmatic the following statement by Alberico Gentili:

A true jurist of this transitional period, Gentili, formulated the battle cry and coined what may be considered to be the slogan of the epoch in terms of the sociology of knowledge: ***Silete theologi in munere alieno!*** [literally: Theologians should remain silent within foreign walls!; figuratively: Theologians should mind their own business!].⁵

And he adds:

At the root of the new European international law is Alberico Gentili's exhortation to theologians, urging them to avoid the question of just war. The move away from a theological conception of international law is expressed for the first time with Gentili exclamation, "*silete theologi in munere alieno!* With this, he attempted to preserve the non-discriminatory meaning of war. The state has become the new agent of this process of de-theologization and rationalization.⁶

The second effect was the rationalisation and ritualization of war. Humanity has in fact always coexisted with war and will continue to do so: the only thing that can be done, according to a realist perspective on the issue, is to organize, ritualize, formalize, and frame war with law, i.e. the realm of what is legitimate when engaging in combat, as Schmitt makes clear:

⁴ C. Schmitt, *The Nomos of the Earth*, 120.

⁵ C. Schmitt, *The Nomos of the Earth*, 121.

⁶ C. Schmitt, *The Nomos of the Earth*, 189. In 1598 Elizabethan England, the Italian jurist Alberico Gentili (1552-1608), exiled because of his conversion to Protestantism, and chosen as the first professor of Civil Law at Oxford, had denounced the interference of theologians into matters that did not concern them at all, thus marking the passage, according to Schmitt, from the end of the Medieval doctrine of Just War to the beginning of *jus publicum europæum*. The quotation comes from A. Gentili, *De iure belli libri tres*, book I, chapter 12. Such an affirmation can be regarded as Gentili's direct response to Dominican theologian Francisco de Vitoria (1483-1546), who had argued in one of his *Relectiones* "Officium ac munus theologi tam late patet, ut nullum argumentum, nulla disputatio, nullus locus alienus videatur a theologica professione et instituto". F. De Vitoria, *De Potestate Civili*, in *Vorlesungen I*, Herausgegeben von U. Horst, H.G. Justenhoven, J. Stüben, W. Kolhammer (Stuttgart, Berlin, Köln, 1995), 116.

The purely state war of the new European international law sought to neutralize and, thereby, to overcome the conflicts between religious factions; it sought to end both religious wars and civil wars. War now became a "war in form," (*une guerre en forme*). Only in this way, only by limiting war to conflicts between territorially defined European states, could a conflict between these spatially defined units be conceived of as *personae publicae* [public persons] living on common European soil and belonging to the same European "family." Thus, it was possible for each side to recognize the other as *justi hostes*.⁷

The third consequence for Schmitt concerns the process of humanization of war:

Compared to the brutality of religious and factional wars, which by nature are wars of annihilation wherein the enemy is treated as a criminal and a pirate, and compared to colonial wars, which are pursued against "wild" peoples, European "war in form" signified the strongest possible rationalization and humanization of war. Both belligerents had the same political character and the same rights; both recognized each other as states. As a result, it was possible to distinguish an enemy from a criminal. Not only was the concept of enemy able to assume a legal form, but the enemy ceased to be someone "who must be annihilated".⁸

This doctrine, Schmitt argues, dominated the time from the 1648 Peace of Westphalia up until World War I, when the League of Nations was created, thus ending the "glorious" epoch of *ius publicum europæum*, and introducing a new brand of international law.

According to a decisionist and realist paradigm such as Schmitt's, international law is a by-product of war, and a clear expression of the power relations between sovereign states. His guiding principle is that law is born out of a fact (*ex facto oritur jus*), and thus law can only legitimize a certain situation, *ex post factum*. Schmitt's central argument on Just War sees change as the main driving force: the enemy is no longer regarded as unjust, but as legitimate (*justus hostis*).

What is most striking about Schmitt's position, which he expresses very eloquently and with insistence in his *The Nomos of the Earth*, is its paradoxical, and even misleading nature, which stands out as the true essence of his thought, despite (or perhaps, as a consequence of) the clarity and peremptoriness that are also typical of his writings.

It seems difficult to bring forward the argument that the formalization of the theory of war caused not only its secularization and rationalization, but also its humanization. Such an affirmation can be valid when it refers to domestic public law, but certainly not when it pertains to international law. As write Scurati: "To the *guerre en forme* typical of *jus publicum*

⁷ C. Schmitt, *The Nomos of the Earth*, 141.

⁸ C. Schmitt, *The Nomos of the Earth*, 142.

Europaeum did not follow peace, but an even more brutal type of war. The demise of the notion of war caused greater suffering”.⁹

Schmitt claims that *jus publicum europaeum* came into effect with the Peace of Westphalia and was utilized up until the treaty of Versailles and the creation of the League of Nations. But such periodization is purely abstract, given that the League of Nations did not succeed in bringing about President Wilson’s cosmopolitan project; the system based on the absolute power of sovereign states remained the predominant one at least until the Second World War and the creation of the United Nations (and even later).

On this point Schmitt writes:

The former bracketing of war overseen by the church in international law had been destroyed by religious wars and creedal civil wars. Its institutional power of creating order obtained only as a *potestas indirecta*, while the union of political spatial order and the organizational form of the state were based on the astounding fact that for 200 years a new bracketing of European wars had been successful, because it again had become possible to realize the concept of a *Justus hostis*, and to distinguish the enemy from a traitor and a criminal in international law. The recognized sovereign state also could remain a *justus hostis* in wars with other sovereign states, and war could be terminated with a peace treaty, even one containing an amnesty clause¹⁰.

But in reality this long period of time of over 300 years was marked by many armed conflicts between sovereign states: wars, because of the technological advances in weaponry that had developed, were even bloodier, more destructive, and more violent than their Medieval or Renaissance counterparts. In this new context the absolute power of sovereigns to declare war was not limited by the formalization and rationalization of the practice of war.

Already in the 18th century the situation had become so serious that the most prominent philosophers of the time had made their voices heard on the matter: Kant’s philosophical project exposed in his *Perpetual Peace*¹¹ is one of the many works that aimed to overcome the ever more intolerable situation of conflict and anarchy in European international relations.¹²

In the words of the Italian philosopher Norberto Bobbio, which refer to the return of the just war doctrine in the context of the First Gulf War:

⁹ A. Scurati, *Letteratura e Sopravvivenza. La retorica letteraria di fronte alla violenza* (Milan: Bompiani, 2012), 157.

¹⁰ C. Schmitt, *The Nomos of the Earth*, 148.

¹¹ I. Kant, *La Pace Perpetua* (Milan: Feltrinelli, 2013).

¹² Well-known is the project by A. de Saint-Pierre: ‘*Progetto per rendere la pace perpetua in Europa (1713-1717)*’, in *Filosofi per la pace*, eds. D. Archibugi e F. Voltaggio, (Rome: Editori Riuniti, 1999). Such project sparked Kant’s reflection and also that of Jean-Jacques Rousseau in ‘*Estratto del progetto di pace perpetua dell’abate di Saint-Pierre*; *Giudizio sul progetto di pace perpetua dell’abate di Saint-Pierre*; *Considerazioni sul governo di Polonia*’, in ‘*Scritti politici*’, Vol. II and III (Rome-Bari: Laterza, 1994).

contrary to what my critics think, the consequence of the demise of the Just War doctrine was not the affirmation of the idea that all wars are unjust, but of exactly the opposite principle, i.e. that all conflicts are legitimate. The *jus ad bellum*, the right to declare war, came to be regarded as the prerogative of sovereign powers.¹³

Bobbio's argument, though very compelling in its self-evidence, was mostly disregarded by the supporters of Schmitt's thesis. If the end of the Just War doctrine legitimized the enemy and erased the former theological concerns and legal limitations, it did not lessen the violence and brutality of war; on the contrary, by eliminating such limits, it heightened its absolute and unbridled freedom of action.

The transformation of the sworn enemy into a legitimate contender certainly applied to the conflicts between Christian powers, but not outside the area of influence of the *jus publicum europæum*, i.e. to the wars waged against those "inferior peoples," as admitted unapologetically by Schmitt himself.

The wars between the European nations were fought within the so called "amity lines", which defined the division of geopolitical space on the continent. Within these lines, wars were supposedly subject to limitations (*Hegung des Krieges*), which though did not apply to the conflicts against the "inferior, wild, and barbaric" peoples with whom the Europeans came into contact, following what Schmitt regarded as the most important event of human history: the discovery of America.

Such wars derived their legitimacy from the argument of the superiority of the European civilization, found throughout *The Nomos of the Earth*:

In reality, the only justification for the great land-appropriations of non-European territory by European powers was discovery. Once the medieval spatial order of the *Respublica Christiana* had been destroyed and every theological argument had been discarded, the only true legal that remained for a Eurocentric international law was to discover - *reperire*, *invenire*, then *decouvrir* - previously unknown (i.e., by Christian sovereigns) oceans, islands, and territories.¹⁴

He further clarifies this thought:

Discoveries were made without prior permission of the discovered. Thus, legal title to discoveries lay in a higher legitimacy. They could be made only by peoples intellectually and historically advanced enough to apprehend the discovered by superior knowledge and consciousness. To paraphrase one of Bruno Bauer's Hegelian aphorisms: a discoverer is one who knows his prey better than the prey knows himself, and is able to subjugate him by means of superior education and knowledge.¹⁵

¹³ N. Bobbio, *Una guerra giusta? Sul conflitto del Golfo* (Venice: Marsilio, 1991), 55-56.

¹⁴ C. Schmitt, *The Nomos of the Earth*, 131.

¹⁵ C. Schmitt, *The Nomos of the Earth*, 150.

While the Christian enemy is a *justum hostis*, the enemy who stands outside of the *respublica Christiana* can be treated even worse than the enemies of the feuds and religious wars of old, precisely because of his condition of inferiority.

This is the basis for Schmitt's critique against the Spanish theologian Francisco de Vitoria's failure to recognize the legitimacy of the right of discovery (*jus inventionis*) as the legal foundation for the conquest of the New World.

2. Carl Schmitt and Vitoria

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Norberto Bobbio

In his *The Nomos of the Earth*, Schmitt devotes an entire chapter to Francisco de Vitoria and, at various points, supports the thesis according to which, despite his critique waged against the *totius orbis* doctrine by the curia theologians, and despite his delegitimization of Alexander VI bull *Inter Caetera*, Vitoria's notion of *communitas orbis* does not go beyond the boundaries of the *Respublica Christiana*, and is far from the idea of *ius inter gentes* of modern *ius publicum Europaeum*.¹⁶

It is true, Schmitt would contend, that one of the main arguments presented by Vitoria to justify the right to free trade between peoples (*ius peregrinandi et degendi*) is the natural bond that unites them (*cognatio*), which contradicts Plautus' famous quote, "man is wolf to man."

As it is written in the *Digesto* concerning force (book I, 1, 3, *Corpus Juris Civilis*), between men, nature has established a tie. This makes any unjustified clash between men against natural law. In fact, man is not wolf to man, as Plautus said, but rather is simply man.¹⁷

¹⁶ C. Schmitt, *The Nomos of the Earth*, 104-140: "The justification for the conquest of a new world (Francisco de Vitoria)".

¹⁷ F. de Vitoria, *Relectio de Indis*, I, 3, 2, commentary by L. Pereña, Italian edition by A. Lamacchia, (Bari: Levante Editore, 1996), 81: «Et ut dicitur ff., De iustitia et iure, 1. *ut vim: inter homines omnes cognationem quandam natura constituit*. Unde contra ius naturale est ut homo hominem sine aliqua causa adversetur. Non enim *homo homini lupus est*, ut ait Comicus, *sed homo*». The second quotation, popularized by Hobbes, is from Plautus, *Aulularia*: «*Lupus est homo homini, non homo, quom qualis sit non novit*». For further reflection on the topic see G. Tosi, *La dottrina della guerra giusta in Francisco de Vitoria*, in *Figure della guerra. La riflessione su pace, conflitto e giustizia tra Medioevo e prima età moderna*, ed. M. Scattola (Milan: Franco Angeli, 2003) 63-88.

Such a statement is often seen as directly contrary to a Hobbesian understanding, especially by those who consider Vitoria to be the founder of a humanistic and universalistic version of international law. But Schmitt sees it differently: “The word ‘man’ stated three times sounds rather tautological and neutralizes itself; it may sound somewhat Erasmian, but in fact it is still intended in a Christian sense.”

And he adds:

Rejecting the contrary opinions of other theologians, Vitoria obviously treated Christians and non-Christians as equals in legal terms, at least from the standpoint of international law. Neither the pope, who had only spiritual power, nor the emperor, who was by no means the ruler of the world, nor any Christian prince could do as he wished with non-Christian peoples and their lands. As with the princes and peoples of Christian lands, barbarian princes in non-Christian lands also had authority (*jurisdictio*), and the native inhabitants also had ownership (*dominium*) of their soil.¹⁸

And furthermore:

But the general quality of being human need not level out the social, legal, and political distinctions developed in the course of human history. Vitoria also recognized that barbarians needed guidance. For him, war against non-Christians was different from war between Christians. Even though all Christian theologians knew that non-believers - Saracens and Jews - were human beings, the international law of the *Respublica Christiana*, with its profound distinctions between various types of enemies and, consequently, various types of wars, was based on profound distinctions between human beings and on great disparities in their status.¹⁹

But according to Vitoria, such distinctions between people were not the product of an idea of superiority of a certain civilization. That is why Schmitt is left bewildered by Vitoria’s lack of support for the right of discovery (*ius inventionis*) in the New World. In fact, in the *Relectio de Indis*, the Salamancan theologian had dismissed such a thesis in only a few words (*non oportet multa verba facere*):

There is another reason that has been adduced, the right of discovery (*ius inventionis*). For a long time, it was believed that Columbus had started his journey only based on the pursuit of this right. But I do not deem it necessary to spend many words on such a right, since I have already stated that the natives were indeed the true owners of their lands (*barbari erant veri domini et publice et privatim sicut christiani*). In the *Istitutiones* is made clear that it is generally accepted that the occupier has a right to acquire those things that are left unclaimed (*quod ad nullius bonis est*). But, since these goods do not lack an owner, they cannot fall under that category. It is thus fair to say that, regardless of the value of such a principle under other circumstances, it cannot justify the appropriation of the lands of the Indians, in the same way that it wouldn’t justify their appropriation of ours (*non plus quam si ipsi invenissent nos*).²⁰

¹⁸ C. Schmitt, *The Nomos of the Earth*, 105.

¹⁹ *Ibid.*

²⁰ F. de Vitoria, *Relectio de Indis*, I, 2, 10, 54.

Vitoria's apparent "objectivity" and "neutrality" calls for Schmitt's ironic commentary:

If Christians and non-Christians, Europeans and non-Europeans, civilized peoples and barbarians have equal rights, all concepts necessarily are reversible. Consequently, such a legal title (*occupatio bonorum nullius* [non-possession of goods]) was of no more use to Spaniards than if the reverse had been the case, i.e., if the Indians had discovered them: *non plus quam si illi invenissent nos*. Today, however, this claim has the ring of an all-too abstract, neutral, apathetic, and, thus, ahistorical exaggeration.²¹

And he further comments:

But what would the representatives of modern civilization say about the fact that Vitoria says nothing about the right of a superior civilization or culture, the right of civilized peoples to rule over half civilized or uncivilized peoples, or about "civilization," which has been a decisive concept in European international law since the 18th century?²²

Really in Vitoria there is no trace of an apology for the right of domination over an inferior people by a superior civilization, nor in the writings of Bartolomé de Las Casas, while such apology is present in germinal form (*in nuce*) in the work of Ginés de Sepúlveda. Such a notion is typical of modern Eurocentric ideologies such as Hegel's, Schmitt would contend:

In his *Vorlesungen über die Philosophie der Geschichte*, Hegel argues that the culture of the Mexicans and the Peruvians "had to perish as soon as the [world-] spirit approached them." This thesis exhibits the self-conscious arrogance of an idealist philosophy of history.²³

Schmitt's opinion on the Just War theory resembles that of Juan Ginés de Sepúlveda²⁴, with whom he shares at least three features: 1) the conviction that international relations are a prerogative of the emerging powers, which are the only real subjects under the law (and of which Spain is the most obvious example); 2) the idea of belonging to a superior civilization endowed with the right of dominion over inferior and barbarian peoples; and 3) the belief in the legitimacy of war as a means to establishing such superiority.²⁵

²¹ C. Schmitt, *The Nomos of the Earth*, 107.

²² C. Schmitt, *The Nomos of the Earth*, 108.

²³ *Ibid.*

²⁴ J. Ginés de Sepúlveda, *Democrates secundus sive de iustis belli causis*, (*Democrate secondo, ovvero sulle giuste cause di guerra*), Latin and Italian texts, by di D. Taranto (Macerata: Quodlibet, 2009).

²⁵ See: G. Tosi, 'La guerra giusta nel dibattito sulla conquista d'America (1492-1573)', in *Dalla civitas maxima al totus orbis. Diritto comune europeo e ordo iuris globale tra età moderna e contemporanea*, eds. A.A. Cassi, A. Sciumè (Catanzaro: Rubbettino, 2008), 57-96.

This is why for Schmitt, contrarily to what Ernest Nys and James Brown Scott had argued²⁶, Vitoria is not the father of modern international law: he is firmly anchored in the Medieval paradigm of *jus gentium* and not in the modern *jus inter gentes*.²⁷

But there is another aspect that casts doubts onto Schmitt's Medieval interpretation of Vitoria. When dealing with the relations between the Christian powers within the *Respublica Christiana*, Vitoria's theory modifies a central tenet of the old tradition. In fact, what made a war 'just' was the clash between a side that was right and one that was wrong: both contenders could not be right. And he who got to decide which side was right, the arbiter, was whoever held the authority to do so. It is precisely this aspect that is questioned by Vitoria, who argues that the prince is the rightful judge over the matters that pertains him.²⁸

Schmitt, who had been accused of complicity with the Nazis by the International Criminal Court in Nuremberg, could by no means accept Vitoria's argument. Vitoria says:

"*Princeps qui habet bellum justum fit iudex hostium...*" [A prince who fights a just war becomes a judge of the enemy]. In Cajetan, 3 1 one already can read: "*Habens bellum justum gerit personam iudicis criminaliter procedentem*" [Fighting a just war produces a person who prosecutes like a judge in a criminal matter].²⁹

Despite of his admiration for the Salamancan theologian, Schmitt relegates Vitoria in the Middle Ages, given that he sees in him "the disturbing logic of the Just War theory, transforming the enemy (*justus hostis*) into a criminal (*perfidus hostis*) who deserves to be condemned, and sees the victor as *judex*".³⁰

Vitoria's "neutrality and objectivity" is thus the product of a moment of transition from the theologians' unquestioned fidelity to the two supreme authorities of the time, the pope and the emperor, to a new phase of trust in the sovereign states that no longer recognize such authorities. This uncertainty makes Vitoria's internationalism rather ambiguous and a major point of divergence between those, including Schmitt, who consider him (and the Salamancan scholastics in general) as still Medieval and not able to understand the new reality of international law, and those like Luigi Ferrajoli who see them as promoters of a new

²⁶ J.B. Scott, *El origen español del derecho internacional moderno*, prólogo de C. Barcia Trelles (Valladolid: Cuesta, 1928).

²⁷ Schmitt sees these two authors (Ernest Nys and James Brown Scott) as the true culprits for a Renaissance of the thought of Vitoria and Suarez in the XX century, since they are the founders of modern international law and of the doctrine of criminalization of war, notions which the German philosopher opposes. See C. Schmitt, *Il concetto discriminatorio di guerra*, preface by D. Zolo, (Rome-Bari: Laterza, 2008). On this topic, and more generally on Vitoria's position on Just War see M. Geuna, *Francisco de Vitoria e la questione della guerra giusta*, in *Dalla concordia dei Greci al Bellum Iustum dei Moderni*, ed. G. Daverio Rocchi (Milan: Franco Angeli, 2013) 143-174.

²⁸ F. De Vitoria, *Relectio de Indis*, III, 7, 25, 86: «*Princeps qui habent justum bellum, fit ipso iure iudex hostium et potest eos iuridice punire et condemnare pro qualitates iniuriarum*».

²⁹ C. Schmitt, *The Nomos of the Earth*, 123.

³⁰ C. Schmitt, *Glossarium* (Milan: Giuffrè, 2001) 149.

jurisprudence that goes beyond the boundaries of the Medieval *Respublica Christiana* and paves the way for a modern version of natural law.³¹

3. Conclusion

The absolute sovereignty of these national states has led to the desire of each to dominate over the others, since they feel threatened by their strength, and each nation feels the need for increasingly vast territories as part of their "living space" to guarantee their right to free movement and self-sufficiency, without needing to rely on others. The only way to placate this desire for domination is through the hegemony of the strongest state over all the other subordinate nations. [...] The most pressing problem, without whose solution progress is merely an illusion, is the definitive abolition of the division of Europe into national, sovereign states.
The Ventotene Manifesto

Through his lengthy and erudite *excursus* Schmitt really aims at addressing the true focus of his work: the contemporaneity. Schmitt to criticize Vitoria meant criticizing the criminalization of the war promoted by his contemporaries, as Stefano Pietropaoli states:³²

Schmitt attacks Vitoria to contest Vitoria's use in the early twentieth century. The doctrine of the just war of Vitoria was victim, according to Schmitt, of a "terrible abuse":³³ "A long experience," he writes, "teaches that nine-tenths of what is written about Vitoria today is shameless lies, a veritable garbage from the scientific point of view, the result of miserable subalternity; typical of a James Brown Scott."³⁴

And James Brown Scott was one of the leading theorists of the League of Nations and the concept of war as an international crime, which Schmitt so detested.

With the end of the Second World War comes the end of the long (and according to him, glorious) epoch of the *jus publicum europæum*, and begins that of a new international law, inaugurated by the creation of the League of Nations and, after its failure, the establishment of the United Nations and its partnering organizations. This new international law, Schmitt would argue, marks the return to the Just War theory, although deprived of any theological undertones.³⁵

It is rather surprising that Schmitt's ultimate objective was not to condemn totalitarian regimes such as Fascism, Nazism, or Stalinism, and their extermination campaigns that revitalized the

³¹ L. Ferrajoli, *La sovranità nel mondo moderno. Nascita e crisi dello Stato nazionale* (Milan: Anabasi, 1995) 11-28. See also *La conquista delle Americhe e la dottrina della sovranità degli Stati*, in *500 anni di solitudine. La conquista dell'America e il diritto internazionale*, introduction by F. Rigaux (Verona: Bertani, 1994) 439-478.

³² S. Pietropaoli, *Mitologie del diritto internazionale moderno. Riflessioni sull'interpretazione schmittiana della genesi dello jus publicum europæum*, in *Quaderni Fiorentini per La Storia del Pensiero Giuridico Moderno*, N. 37, (2008), 465-498, 488.

³³ C. Schmitt, *Glossarium*, 242.

³⁴ C. Schmitt, *Glossarium*, 243.

³⁵ For a modern version of Just War theory see: M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Book, 2015).

notion of an illegitimate enemy that deserved to be criminalized and annihilated, like in the holy wars against the Infidels. Rather, he criticized the winning powers of Second World War which, through the Nuremberg and Tokyo criminal courts, had criminalized their enemies.³⁶

It is even more surprising still that Schmitt never said a word against the political regime that he supported, the regime which had created the notion of the “absolute enemy”, applied it to the Jews and other groups, and had attempted to eliminate them in an even more brutal and radical way than the Medieval holy wars had done with the *hostes perpetui*.

However, Schmitt found himself in a dilemma that he could not escape: even if the war that the Nazis had waged against their domestic and external enemies was an expression of unlimited national sovereignty, it still remained an example of *ius publicum europæum*, and witnessed to the fact that the rationalization, formalization, and de-theologization of war did not result in its humanization, but on the contrary, in more brutal *dehumanization*.

On the other hand, if this war was considered to be an example of the return to the Just War theory because it saw the enemy not as a *justus hostis* but as a *perfidus hostis*, then it should serve as the supreme witness to the danger of the notions of just war and criminalization of the enemy, much more than the humanitarian interventions carried out by the Allies, that he bitterly condemns, ever could.

All in all, it is difficult to grasp what was the humanizing effect of the end of the Just War theory. The wars between sovereign states abiding by the *ius publicum europæum* certainly did not promote the humanization of the relations between the European states, contrary to what Schmitt professes; furthermore, they legitimized colonial wars against inferior peoples. Modern wars, which recognized all enemies as *iusti hostes*, were not any less terrifying than the medieval wars declared in the name of *iustum bellum*.

This conversation would merit the further exploration of the return to the notion of Just War after World War I, and even more so, after World War II. We only could say that perhaps Schmitt overestimated the role of Just War theory both in terms of its dismissal and of its resurgence. In fact, such doctrine is relevant to *ius publicum europæum* only since it legitimizes the modern state and ceases to see any other higher authority above it.

The pivotal change that occurred after World War II was not the return of just war theory, but the end of the absolute sovereignty of states and its replacement with the framework that led to the creation of the European Union. It was precisely the overcoming of the absolute sovereignty

³⁶ Danilo Zolo, who shares much of Schmitt’s thesis on Just War, admits that “In *Der Nomos der Erde* Schmitt does not cover the years after World War I. Although the tragedy of World War II looms in the back of his mind, Schmitt never condemns the atrocious crimes carried out by the Nazis at home and internationally”. In D. Zolo, *La profezia della guerra globale*, preface to Schmitt, *Il concetto discriminatorio di guerra* (Rome-Bari: Laterza, 2008), XX.

of the states that gave this “tormented continent” the longest lasting period of peace since the times of the emperor Augustus. It was this development that the subscribers to the 1941 Ventotene Manifesto had hoped for:

The absolute sovereignty of these national states has led to the desire of each to dominate over the others, since they feel threatened by their strength, and each nation feels the need for increasingly vast territories as part of their “living space” to guarantee their right to free movement and self-sufficiency, without needing to rely on others. The only way to placate this desire for domination is through the hegemony of the strongest state over all the other subordinate nations. [...] The most pressing problem, without whose solution progress is merely an illusion, is the definitive abolition of the division of Europe into national, sovereign states.³⁷

And it is precisely the return of the sovereignty of the States, now under the name of “sovereignism”, which is leading to the possible dissolution of the European Union. We don’t know if Schmitt would have looked upon this caricature of his glorious *jus publicum europaeum*.

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³⁷A. Spinelli, E. Rossi, E. Colorni, U. Hirschmann, *Manifesto for a Free and United Europe*, also known as *The Ventotene Manifesto*, 1941 (1944). Disponivel in: https://www.cvce.eu/content/publication/1997/10/13/316aa96c-e7ff-4b9e-b43a-958e96afbecc/publishable_en.pdf

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