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'Iustitiam non includo': Carl Schmitt, Hugo Grotius and the *Ius Publicum Europaeum*

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ABSTRACT

Through a discussion of Hugo Grotius' conception of just war, this essay shows that within his critique of liberalism, Schmitt clashed with the very intellectual tradition he claimed to represent. Both historically and philosophically Schmitt's concept of the *Ius Publicum Europaeum* was a mirage. Indeed, his concept of the political was a rejection of the moral and civil philosophy that sees politics as the world of active citizens and commonwealths arguing with each other about fundamental questions of justice and equity.

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'Grotius had a strong, general pathos for justice, but no juridical and scientific awareness of the problem'. Carl Schmitt did not have much time for the work of Hugo Grotius. Whilst fully recognising Grotius's 'irrepressible popularity', Schmitt's verdict in *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* is, as usual, strong and straightforward. Grotius 'lacked the clear objectivity of a pragmatic jurist'.¹ In many ways these remarks are the culmination of a life-long, on and off and rather troublesome encounter between the German intellectual, so often seen as 'the Crown Jurist of the Third Reich' and the early modern Dutch Humanist, so often seen, especially thanks to the enduring fame of *De Iure Belli ac Pacis*, first published in 1625, as one of the founding fathers of international law and modern natural law theory.

In fact as young Carl Schmitt took up the study of law, first in Berlin and then, with more success and pleasure in Munich and Strasbourg, Grotius was going through one of his many revivals. In 1913 the Peace Palace was opened in The Hague. It was built with the financial support of Andrew Carnegie, whose Endowment for International Peace also financed the 22-volume series *Classics of International Law*, edited by James Brown Scott. Grotius' *De Iure Belli ac Pacis* was the third volume to be published in the series, featuring both the Latin 1646 edition and a new English

translation.² Scott, who wrote the introduction to the new editions and who later, in 1925, reappraised *De Iure Belli ac Pacis* as 'the work of a lawyer, statesman and theologian',³ was one of Schmitt's targets in *Nomos of the Earth*, first published in 1950. In those very years other scholars, most notably Hersch Lauterpacht, took up what was called 'The Grotian Tradition in International Law', presenting Grotius as the advocate of 'the fundamental rights and freedoms of the individual' and connecting him with Locke and the 'liberal revolutions' of the eighteenth century⁴—in short with the kind of liberalism Schmitt so thoroughly abhorred.

At the same time, like Scott and Lauterpacht, Schmitt was keen to connect his own work with the 'classics of international law'. In *Nomos of the Earth*, as indeed in all of his works, Schmitt indulged in parading his erudition and historical knowledge. In a sense *Nomos of the Earth* is a mere final expression of Schmitt's historical reading, taking us from the times of the Hittites to 1950, the year of

³ J. B. Scott, 'Grotius' *De Iure Belli ac Pacis* Libri tres: The Work of a Lawyer, Statesman and Theologian', *American Journal of International Law*, 19 (1925), 461–8. For a recent study of Scott's work see C. R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (Dordrecht, 1998).

⁴ See H. Lauterpacht, 'The Grotian Tradition in International Law', in: *International Law, being the collected paper of Hersch Lauterpacht*, ed. E. Lauterpacht, vol. 2 (Cambridge, 1975), 307–65. On the Grotian tradition, carried forward in particular by Martin Wight and Hedley Bull, see for recent overviews *Hugo Grotius and International Relations*, ed. H. Bull, B. Kingsbury, A. Roberts (Oxford, 1990); A. C. Cutler, 'The "Grotian tradition" in international relations', *Review of International Studies*, 17 (1991), 41–65; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, 2002); E. Keene, 'Images of Grotius', in: *Classical Theory in International Relations*, ed. B. Jahn (Cambridge, 2006), 233–52 and M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge, 2001), especially 353–412.

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¹ C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin, [1950] 1997), 106 and 133; for the English translation see C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York, 2003), 135 and 159/1560.

² H. Grotius, *De iure belli ac pacis libri tres*, reproduction of the Edition of 1646 (Washington, DC, 1913) and *On the Law of War and Peace Three Books*, introduction by J. B. Scott, trans. by F. W. Kelsey Washington (Washington, DC, 1913).

the book's publication. In his show of erudition Schmitt is keen to display his engagement not only with Bodin and Hobbes, but also with Ayala, Gentili, Pufendorf, with Hegel and Rousseau—and, albeit only in a footnote with Shakespeare.⁵ The footnote was hardly coincidental. Six years later, in 1956, Schmitt published *Hamlet oder Hekuba*, reading *Hamlet* as representing a world, as Victoria Kahn has put it, 'in which heroism and tragedy are still possible'.⁶ Perhaps there was, for Schmitt's taste, not enough room for heroism and tragedy in Grotius. Whilst Schmitt treated most of his sources and classical predecessors with respect and at least a certain sense of historical sensitivity, in *Nomos of the Earth* Grotius features mainly as source of irritation. At crucial points, most notably in the discussion of the problem of just war, 'Grotius' line of argument,' is for Schmitt, 'in all important respects . . . unsteady and uncertain'. As this paper argues, the relationship between war and justice is central to Schmitt's reading of Grotius, indeed it is central to their fundamental incompatibility.

Both *Nomos of the Earth* and *Hamlet* can be read as attempts to come to terms with the tragedy that had befallen Europe, Germany and, as Schmitt saw it, himself. For a while Schmitt had been 'the crown jurist' of Nazi Germany. As Raphael Gross and Jan Werner Müller have recently argued in two seminal studies,⁷ starting in the 1920s Schmitt formulated what was perhaps the most intelligent version of Nazi ideology, steeped, from the very beginning, in 'intense' and 'extreme' anti-Semitism. Whilst he lost his leading role as 'crown jurist' in factional Nazi-strife in 1936, Schmitt remained close the regime. In 1943 and 1944 he still toured Europe, lecturing that classical traditions of European jurisprudence were under powerful Anglo-American threat. Schmitt's main pieces of the war years included his 1943–1944 publications, 'Strukturwandel des Internationalen Rechts' and 'Die Lage der europäischen Rechtswissenschaft', translated, catching Schmitt's main message, as 'The Plight of European Jurisprudence'.⁸ After the end of the war Schmitt was arrested, first, very briefly, by the Red Army, and then in 1946 and 1947 by the Americans. Schmitt was interrogated in the framework of the Nuremberg trials by Robert Kempner.⁹ After his release he returned to his native village in the Sauerland. Having lost his Berlin Chair Schmitt became the professor from Plettenberg. As is well known, after the war Schmitt continued to be influential, not only amongst his former colleagues and students, but for all those who, like Schmitt himself, were and are critical of liberal conceptions of politics, of what Žižek has called 'liberal-democratic formalism'.¹⁰ Of course Žižek was not the only contemporary theorist to be tempted by Schmitt's insistence on existential and intense antagonism as the essence of politics. The

list is long, going from Foucault, to Derrida, to Mouffe, to Koselleck—to end with a historian, who throughout his life engaged with Schmitt's concept of 'the political'.¹¹

From Schmitt's perspective *Nomos of the Earth* was his most important post-war attempt to woo his readers and to attract them to his vision of politics and law.¹² In the book Schmitt takes up and extends the argument he started to develop during the war. Schmitt claims that a new world order, based on American supremacy, was in the process of replacing the 'European era' in international relations and politics. A new *Nomos*, that is a new American paradigm of territorial, indeed spatial, political and legal order was casting aside Europe's sense of order, which, as Schmitt saw it, had been at the core European order, power and identity since the 17th century. In terms of international law new American and liberal forms of 'moralism', full of talk of human rights and international justice, were setting aside the old European *Nomos* as embodied by the *Ius Publicum Europaeum*, by European public law, personified by the 1648 Peace Treaty of Westphalia.

Schmitt had already expressed his great disdain for America's aspirations in his 1943 reflection on what he called the *Strukturwandel*, the structural and fundamental transformation of international law. Here he ridiculed and attacked the American policy to move away from the *Ius Publicum Europaeum*, to see the war as a 'Straf- und Sühneaktion' and to treat sovereign adversaries as 'criminals'. After the war Schmitt was even keener to underline the merits of *Ius Publicum Europaeum*. One of his key arguments was that whilst the new American order was once again, as the *respublica christiana* had done in the Middle Ages, analysing, judging, legitimating, indeed waging war on moral grounds, for three hundred years the *Ius Publicum Europaeum* had been able to desacralize and therefore to limit warfare. Schmitt connected the rise of the *Ius Publicum Europaeum* and the *Nomos* it embodied with Europe's discovery and, more importantly, scratch for the conquest of the new world and with the growing recognition at the end of the 16th century, due to the work of *politiques* such as Jean Bodin, that ending religious warfare was imperative for the mere survival of Europe.

Schmitt fully recognised Hugo Grotius as one of the founding fathers of this *Ius Publicum Europaeum*, together with Francesco de Vitoria and figures such Balthazar Ayala, Alberico Gentili and Richard Zouch, whose works, were in fact all part of Scott's series of *Classics of International Law*. As Schmitt wrote – specifically referring to Vitoria, Gentili and Grotius – in his personal ruminations during the immediate aftermath of war, published in 1950 in a collection that featured the telling title *Ex Captivate Salus*: 'I know them, their work, their life, their fate, and the history of their fame until this very day. I love them. For sure they belong to our Camp. But they do not belong to my living room'.¹³ Schmitt felt much more at home with Jean Bodin and Thomas Hobbes—they were his 'friends' and nobody could stop him he writes, 'to pray for their soul'.¹⁴ In these moments of self-reflection and self-fashioning Schmitt saw himself as standing directly in the line of his illustrious friends. He presented himself as the 'last conscious representative' of the *Ius Publicum Europaeum*, 'its last theorist and scholar in an existential sense'.¹⁵ Seeing himself as scholar was of vital importance to Schmitt—indeed

⁵ Schmitt, *Nomos der Erde*, 116–7, footnote 2.

⁶ V. Kahn, 'Hamlet or Hecuba: Carl Schmitt's Decision', *Representations*, 83 (2003), 82.

⁷ R. Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory*, (Madison, 2007) and J.-W. Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, (New Haven, 2003). Other key recent studies of Schmitt's legal and political thought include J. P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology*, (Cambridge, 1997); W. E. Scheuerman, *Carl Schmitt: The End of Law*, (Lanham, 1999). For a critical review of recent Schmitt-studies see P. Caldwell, 'Controversies over Carl Schmitt: A Review of Recent Literature', *Journal of Modern History*, 77 (2005), 357–87 and A. Norris, 'A Mine that explodes silently: Carl Schmitt in Weimar and After', *Political Theory*, 33 (2005), 887–98. A new biography is Reinhard Mehring's impressive study *Carl Schmitt: Aufstieg und Fall* (Munich, 2009).

⁸ C. Schmitt, 'The Plight of European Jurisprudence', trans. G. L. Ulmen, *Telos*, 83 (1990), 35–70.

⁹ See C. Schmitt, *Antworten in Nürnberg*, ed. H. Quaritsch (Berlin, 2000), a small part of which is translated in *Telos*, 139 (2007), 35–44. See the commentary of Joseph W. Bendersky, 'Carl Schmitt's Path to Nuremberg: A Sixty-Year Reassessment', *Telos*, 139 (2007), 6–34.

¹⁰ S. Žižek, 'Carl Schmitt in the Age of Post Politics', in: *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (London, 1999), 35.

¹¹ For Koselleck and Schmitt see N. Olsen, 'Beyond Utopianism and Relativism: History in the Plural in the Work of Reinhardt Koselleck' (European University Institute Ph.D. thesis, 2009).

¹² A collection of recent reappraisals of the importance of Schmitt's *Nomos of the Earth* is *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order*, ed. L. Odysseos, F. Petito (London, 2007).

¹³ C. Schmitt, *Ex Captivate Salus: Erfahrungen der Zeit 1945/47*, 2nd ed. (Berlin, 2002), 63.

¹⁴ Schmitt, *Ex Captivate Salus*, 67.

¹⁵ Schmitt, *Ex Captivate Salus*, 75.

he saw himself as unique. In the summer of 1945 Schmitt claimed to be 'the only jurist, the only teacher of the law on this earth, who has grasped and experienced the problem of just war, including alas of civil war, in all its depth and fullness'.¹⁶

Schmitt's self-fashioning as the last representative of the *Ius Publicum Europaeum* made it imperative to engage with the founding fathers, perhaps most notably Vitoria and Grotius. As far as Vitoria was concerned this entailed a polite dispute and powerful disagreement with the views of Scott, who had spent his entire career pleading for a return of international law to the roots of Vitoria's Neo-Scholasticism, to the tradition of Aristotle, Augustine and Thomas Aquinas. Scott favoured a revival of Vitoria's reflections on just war. From Schmitt's perspective this meant that 'the Spanish Dominican's arguments' were now being 'inserted, in an even more astonishing manner, into a system of thought completely foreign to him'.¹⁷ Due to what Schmitt called 'Scott's zeal ... the instrumentalization of Vitoria's arguments ... has reached the point of political myth-making'. Schmitt reminded his readers of what he called 'the general antithesis between medieval Christian and modern civilized beliefs' and insisted that 'despite all his neutrality, objectivity, and humanity', as far as 'the relation between theological and juridical thinking' and the questions of just war were concerned, Vitoria, 'the great theologian', 'belongs to the Christian Middle Ages, rather than to modern international law amongst European States'.¹⁸

For the *Ius Publicum Europaeum* to arise, the break between theology and law was vital. Schmitt warmly endorses the 'battle cry', the 'Kampfruf' of 'a true jurist' Alberico Gentili, *Silete theologi in munere alieno!*, calling on theologians to 'remain silent within the office of others' and leave matters of law to the jurists, to the likes of Gentili, Bodin, Grotius and of course, Schmitt himself. As Schmitt saw it, the key achievement of the early modern jurists had been to dissociate theology from law, and, almost by implication matters of war from debates on Christian justice. Schmitt highlighted 'a doppelte Trennung', a dual line of division between medieval and modern thought on international relations. First, there was 'the definitive separation of moral–theological from juridical–political arguments' and second, there was 'the equally important' move away from debates on the just causes of war to the recognition of war as an expression of conflict between sovereign and, in terms of their legal position, equal states, who, being at war, recognised each other as *justus hostis*, as rightful enemy. In Schmitt's view this double seminal move not only had helped to abolish civil and religious war in Europe, it had introduced 'a non-discriminatory concept of (European) war', now seen as a 'duel' between equals, namely the sovereign states of Europe. In doing so, last but not least, the *Ius Publicum Europaeum* had contributed to the 'humanization' of war 'by conceptualizing the enemy as *justus hostis*', as a public enemy, not as a private foe with whom one disagreed on moral or religious grounds.¹⁹

For Schmitt justice and war are worlds apart, as he had emphasised as early as 1927, in *Der Begriff des Politischen*, the famous treatise on 'the concept of the political'. In fact Schmitt juxtaposed war and justice with an explicit quote from Grotius: 'Iustitiam in definitione (sc. belli) non includo—I do not include justice in the definition of war'.²⁰ The quote, often repeated in Schmitt's later writings, is a startling and wilful distortion—also by Schmitt's standards of scholarship. As Grotius explains in Book I, Chapter 1, Section II of *De Iure Belli ac Pacis*, where he defines war

and explores the etymology of the word, 'I do not include justice in my definition, because in this *disputatione* we are exploring this very subject, whether there can be any just war and what a just war would be'. 'Moreover', Grotius goes on to add, 'what is examined, must be distinguished from the perspective from which it is examined'.²¹ As Schmitt saw it in *Nomos of the Earth*, at this point Grotius's 'general pathos for justice' made the Dutch jurist muddle the waters. In Schmitt's view Grotius 'confronted many practical questions without a thoroughly considered system and without clear concepts'.²²

Whilst questions of justice carry Grotius' entire analysis of *The Laws of War and Peace*, one of Schmitt's principal aims was to connect war and politics in such a way that questions of justice were to be left fully out of the equation. Questions of 'good' and 'evil' belong to the moral realm, not to the political. Schmitt argues that as a concept 'the political' hinges on making the distinction between 'friend' and 'enemy' and on doing so as group, or rather as state, at your own will. As a key mark of sovereignty the political choice and declaration that a distinct group is the 'enemy' should not be seen in moral, but, in one of Schmitt's favourite words, in 'existential' terms. As Schmitt puts it himself in one of his more notorious passages: 'The political enemy need not be morally evil ... He is simply the other, the stranger; and it is sufficient for his nature that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible'.²³ The terms 'enemy', 'the other', 'intense', 'extreme' and 'conflicts' form the very core of Schmitt's political vocabulary. Politics is the sphere of human life, where we as a group declare another group to be our 'enemy' and where, if need be, we are willing, again as group, to bring our intense antagonism with the other to the 'extreme', that is to 'war', to *Krieg*. War is absolutely central to Schmitt's 'concept of the political'. Whilst he urges his readers to refrain from the view that 'the political signifies nothing but devastating war', Schmitt insists that 'war follows from enmity; war is the existential negation of the enemy; it is the most extreme consequence of enmity'.²⁴ At this point *Nomos of the Earth* linked up with *The Concept of the Political*. *Nomos* spelled out the implications Schmitt's 'concept of the political' had for matters of war and peace in particular and for international relations in general.

Reading *De Iure Belli ac Pacis* Schmitt was therefore deeply irritated to see that Grotius did not disentangle war and justice at all and that therefore war could never be merely part of 'the concept of the political', as Schmitt tried to develop it. Whilst Schmitt has often been seen as a critic of liberal conceptions of politics, the Schmittian conception of 'the political' meant an even more dramatic departure of Renaissance visions of politics, and of Grotius' concept of 'the civil'. Ever since the writings of Brunetto Latini in the 1260s and Ambrogio Lorenzetti's frescoes of 'good government' in Siena from the 1330s Renaissance humanists saw politics as that part of practical philosophy, the most noble activity of man, that taught us how to govern our commonwealth according to reason and justice. As Lorenzetti represented this view in Siena, politics is the art of good government, based on reason, indeed on wisdom, and on the primacy of justice, for the common good of the commonwealth and its citizens, who at best should hold the ropes of government themselves in good concord

²¹ H. Grotius, *De Iure Belli ac Pacis*, ed. B. J. A. de Kanter-Van Hettinga Tromp (Leiden, 1939; repr. Aalen, 1993), Book I, Chapter 1, Section II, p. 30: 'Iustitiam in definitione non includo, quia hoc ipsum in hac disputatione quaerimus, sitne aliquod bellum iustum, et quod bellum iustum sit. Distingui autem debet id quod quaeritur an eo de quo quaeritur'.

²² Schmitt, *Nomos der Erde*, 106; *Nomos of the Earth*, 134.

²³ Schmitt, *Der Begriff des Politischen*, 27; Schmitt, *Concept of the Political*, 27.

²⁴ Schmitt, *Der Begriff des Politischen*, 33; Schmitt, *Concept of the Political*, 33.

¹⁶ Schmitt, *Ex Captivate Salus*, 12.

¹⁷ Schmitt, *Nomos der Erde*, 87; *Nomos of the Earth*, 117.

¹⁸ Schmitt, *Nomos der Erde*, 92; *Nomos of the Earth*, 121.

¹⁹ Koskenniemi, *The Gentle Civilizer of Nations*, 416.

²⁰ C. Schmitt, *Der Begriff des Politischen* (Berlin, [1932] 2002), 50, footnote 16; C. Schmitt, *The Concept of the Political* (Chicago, 1996), 49, footnote 20.

and with proper civic virtue. Not war but peace, sitting right at the centre of the fresco, is the hallmark of politics.²⁵

In the days of Hugo Grotius this conception was taken up by scholars who, from a variety of perspectives, were successful in institutionalising *Politica* as an academic discipline. Grotius had lots of praise for one of the founding fathers of the German school of Political Aristotelianism, Henning Arnisaeus. As late as 1639 he warmly recommended the writings of this 'very learned man' to his close friend and long-time ally in both politics and religion, the Remonstrant leader Johannes Uytenbogaert.²⁶ Grotius himself had bought Arnisaeus's treatise on political sovereignty, *De Maiestate*, as early as 1614. After his studies in Leiden in the 1590s, where Grotius was part of the select group of young scholars around Europe's leading humanist Joseph Justus Scaliger, he had quickly become the main political and intellectual confidante of the political leader of the young Dutch Republic, Johan van Oldenbarnevelt. On the most important political issues it was Grotius, who framed the language of the Dutch debates on law, politics and religion. In a sense Grotius was to Oldenbarnevelt what, later in the century, John Locke was to the Earl of Shaftesbury. He was Holland's leading republican intellectual.

By the time Grotius bought Arnisaeus's *De Maiestate* Holland was in deep political and religious trouble. Theological debates on issues such as the nature of conscience and the freedom of the will and the political question which authority, ecclesiastical or secular, was entitled to settle such issues were bringing the Dutch Republic to the brink of ruin. For Grotius these political and religious conflicts ended in tragedy. His arrest in 1618 and imprisonment in the Fortress of Loevestein, marked a dramatic fall from political power. In the end Holland's humanist 'miracle' and seminal republican philosopher had to flee from his prison in a book chest and go into exile. Holland's leading republican moved to Paris, living under regal protection, with a – highly unreliable – royal pension.²⁷ But in exile the intellectual triumph started. In the 1620s Grotius published his most influential works, first *De Iure Belli ac Pacis* – dedicated to the French monarch, Louis XIII, who paid the unreliable pension – and then in 1627 *The Truth of the Christian Religion (De Veritate Religionis Christianae)*,²⁸ a major bestseller across Europe, offering a systematic analysis of the fundamentals of Christianity and of its relations with Judaism and Islam.

None of Grotius's main works had *Politica* as subject. All he had to offer directly to the new discipline were a set of friendly and rather limited comments to the political aphorisms of his friend Tomasso di Campanella, published in 1652, seven years after Grotius' death.²⁹ Nor was Grotius, as Schmitt put it, an 'objective pragmatic jurist'. Probably Grotius's main practical contribution to the discipline of law was his *Introduction to the Jurisprudence of Holland*, a highly successful attempt to create a vocabulary of legal terms in the Dutch language, derived from Roman Law. Like Schmitt, many other 19th- and 20th-century readers have appreciated *De Iure Belli ac Pacis* mainly as a contribution to the rise of international law, but the aspiration of the book is much grander. To begin with, there is the title. Whilst there were many studies published 'de iure belli', on the right or law of war, Grotius'

title announces that he is not only going to address the *ius* of war but also of peace. Moreover, as Grotius insists right at the beginning, '*ius* means nothing else but what is just, and this in a more negative than assertive sense, so that *ius* shall be what is not unjust and indeed the unjust clashes with the nature of the society of those of us who use reason'.³⁰ Those readers familiar with Roman Law – and Carl Schmitt was one of them – were reminded of the very first definition of *ius* in the Digest, in the famous title *De Iustitia et Iure*, where Ulpian, following Celsus, states that '*ius*' is the '*ars boni et aequi*', 'the art of goodness and equity'.³¹ *Ius* and *Iustitia* are at the heart of all issues concerning war and peace, indeed of all civil philosophy. As Grotius insisted ever since his very first essay from 1603 to 1604 on the topic, *De Iure Praedae*, the problems of war and peace cannot be solved 'solely on the basis of written laws'. For a proper inquiry a turn to the *ratio naturae*, 'to the ordered plan of nature' is needed. We must turn to the 'jurists of antiquity', who, 'refer the art of civil government back to the very fount of nature'.³² If we want to discuss war and peace, we must depart 'from the inmost heart of philosophy'. Hence, following Grotius, the engagement with legal and political issues has to be embedded not just in the European traditions of the study of Roman Law, but also, indeed principally in moral philosophy in its full humanist sense. *Au fond* the ambition of *De Iure Belli ac Pacis* is to provide a new system of moral philosophy that provides the foundation for its daughters, for jurisprudence and politics. The fundamental aim of Grotius is to formulate a civil philosophy—its key concept was 'the civil'.³³

In doing so, Grotius was seen by many of his later readers, as initiating a tradition that lasted deep into the eighteenth century. When, so to speak halfway between Grotius and Schmitt, in 1769, James Madison started his studies at the College of New Jersey, now Princeton University, the lectures on moral philosophy by the college president, John Witherspoon, were steeped in the tradition of European civil and moral philosophy, that was seen to start with Grotius and Pufendorf and to culminate in the Scottish Enlightenment, in the works of Francis Hutcheson, Adam Ferguson, Adam Smith and David Hume. Modelled on Hutcheson's *System of Moral Philosophy*, itself deeply indebted to Grotius, Witherspoon taught his pupils the key topics of this tradition, its debates on human nature, the relationship between man's rights, duties and virtues, the laws of nature and the *ius gentium*, the law of peoples, the questions concerning human sociability, the principles of the household, and the formation of civil society.³⁴

Witherspoon still saw politics as part of moral philosophy. The reading list for the politics part of his course included the works of Locke, Hobbes, Pufendorf and Grotius.³⁵ *De Iure Belli ac Pacis*,

²⁵ See M. Viroli, *From Politics to Reason of State. The Acquisition and Transformation of the Language of Politics, 1250–1600* (Cambridge, 1992) and Q. Skinner, *Visions of Politics*, vol. 2, *Renaissance Virtues* (Cambridge, 2002); chapters 3 and 4 focus on Lorenzetti's frescoes.

²⁶ *Briefwisseling van Hugo Grotius*, ed. B. L. Meulenbroek, vol. 10, 1639 (The Hague, 1976), 788.

²⁷ For the story see M. van Gelderen, 'Slot Loevestein. Hugo de Groot ontsnapt in een boekenkist', in: *Plaatsen van herinnering. Nederland in de zeventiende en achttiende eeuw*, ed. Maarten Prak (Amsterdam, 2006), 147–57.

²⁸ H. Grotius, *The Truth of the Christian Religion*, ed. J. Le Clerc, trans. J. Clarke (London, 1800).

²⁹ H. Grotius, *Argumenti Theologici, Juridici, Politici* (Amsterdam, 1652).

³⁰ Grotius, *De Iure Belli ac Pacis*, Book I, Chapter I, Section 3, p. 31: 'Nam ius hic nihil aliud quam quod iustum est significant: idque negante magis sensu quam aitante, ut ius sit quod iniustum non est. Est autem iniustum quod naturae societatis ratione utnetium repugnant.'

³¹ Digest.

³² H. Grotius, *De Iure Praedae Commentarius*, ed. H. G. Hamaker (The Hague, 1868), 6, from now on abbreviated as DIP. I will also give references to the English translation *De Iure Praedae Commentarius. Commentary on the Law of Prize and Booty*, vol. 1, ed. G. L. Williams, W. H. Zeyde (Oxford, 1950), 7.

³³ See A. Brett, 'Natural right and Civil Community: the Civil Philosophy of Hugo Grotius', *Historical Journal*, 45 (2002), 31–51 and for my own view M. van Gelderen, 'The Low Countries: The Quest for Concord,' in: *European Political Thought 1450–1700: Religion, Law and Philosophy*, ed. G. Burgess, H. Lloyd, S. Hodson (New Haven, 2007), 376–415.

³⁴ On Witherspoon see J. H. Morrison, *John Witherspoon and the Founding of the American Republic* (South Bend, 2005); *Scotland and America in the Age of Enlightenment*, ed. R. B. Sher, J. R. Smitten (Princeton, 1990); M. A. Noll, *Princeton and the Republic, 1768–1822* (Princeton, 1989).

³⁵ See J. Witherspoon, *Lectures on Moral Philosophy* (Philadelphia, 1822), 173. See also D. F. Thomson, 'The Education of a Founding Father: the Reading List for John Witherspoon's Course in Political Theory, as taken by James Madison', *Political Theory*, 4 (1976), 523–9.

available to Madison's generation in the 1738 English translation, *The Rights of War and Peace*, marked the chronological beginning of this tradition of civil philosophy. In the eyes of these eighteenth-century readers, Grotius was, in the words of his main editor Jean Barbeyrac, 'the first who broke the Ice', who freed himself from the prison of medieval scholastic and 'Peripatetic Philosophy'. Grotius moved towards a new 'Science of Morality', based on 'the Knowledge of the true fundamental Principles of the Law of Nature' and the 'right method' of this new science. Whilst the purpose of *De Iure Belli ac Pacis* was to settle the problems laws of war and peace, Grotius moved to do so, as Barbeyrac put it in 1729, by taking 'into his Work the principal Subject Matters of Natural Jurisprudence and Politicks'. This was the starting point for the new 'Science of Morality'.³⁶

Hence, when in the 1920s Schmitt started to argue that the specific moment of the political was the one of a sovereign state choosing its friends and enemies, he was not only criticising liberalism and dismissing, in *Nomos of the Earth*, the Anglo-American revival, as exemplified by Carnegie and Scott, of notions of just war and justice in international relations. Schmitt was also discarding the tradition of civil philosophy that, starting with Grotius has taken jurisprudence and politics as part of a science of morality, as civil philosophy. On all key points Schmitt's concept of the political clashed with 'the civil' in the tradition—from Grotius to Madison. First, whilst for Schmitt the sovereign state was the principal actor in politics, Grotian civil philosophy put full emphasis on the commonwealth as a civic creation. Having returned to the 'very fount of nature' Grotius starts his analysis from the key insight that 'true and divinely inspired self-love' is the basic 'principle of the whole natural order'. 'All things in nature' Grotius writes with a reference to Cicero, 'are tenderly regardful of self, and seek their own happiness and security'.³⁷ The primacy of self-preservation, *amor sui* and friendship, *amicitia*, are the main characteristics of individual human beings in the state of natural liberty. Here each of us is 'free' and therefore sovereign, each of us is *sui iuris*, fully entitled to govern her- or himself. Liberty means sovereignty, as Grotius puts it, and that quintessentially means self-government.

As Grotius insists, this state of natural self-government is not a state without justice. Whilst the Fall may have darkly beclouded our 'rational faculty', we are still able, Grotius argues, to recognise that 'the regard of the other' leads to, what might be called, two basic rules of sociability and justice: no one should 'inflict injury upon the other' and no one should 'seize possession of that which others have taken into possession'.³⁸ In elucidating these rules Grotius makes a number of key moves. First, he emphasises man's natural sense of justice, his knowledge of what it means to 'inflict injury'. Second, Grotius highlights man's natural capacity of the rational recognition of the other, and of what is good and evil for the other. Thus, implicitly, Grotius endows man with the faculty of what Adam Smith would later call moral sentiments, enabling us to imagine the situation of the other, 'by conceiving', in the words of Smith, 'what we should feel in the like situation', to 'imagine' and to assess rationally whether the other suffers from wanton injury.³⁹ Along these lines Grotius moves to a conception of human sociability that is based on the fundamental recognition of the other. The moment of recognition of the 'other', not as Schmittian friend or enemy, but as fellow human being marks the foundation of justice.

As Grotius goes on to explain, for reasons of demographic growth, better protection and greater economic convenience, in their state of natural liberty free individuals start to create smaller societies, which are 'formed by general consent for the sake of the common good'.⁴⁰ The *respublica* refers to a multitude of private persons, who have come together to increase their protection through mutual aid and to assist each other in acquiring the necessities of life. At their own free will these individuals unite by way of civil contract – Grotius uses the term *foedus* – in a 'unified and permanent body' with its own set of laws. From *singuli* they turn themselves into *cives*, citizens, and as such they make, respect and obey civil law. The laws of the commonwealth emanate from its will as a unified body based on consent. Grotius argues that 'civil power, manifesting itself in laws and judgements, resides primarily and essentially in the bosom of the commonwealth itself'.⁴¹ For Grotius city and citizenship are civic creations—more precisely they are the creations of individuals, who on the basis of considerations of utility and the recognition of the likeness of the other decide to create the commonwealth.

Politics belongs to 'the civil', indeed to the piazza. It is one of the fundamentals of the Grotian civil philosophy to see the commonwealth as a civic creation of free and rational human beings who choose to come together and who make the laws that bind them. There is great belief here in the powers of human freedom, human agency and human rationality; there is great emphasis on moral duty, on *officium* and on civic virtue. The entry into civil life marks the beginning of politics—the beginning of a moment that, unless we leave the piazza, lasts as long as life itself. Historically, this idea of the commonwealth was competing with different proposals for human association and union, including the model of what is called, with and since Hobbes, the state.⁴² The Hobbesian state, where a powerful, indeed absolute sovereign governs his subjects, was competing with the ideal of a free commonwealth, constituted by free persons, and governed by citizens. It comes as no surprise then that Schmitt prayed for Hobbes and Bodin—not for Grotius. Schmitt made much of Bodin's notion of absolute sovereignty and of Hobbes' concept of the state. Schmitt's engagement with Hobbes was complex and troublesome. Whilst Schmitt was enamoured with Hobbes's vision of absolute sovereignty and the kind of decisionism Schmitt felt it entailed, he was – and as Leo Strauss spelled out to him in some detail, he should be – troubled by Hobbes's view of the state as an 'artificial person', whose principal aim was 'Peace and Common Defence', as Hobbes put it so explicitly in his definition of the state, the commonwealth, at the end of Chapter 18 of *Leviathan*.⁴³

Turning to international relations, the problem of Schmitt's claim that both Hobbes and Bodin derived international law from what he called *Staatsrecht*,⁴⁴ is that none of the two had much to say about international law. All believers of what is usually called Hobbesian realism in international relations have to grapple with the problem that Hobbes' sole remark on the matter, in Chapter 21 of *Leviathan*, where he suggests that the freedom of states vis-à-vis each other is that of natural liberty, comes as a 'sarcastic dismissal' of the celebration of the 'free commonwealth', not as any

⁴⁰ Grotius, DIP, 19/20; Commentary, 20.

⁴¹ Grotius, DIP, 25; Commentary, 25.

⁴² M. van Gelderen, 'The State and its Rivals in early-modern Europe', in: *States & Citizens. History, Theory, Prospects*, ed. Q. Skinner, B. Stráth (Cambridge, 2003), 79–96.

⁴³ T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge, 1991), chapter 18, p. 121. For a critical and powerful discussion of Schmitt and Hobbes (and Shakespeare) see V. Kahn, 'Hamlet or Hecuba: Carl Schmitt's Decision', *Representations*, 83 (Summer 2003), 67–96. Other recent commentaries include J. W. Bendersky, 'Schmitt and Hobbes', *Telos*, 109 (1996), 122–9 and S. Holmes, 'Does Hobbes have a concept of the Enemy?', *Critical Review of International Social and Political Philosophy*, 13 (2010), 371–89—thanks to Matthew Hoye for this reference.

⁴⁴ See Schmitt, *Ex Captivate Salus*, 63.

³⁶ J. Barbeyrac, *A Historical and Critical Account of the Science of Morality* (London, 1729), 79; published in England as 'prefatory discourse' to the translation of Barbeyrac's edition of Pufendorf's *Of the Law of Nature and Nations*.

³⁷ Grotius, DIP, 9; Commentary, 9.

³⁸ Grotius, DIP, 13–4; Commentary, 13.

³⁹ See A. Smith, *A Theory of Moral Sentiments*, ed. D. D. Raphael, A. L. Macfie, Glasgow edition (Indianapolis, 1984), 9–10.

thoughtful attempt to set out the foundations of international relations.⁴⁵

Of course Grotius had much more to say about international affairs and the *ius gentium*—he was widely seen to be the moral father of the 1648 Peace of Westphalia and the European peace it entailed. In Grotius' view the commonwealth is the basic unit of international politics. The opening line of *De Iure Belli ac Pacis* refers to its subject both in terms of the concept of *patria*, of fatherland, and then speaks about the laws between peoples. The Grotian vision of international relations is not that of sovereign states which can act at will but that of an assemblage of commonwealths, which live – and are governed – by the main principles of moral philosophy as elucidated in *De Iure Belli ac Pacis*. If they do so properly the world will be at peace; war will be limited to the few cases where it is in accordance with justice.

As Grotius insists – to Schmitt's horror – justice cuts across borders, governing not only the international relations between commonwealths, but also between citizens, merchants, sailors, refugees and exiles. A most illuminating example of this line of thought is the pioneering analysis of the rights of refugees and exiles. As so often, Grotius returns to the works of Iberian Neo-Scholasticism to tackle the issue. Building on the work of Francesco de Vitoria, Domingo de Soto, Fernando Vázquez and Diego Covarruvias, Grotius argues that the right of life is the cornerstone, the rock from which every reflection on human rights should grow. Life '*as such*' is a precondition of being able to have and to enjoy any right or duty whatsoever. To grant human beings the right to live means, first and foremost, to acknowledge their right to try and continue to live and to enable them to find the means and ways to preserve and sustain themselves, especially in cases of necessity, of wear and starvation.

In a striking move Grotius takes one of his main examples from trade, from seafaring practices. 'At Sea', he writes, 'when there is a Scarcity of Provisions', the goods which 'each Man has reserved in store, ought to be produced for common Use'. This seafaring rule is not introduced by Civil Law. It only explains, Grotius insists, 'by such Regulations, the Maxims of natural Equity, and enforces them by its authority.' Maxims of natural equity override 'all Laws of human Institution'. One of these maxims is that whoever shall take from another what is absolutely necessary for the preservation of

his own Life, is not from thence to be accounted guilty of Theft'.⁴⁶ Whilst Grotius lists a number of precautions, the morale is clear. If humans leave their land out of necessity or with the explicit purpose of finding a livelihood, it is their natural right to do so and no commonwealth can deny entrance to those who flee from starvation. In this sense there is a human right of immigration, applicable to all whose lives are at stake. Indeed there is a right to take from the rich in case of necessity. Grotius endorses the natural precept of, as he calls them, the 'Theologians, of St. Thomas, of Soto and Covarruvias' that 'whoever in case of necessity takes from others what is necessary for the preservation of his or her life, does not commit theft'.⁴⁶ Finally, along similar lines, in a famous and much discussed passage Grotius argues that we should welcome 'those who – like he himself, MvG – have been forced out' of their house, their city, their country'. We should grant these exiles the right to permanent residence amongst us,⁴⁷ on condition that they accept and endorse the laws of their new homeland and will refrain from any kind of action that might give rise to faction and discord.

The point is clear: 'Others' are not to be classified as friends or enemies but as fellow human beings who have moral rights and duties, who live '*de iure*'.

In short, there are worlds apart between the Schmittian 'concept of the political' and its highly idiosyncratic version of the *Ius Publicum Europaeum* as one where *au fond* the world is divided up into friends and enemies, who can fight or love at their sovereign will, and the civil philosophy, going from Grotius to Madison, that asks all citizens and commonwealths of this world to be 'civil', that is to argue and live with each other on the basis of the moral philosophy of natural jurisprudence. The point is not only to note that from a historical perspective Schmitt had fundamentally misunderstood the arguments of the founding fathers of the *Ius Publicum Europaeum*. It is to highlight that from a moral and political perspective Schmitt clashed with the very intellectual tradition he claimed to represent. Both historically and philosophically Schmitt's concept of the *Ius Publicum Europaeum* was a mirage. His concept of the political was a rejection of the moral and civil philosophy that sees politics as the world of active citizens and commonwealths arguing with each other about fundamental questions of justice and equity. For philosophy and life to be 'civil' it is imperative to have 'a general pathos for justice'.

⁴⁵ T. Hobbes, *Leviathan* (1651), ed. R. Tuck (Cambridge, 1991), chapter 21, 149; see Q. Skinner, 'Surveying the Foundations: a Retrospect and Assessment', in: *Rethinking the Foundations of Modern Political Thought*, ed. A. Brett, J. Tully (Cambridge, 2006), 250.

⁴⁶ Grotius, IBP, Book II, Chapter II, Par 6.

⁴⁷ Grotius, IBP, Liber II, Caput II, Par XVI, p. 201; see E. Tiessler-Marenda, *Einwanderung und Asyl bei Hugo Grotius* (Berlin, 2002).