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# Waging war and making peace

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**Title:**

*The construction of the modern state: between the law of war and imperialism*

**Abstract:**

The framing of war in the form of a legitimate right of the sovereign state was one of the structural elements of the construction of a common European identity, conceived as opposed to the rest of the world. In *the Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, Carl Schmitt shows indeed that the secularization of European states has gone hand in hand with the partitioning of the world around a "Eurocentric space order". The development of European public law brought an end to the European civil war by establishing a state monopoly on war and international relations, but also opened the non-European space to conquest. Considered an "Underworld" free of law, the space outside Europe is conceived as a lawless space and freely colonized by European powers. From the perspective of the *Jus publicum europaeum*, all land is either the territory of a European state or a virgin land to be freely occupied. In such a space, the law has no short, leaving room for conquest or plunder. While state sovereignty is the foundation of the European order, non-European territories are designed only as potential colonial territory. Drawing on the work of Carl Schmitt but also Hannah Arendt on imperialism, this contribution therefore proposes to see how the construction of the sovereign state with a monopoly on the right to wage war or peace, goes hand in hand with the development of an unlimited right of conquest over the rest of the world, which finds its culmination in the imperialism of the late 19th century with the Berlin Conference.

**Biography:**

Arthur Guezengar is Phd student in political philosophy in Grenoble Alpes university. His work focuses on Hannah Arendt's philosophy and the relationship between imperialism and totalitarianism.

## **Introduction**

Europe is a region of the world characterized both by the recognition of a common identity, in addition to that defined by Christianity or Catholicism, and by the existence of a multitude of local identities, strongly structured socially and politically, in conflict with each other. Since the fall of the Roman Empire, none of the great continental empires that may have emerged during European history has managed to maintain political unity in areas comparable to those of China or the United States, with the notable exception of Russia. Europe, and in particular its western part, has thus remained fragmented into a multitude of sovereign states, confronting each other without any of them succeeding in lastingly imposing their hegemony over the others. However, in parallel with this fragmentation of states within the European sphere, European nations have massively extended outside their metropolitan sphere, constituting ultra-marine empires previously unknown, to the point of achieving a state of quasi-domination over the whole world at the end of the 19th century. This dual movement, recognizing the sovereignty of the state within the European sphere while leading to endless expansion outside it, is a constitutive element of European identity and its relation to the world. European states have been built by recognizing both the sovereignty of other states over their own territory, and by considering the extra-metropolitan sphere as a virgin space, or at least not sovereign and legitimately liable to be conquered. Beginning at the beginning of the 16th century, with colonial expansion in America, this movement will culminate during the 19th century and the beginning of the 20th century, when the struggles of European nations will be manifested, and the continuing search for these same nations for their own colonial empire.

Drawing on both the work of Carl Schmitt but also of Hannah Arendt, we will therefore show that this double movement is linked to the European construction of the right to war as a sovereign right, from which the extra-metropolitan area considered on the contrary as an unregulated area and free of rights. The fall of the colonial empires following the outbreak of the two world wars and the independence movements, then leads to the exclusion of the right to war from the European sphere but also to the return of the just war paradigm, which had been sidelined by the birth of the nation state. Like Heidegger, the thought of Carl Schmitt remains eternally marked by his collaboration with the National Socialist regime. If he defended, before 1933, a conservative position and the establishment of a dictatorship of the executive capable of opposing both the Communists and the Nazis, he quickly approached the latter once they had arrived in power, and tries in particular to present himself as the official lawyer of the Third Reich. However, despite, or even because of, this compromise with the Nazi regime, Carl Schmitt remains an extremely interesting observer of the evolutions of its legal structure, and of its relations with geopolitical evolutions. Having had a particularly long academic career, Carl Schmitt was directly confronted with the political and legal developments of the 20th century. As one of the losers of World War II, his work takes a critical look at what he describes as the return of the just war paradigm following the emergence of the American superpower on the international stage. This position allows him to develop a retrospective analysis on the origins of modern law and the establishment of a European legal order based on the sovereignty of the State.



## 1. *A political dynamic of spatial annexation*

The interest of Carl Schmitt's work lies in his ability to analyze the close link that exists between political power and the legal structure. Contrary to the legal positivism defended by Kelsen, which makes law the foundation of political organization, which it thus contributes to shape but also to limit, Carl Schmitt perceives the legal order as being the expression of politics. This perspective therefore enables him to better highlight the evolutions and paradigm shifts between the different legal orders which govern, within a given space, the relationships between individuals and between institutions. For Carl Schmitt, the legal order does not exist by itself but is based on a political system which founds it. Law then appears as the manifestation of political will and not as the source of public action. This approach to the relationship between law and politics is reflected in the concept of "nomos", which Schmitt opposes to the concept of "us" drawn from Aristotelian metaphysics. The us is indeed presented as a universal concept, characterizing the whole of the human species. On the contrary, the nomos designates a spatially and temporally delimited reality<sup>1</sup> :

Schmitt soutient que tout ordre juridique est lié à un territoire particulier et qu'on ne saurait concevoir d'ordre juridique universel. [...] La loi n'est pensable que par référence au territoire qui exclut et divise : il n'y a pas de droit naturel, c'est-à-dire universel. Il n'est pas de vérité qui transcende l'opposition de l'ami et de l'ennemi.<sup>2</sup>

Carl Schmitt also endows the law with a telluric dimension: "The earth is therefore threefold linked to the law. It carries it within itself, as retribution for work; it manifests it on its surface, as an established limit; and she wears it as a public sign of order."<sup>3</sup> The surface of the earth in fact presents a set of physical elements, whether natural (rivers, mountains, meadows, etc.) or created by man (pastures, hedges, fences, house walls, etc.) which make it easy to define and define. Land ownership is thus based on the ability of man to separate the land into separate plots, whether individual or collective, to cultivate to feed their population and which can then be bequeathed to subsequent generations. In the manner of Rousseau, in the *Discourse on the origin and foundations of inequality among men*, making the delimitation of fences the inaugural gesture from which property and civilization could develop for the greater misfortune of men, Carl Schmitt makes the capacity to delimit and maintain the earth the foundation of the legal order. Land therefore appears to be the bedrock of the law, of which it constitutes both the most obvious origin and physical manifestation.

Faced with this telluric dimension of law, Schmitt opposes the sea as a free and unregulated space. Although fishery resources can be extracted by human labor in the same way as land resources, the impossibility of easily delimiting enclosed maritime spaces beyond the immediate space of the coasts, makes the sea - and more precisely from the high seas - a neutral space free to use<sup>4</sup>. This idea of an initial opposition between land and sea is still found

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<sup>1</sup> Carl Schmitt, *The Nomos of the earth in the international law of the Jus publicum Europaeum*, p. 82, translated [from the German] and annotated by G.L. Ulmen, New York, N.Y. : Telos Press, 2003

<sup>2</sup> Émile Perreau-Saussine, « Carl Schmitt contre la guerre juste », *Commentaire*, vol. numéro 96, no. 4, 2001, pp. 972-974

<sup>3</sup> Carl Schmitt, *The Nomos of the earth*, Op. cit.

<sup>4</sup> *Ibid.*, p.

in the principles of modern law, with the idea that international waters constitute a global public good. Territorial sovereignty is thus only exercised over twelve nautical miles from the coasts of a state, before giving way to the law of the sea and freedom of movement. This opposition between land and sea will then play a central role in the analysis of Carl Schmitt. It also helps to set it apart from the Lockean interpretation of the origin of the property. From the perspective of Carl Schmitt, it is indeed not work that founds property, and therefore the entire legal system, but the ability to appropriate the land and delimit space.

This land-centered approach to law therefore leads him to think about political action and legal construction from a dynamic of appropriation. Carl Schmitt insists that the "earth ground establishes the right to a double direction, inward and outward"<sup>5</sup>. The annexation of territory is thus presented as a social dynamic involving both the distribution of land within the group, and its confrontation with other social groups engaged in an expansionist approach. Land acquisition therefore appears to be a tool for political and social structuring, which helps organize the group according to an internal order and distinguish it structurally from other gatherings of human beings. For Carl Schmitt, these mechanisms of expansion and confrontation, linked to territorial capture, are at the heart of the construction of the very idea of law, and therefore predate the development of modern concepts such as territorial sovereignty. It is above all a "historic event and not a purely conceptual construction"<sup>6</sup>. Land capture is therefore not a legal phenomenon, but the founding moment, which, through the internal and external dynamics it generates, involves the development of law.

By making the taking of land the starting point for his reflection on the construction of the law, Carl Schmitt therefore takes up on his own the idea that the process of civilization is linked to a dynamic of territorial conquest, and not to a regulation of violence by the state as Norbert Elias thinks. By endeavoring to understand the specific place occupied by the law of war in the Western legal system, his analysis then gives the keys to grasp the way in which law and land acquisition have been articulated throughout history .

## 2. *The "just war": a medieval paradigm*

The analysis of Carl Schmitt developed in *The Nomos of the Earth: in the law of nations of Jus Publicum Europaeum* relates above all to what he describes as "global law of nations", and which describes the evolutions of the right to do war from the Renaissance and the gradual establishment of the sovereign state paradigm. It is not, however, a globalized law, intended to apply to all interstate relations on the surface of the planet, as contemporary international law may be. As the subtitle of his work indicates, this comprehensive international law is a centered euro concept, which describes relations within the European public sphere, and therefore excludes the extra-European area from its scope. The notion of globality should therefore not be understood as a synonym of universality. It does not designate a law intended to be applied everywhere, but the attitude of Europe towards the rest of the world. By this concept, Carl Schmitt means the emergence of a "global representation

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<sup>5</sup> Ibid., p. 50

<sup>6</sup> Ibid., p. 52

of the earth"<sup>7</sup>. If he is not unaware of the existence of geopolitical relations and very precocious legal agreements between the States, as attests the treaty between Pharaonic Egypt and the Hittite empire in 1279 BC. JC<sup>8</sup>, these relationships are part of a pre-global order that has not yet become aware of the reality of the world as a whole.

If Carl Schmitt is therefore not interested in these pre-global inter-state relations, he nevertheless grants a specific place in his analysis of the question of law in medieval Europe. Although it is also part of a pre-global system in the sense understood by Carl Schmitt, his interpretation of the nature of medieval law and its passage to modern law allows him to describe in contrast the structures of *Jus Publicum Europaeum*. Carl Schmitt then insisted on the concept of *Respublica Christiana*, which founds the political and legal organization of the European space order. The unity of the medieval world is thus ensured by its Christian nature, more than by the European space *stricto sensu*. The rumors around the kingdom of the priest John and the search for alliance with a Christian kingdom located beyond the Muslim world, illustrate the fact that the medieval world is thought above all from Christianity and not from a spatial separation. Despite the conflicts engendered by the schism between the Catholic and Orthodox Churches, of which the fourth Crusade is the most important manifestation, medieval people's law rests on the idea that there is a Christian community outside of which the principles of law cease to apply. So, as Carl Schmitt puts it:

L'unité globale de droit des gens que formait dans son ensemble le Moyen âge européen était appelée *Respublica Christiana* et *Populus Christianus*. Elle comportait des localisations et des ordres clairs. Son nomos est déterminé par les divisions suivantes : le sol des peuples non-chrétiens, païens, est terre de mission chrétienne ; il peut être assigné à un prince chrétien par un mandat papal en vue de la mission chrétienne. La continuité entre l'Empire romain et l'Empire byzantin est un problème de droit des gens à part, mais ne concerne en pratique que les Balkans et l'Orient. Le sol des empires musulmans était considéré comme territoire ennemi qui pouvait être conquis et annexé par des croisades. De telles guerres ne sont pas seulement par là-même au bénéfice d'une *justa causa*, elles deviennent même des guerres saintes lorsqu'elles sont décrétées par le pape. [...] Le point essentiel est que, au sein de la chrétienté, les guerres entre princes chrétiens sont circonscrites. On les distingue des guerres contre des princes et des peuples non-chrétiens. Les guerres internes, circonscrites, ne suppriment pas l'unité de la *Respublica Christiana*.<sup>9</sup>

At the heart of the mechanics of annexation of the lands of medieval nomos is the paradigm of just war. The dichotomy between the space of Christianity and the non-Christian space be it pagan or Muslim, which structures the medieval law of war according to Carl Schmitt, is indeed based on a moral conception of war. The conflict and the annexation of the land that it entails is legitimized by the existence of a higher order, the purpose of which is to propagate the Christian faith throughout the world. This "mission" devolved to Christian princes thus helps to morally justify any conflict, as soon as it is turned towards non-Christian peoples. Whether it is to evangelize non-Christianized peoples or to fight Islam with the

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<sup>7</sup> Ibid., p. 59

<sup>8</sup> Ibid., p. 57

<sup>9</sup> *Le nomos de la terre*, op. cit., p. 62

crusades, war is considered just from the moment it targets territories outside the Christian world, and is therefore seen to be legitimized by as an action morally desirable, even necessary.

The Muslim world occupies a specific place in this device for justifying conflicts since it presents not only as a legitimate space for conquest but also as a true "enemy" of Christianity. The struggle against Islam is thus invested with a superior religious dignity, which takes the form of a holy war legitimized by the supreme authority of the Catholic Church, which is the Pope. The war against the enemies of Christianity therefore presents itself as a form of moral duty in an almost Kantian sense, where the idea of Christianity would have replaced the idea of universality. Kant bases the universality of the moral law on the capacity of each individual to acquire his own maxim according to a practical reason, which is the same for all<sup>10</sup>. The structure of medieval law makes nevertheless the fight against the enemies of the Christianity a duty shared by all Catholic princes, in the name of their belonging to the Christian world. The notion of enemy thus helps to exclude the target group from a legal and moral order with a vocation to universality, thus justifying the conflict and the annexation of its territory.

On the contrary, internal conflicts in the Christian world are removed from this religious and moral dynamic of war. This does not mean that they do not exist or are not taken into account by medieval law, but that they cannot be legitimized by the use of *justa causa*. This device then contributes to limiting the conflicts between Christian Princes, by partitioning them inside a moral order, which makes it possible to avoid that, one of the parties in presence could seize the religious authority conferred by the just war, and therefore calls into question the unity of the Christian world. This desire to circumscribe internal wars is reflected in particular in a set of legal and moral codes, which aim to frame and limit the violence of internal wars, particularly around the treatment of prisoners or with the ban on the use of the crossbow 1139 during the Second Lateran Council. Although this prohibition has many limitations, which reduce its real impact, in particular the fact that it only applies in the context of "unjust"<sup>11</sup> wars, it testifies to the will of the ecclesiastical authorities to regulate military practices.

This moral approach to war proper to the medieval European order helps to structure the world in a non-Christian space where war is considered just and necessary, and a Christian space where it must instead be circumscribed and framed. The opposition between friend and enemy, which founds politics according to Carl Schmitt, thus determines the unity of Christianity as opposed to a space considered as enemy, where war appears to be naturally legitimate. Nevertheless, there is at the same time an extension of the paradigm of just war, which goes beyond the opposition between the Christian world and the non-Christian world to become a tool to justify war inside the Christian world. The theory of just war thus evolved in particular from the 12th century and under the influence of Thomism. The *Justa causa* is no longer based on a spatio-cultural dichotomy, as explained by Carl Schmitt, but becomes an internal measurement tool aimed at identifying what are the legitimate uses of violence

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<sup>10</sup> Immanuel Kant, *Critique of practical reason: and other writing in moral philosophy*, transl. and ed. with an introd. by Lewis White Beck, New York ; London : Garland, 1976

<sup>11</sup> Carl Schmitt, *The Nomos of the earth*, op. cit., p. 142



according to the practices themselves and not the nature of the spaces targeted. The concept of just war thus leaves part of theology to become a moral and legal theory with jurisprudence, aiming to both justify and limit the use of violence.

The legitimate use of violence is thus linked to the search for good, which is itself linked to the idea of a natural reason guiding human actions. War can therefore be described as "just" as long as it can be linked to natural motives, such as defending oneself, helping a threatened ally, or on the contrary avenging an offense suffered. As Carl Schmitt points out, the just medieval war is not necessarily a defensive war, intervening in reaction to an attack deemed illegitimate, but can take the form of a war of aggression, which will always be considered legitimate provided that his reasons are recognized as just<sup>12</sup>. However, this approach to just war implies the idea of proportionality in the outbreak of the conflict, which must meet specific criteria to be able to claim a *justa causa*.

This brings about a first objectification of the conditions for the legitimacy of violence, based on criteria allowing the correctness of the intentions of those who undertake a war to be assessed. If legitimate violence is always based on a moral and theological approach to the world, attached to the idea of a search for good, Thomist thought presents itself as an attempt to rationalize the right to wage war by establishing a set of criteria objectives to determine whether the fairness of the conflict is well established. However, this conception of just war is essentially based on the intentions of the perpetrators, not on their actions. The materiality of the processes through which a conflict is triggered serves only as an index to assess the correctness of these intentions, rather than as the criterion as such which would determine the legitimacy of the conflict. This is evidenced in particular by the doctrine of double effect, which affirms that is only morally responsible for the effects, which it directly desired, not for those which occur laterally. Intentionality therefore appears to be the only element that makes it possible to define a just war, while unwanted effects do not imply responsibility.

Thomist thought thus presents itself as a way of rationalizing the law of war, by thinking of it based on objective criteria enabling the correctness of its cause to be assessed. However, it is still part of a concept of *justa causa*, which makes war a moral phenomenon, linked to the intentions of its authors, and which contributes to making the adversary an enemy that he is legitimate to fight for the pursuit of good. Critics of the just war, which will develop from the end of the Middle Ages and the beginning of the Renaissance, will then allow the establishment of a new system of regulating violence, which relies not any more on the correctness of the intentions but on the respect of a whole of legal procedures and thus contributes to go out from a moral concept of the war.

### 3. *The construction of the modern state and the limitation of war*

The concept of just war based on the correctness of intentions is gradually being challenged by the emergence of two phenomena that mark the passage from the Middle Ages to modern times. The discovery of America on the one hand, generates the appearance of new lands to be conquered. The Reformation of the other implies a questioning of the authority of

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<sup>12</sup> Ibid. p. 24

the pope and the breaking up of the unity of Christianity. One of the essential points of Carl Schmitt's analysis of the transition from a conception of just war to an interstate approach to international law is the phenomenon of detheologized the law of war. The authors presented as major players in this process are indeed essentially lawyers, such as Bodin, Araya, or Gentilly. Even Grotius, whose hesitation and persistence in the concept of just war is described by Carl Schmitt, is presented as an author who can interpret war from its formal characteristics<sup>13</sup>. On the contrary, a theologian like Vitoria is presented as still falling under the medieval interpretation of the just war, despite the criticisms, which he issues against this concept and the founding role, which it plays in the construction of modern international law<sup>14</sup>.

The dual movement of detheologized and legalization of war therefore contributes to breaking out of a moral conception of violence, based on the purity of intentions. The weakening of the institutional and cultural structures of the Middle Ages was thus accompanied by the appearance of new secular institutions supporting a legal and non-religious approach to war. Carl Schmitt insists on the sociological dimension of this process. These transformations are not only the result of conceptual thinking about the nature of war, but are the result of political and social developments that affected Europe during the Renaissance<sup>15</sup>. The legalization of war is thus linked to the establishment of a new European order and to the development of the new institutional structure that is the modern state, supported by the emergence of new humanist elite causing questions to evolve. On the war towards the act and the procedures of decision, to the detriment of its moral causes:

Theologians of the Middle Ages did not argue from a vacuum, nor to lead to a vacuum. They were all in an institutional order, and each of their words can only be heard in concrete terms, that is to say by reference to this *ordo*. Now, from the 16th century, the jurists (who were in the service of a government) continued to study the problems of international law.<sup>16</sup>

The development of a law of nations based on interstate relations and conceived as an exclusive privilege of the sovereign, is linked to the appearance of a new social class composed of lay jurists, which calls into question the authority of ecclesiastical institutions to define the law of war according to a higher moral order. The political construction, which is the political model of the sovereign state, is therefore accompanied by a socio-cultural transformation, which contributes, to calling into question the concept of just war. However, if this evolution contributes to the political and legal development of the institutional structure that is the State, the theoretical reflections around the law of war remain in the filiation of the principles of the moral theology of just war that they contribute to secularize. The result is a “hybrid” approach to war, which continues to rely on the moral approach of just war, but which, by shifting reflection on the causes of war to the territorial state and the decision of the sovereign, contributes to the emergence of a new interstate political order.

From this perspective, the Reformation plays a decisive role in questioning the

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<sup>13</sup> Ibid., p. 162

<sup>14</sup> Ibid., p. 122

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., p. 127

theological unity of Europe. The rupture in the order of the medieval *Res christiana* generates a breakdown of the socio-cultural structure, which gave meaning to the concept of just war, leading to the conflagration of Europe during the wars of religion. For Carl Schmitt, there is indeed a close link between just war, civil war, and total war. Stressing the limits of the prohibitions resulting from the Lateran Council, he affirms, "The connection between just war and total war is already total there"<sup>17</sup>. The appearance of the wars of religion in Europe during the 16th century then consolidates its interpretation by showing how the concept of just war, not limited by the presence of a moral authority considered superior, leads to a demonization of the adversary, who results in the outbreak of a total war aimed at the destruction of the enemy.

If the unity conferred by the medieval *Res christiana* had indeed helped to avoid the development of civil war in Europe, the collapse of this theological order generates on the contrary the multiplication of interfaith conflicts. Wars of religion thus appear as a symptom of the transition from a theological order based on the concept of just war, to a legal order based on conflicts between sovereign states. The Reformation therefore presents itself both as an internal event, which calls into question the structures of the internal order, and one, which, by the consequences, which it engenders, implies the transition to a new legal order capable of overcoming the civil war and the will to destroy the other that it implies. The questioning of the common framework constituted by the authority of the Church thus imposes the establishment of a geopolitical order based on the mutual recognition of the other as an independent and sovereign State, and the overcoming of the idea of *unjust enemy* by that of adversary likely to enter into a relation of equals between equals.

The interstate structure of international law, as described by Carl Schmitt, is therefore gradually being put in place, with the emergence of the model of the sovereign state, the sociological developments linked to humanist culture, and the questioning of the medieval unit of *Res christiana* by the Reformation. The law of war only took its modern form after the Thirty Years War and the establishment of a new international order with the Treaty of Westphalia in 1648<sup>18</sup>. Carl Schmitt thus links the process of building the modern state to the establishment of an international legal order aimed at organizing and circumscribing war. The establishment of the model of the sovereign state and the attempt to leave the civil wars engenders a process of secularization which results in the abandonment of the medieval concept of the war, in which the conflict is justified by the justness of its reasons, and the establishment of an interstate legal structure in which the legitimacy of the war is based only on the materiality of its procedure.

War can therefore take the form that Clausewitz will also theorize: a duel between two sovereign states deemed to be equal<sup>19</sup>. In this perspective, the armed conflict appears indeed to be the continuity of a national policy, which replaces diplomacy in order to resolve the geopolitical tensions, which result from territorial collisions between the States of the European sphere. As Carl Schmitt points out, the spatio-political order that began to take shape from the 17th century did not suppress war but contained it within a legal system,

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<sup>17</sup> Ibid. p. 142

<sup>18</sup> Ibid., p. 146

<sup>19</sup> Ibid., p. 143

which regulated its use. From a Schmittian perspective, the opposition between friend and enemy defines politics. War therefore pursues the same ends as political action by organizing oppositions between rival powers. Carl Schmitt opposes the concept of enemy to that of criminal<sup>20</sup>. Contrary to the concept of criminality, which implies that the person targeted is outlawed in relation to the legal order, the concept of enemy recognizes the other as a full member of the legal-political order, of which he constitutes a legitimate element despite its opposition during the conflict:

The essence of these wars was to measure these forces in an orderly fashion, in front of witnesses and in a limited space. Such wars [...] are the only protection against the vicious cycle of over-reprisals, that is to say, against nihilistic reactions of hatred and revenge, the meaningless aim of which is mutual annihilation. Eliminating or avoiding the war of annihilation is only possible by finding a form to measure its strength. This in turn is only possible if the opponent is recognized as an enemy on an equal footing, like *Justus hostis*.<sup>21</sup>

For Carl Schmitt, the use of violence cannot be completely abolished. As we have seen previously, Carl Schmitt thinks of law from a land annexation dynamic. This relationship with the land helps to limit and partition the political order to a given space, ruling out any conception of a natural or universal right, which would have the vocation to apply everywhere, apart from any reference to a given territory, but also leads him to think politics as territorial expansion. Consequently, the law cannot abolish violence but only avoid its degradation in a war of total annihilation. The international legal order aims to organize conflicts, by giving each State the opportunity to persevere in its being - to paraphrase Spinoza - by maintaining its own process of territorial expansion, while framing this process to avoid the appearance of total wars in which this process of expansion would turn into an attempt to exterminate the other.

In the same way as the medieval *Res christiana*, the purpose of modern international law is therefore to circumscribe war within a system aimed at defining the conditions for its realization. However, while the theological and moral order of the Middle Ages sought to preserve the unity of the Christian world, as opposed to the pagan or Muslim world, thanks to a conceptual tool making it possible to distinguish between just wars and unjust wars, the order Modern legal law presents itself as a device internal to Europe, aiming to regulate relations between divergent states and not to preserve their unity. It is thus not based on the existence of a higher moral authority able to judge which conflicts are just or not, with the paradoxes that this position implies and the risk of falling back into the war of annihilation, but on the relations between the states. The regulation of war by the modern legal order thus resembles a form of peer judgment, which operates a real reversal compared to the paradigm of just war, since it is no longer the nature of war which determines its legitimacy but the recognition of the States between them.

This mutual recognition of sovereign states among themselves presupposes both the limitation of their respective authority outside their borders, the exclusion of all persons

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<sup>20</sup> Ibidem

<sup>21</sup> Ibid., p. 186

deprived of the law of war, and the existence of formal equality between them. The European legal order therefore presupposes the preservation of a certain geopolitical balance between the great powers, so that no European power can have a hegemonic position over other states<sup>22</sup>. Most of the internal conflicts in Europe during the 18th and 19th centuries, with the notable exception of the wars of the French Revolution and the Empire, thus fall within the framework of an international balance, which seeks to prevent the appearance of an intra-European superpower capable of establishing itself territorially and politically as a single dominant power.

This quest for European equilibrium obviously does not mean that there is no great European power capable of imposing itself against less important states, or that no territorial conquest would be possible in European space. Like the theory of the separation of powers defended by Montesquieu, the European balance rests on the idea that power stops power, the great powers neutralizing each other in a dynamic approach more than in maintaining 'an irremovable status quo. New great powers can thus appear on the international scene, as evidenced by the emergence of English power in the 18th century or that of unified Germany at the end of the 19th century. Conversely, certain states can be demoted in the order of European geopolitics, as is the case for Spain or Denmark, great powers of the 17th century which only appear as medium or even minor powers in the 19th.

Likewise, territorial expansion remains at the heart of the political dynamic of modern Europe. Russia thus appropriates Finland following the conflict with Sweden in 1808. Likewise, the unification of Italy and Germany during the 19th century are essentially military processes, with a strong diplomatic dimension. , founded on the attachment of independent territories or belonging to a great foreign power, to an already constituted State (the kingdom of Sardinia and Prussia). However, these different conquests are part of a spatial order seeking to limit space conquests. The involvement of France and England in the Crimean War in 1853 is thus essentially motivated by the desire to curb the territorial expansion of Russia in the face of a declining Ottoman empire, yet long regarded as an enemy of Christianity, but appears to be a central element in European equilibrium<sup>23</sup>.

As Carl Schmitt puts it, "the European system of states had thus found its fixed form as a spatial order between territorially delimited powers"<sup>24</sup>. The European space order thus makes it possible to maintain the bellicose dynamic between the recognized members of this legal-political order, which are the States, while limiting their territorial expansionism to avoid the emergence of a hegemonic superpower in the European space. Such an organization, based on the mutual recognition of States as full members of the international community, nevertheless excludes all organizations, which are not considered as full sovereign States. If this system contributes to rationalize the war by excluding any person of private law, it does not take into account other political realities such as peoples or community institutions that may exist outside the legal framework of the modern State. Carl Schmitt cites the example of the kingdom of Poland which, not being organized as a sovereign state but as a feudal state, could legitimately be abolished and see its territory divided between the great

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<sup>22</sup> Ibid., p. 161

<sup>23</sup> Orlando Figes, *The Crimean War : A History*, New York: Picador, 2012

<sup>24</sup> *The Nomos of the earth*, p. 166

powers at the end of the 18th century<sup>25</sup>.

As described by Carl Schmitt, the *Jus Publicum Europeanum* turns out to be an extremely formal spatial structure, based on the mutual recognition of the authority of the State as a legally normalized public person, and the exclusion of all other political and social reality of the field of the law of war. This legal formalism paradoxically brings Schmitt closer to the justice-naturalism of Kelsen, of which he is nevertheless one of the main contenders, and distances him from the National Socialist doctrine, which, on the contrary, sees the State as a limit to the expansion of the biological movement of the German race, which should be discarded. This legal formalism then plays a fundamental role in allowing the pursuit of territorial expansion outside the European sphere. Not being considered as sovereign states in the formal sense of modern law, non-European territories indeed become lands free of law and open to colonial conquest. By excluding actors not recognized as fully fledged states, the law of modern war thus contributes to breaking out of the just war paradigm so as to regulate conflicts and limit territorial conquests within the European sphere, while opening up non-European territories to colonization, to the point of leading to a veritable continuous quest for territorial expansion.

#### 4. *The colonial sphere: an unregulated space*

The Reformation can be described as the founding event of modern law, which brings Europe out of the paradigm of just war and which, by its consequences, leads to legalize the conflict and to think of it as an exclusive privilege of the State. This development was only possible for Carl Schmitt, however, thanks to the discovery of America and the appearance of new lands which enabled continued expansion outside Europe. Colonization thus plays a decisive role in the Schmittian analysis of developments in the law of war and the establishment of the modern state:

The spatial order with its idea of balance had [...] as essential condition and foundation the fact that the great European powers of the time, from the 17th to the 19th century, had in practice a space open to colonial expansion all over the world outside Europe.<sup>26</sup>

The *Jus Publicum Europaeum* is based on a dichotomy between the European space regulated by relations between states and the extra-European space considered open to conquest and not regulated by public law. This separation between the metropolitan space and the colonial space then results in a veritable externalization of violence, and the reappearance on non-European space of the phenomenon of total war, which Carl Schmitt describes as characteristic of the civil war. For the latter, the appearance of vast lands considered virgin and therefore open to colonization due to the absence of sovereign states is, moreover, an essential element in the construction of the law of modern war, since it allows the persistence of the dynamics of conquest while limiting it in the European sphere.

The fortuitous discovery of America, and the mass disappearance of the native

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<sup>25</sup> Ibidem

<sup>26</sup> Ibid., p. 161

populations following the infectious diseases brought by the Europeans<sup>27</sup>, allows the great European powers to have vast spaces, which they can henceforth conquer without questioning the status quo within the European space. They can thus constitute real empires without appropriating new lands, which would call into question the internal order of Europe. The limitation of international law and its annexationist dynamic, which constitutes the heart of political construction for Carl Schmitt, thus has the corollary of the presence of an area open to endless expansion by European states. The emergence of a New World, whose populations have been swept away by epidemics and which may therefore appear virgin in the eyes of the colonizers, has therefore enabled the emergence of modern law on the Old Continent.

The discovery of America is thus the event that guarantees the persistence of the dynamics of conquest described by Carl Schmitt. These two events thus contribute to resolving the paradox of a Europe fragmented into a multitude of belligerent States, driven by a policy of territorial expansion, without any of them succeeding in forming a continental empire comparable to China or the Roman Empire, with the exception of Russia. The construction of modern law has indeed made it possible to maintain a geopolitical balance within Europe, preventing the creation of empires with hegemonic power over the whole of European territory, while keeping European states in a dynamic of permanent conflict, capable of expressing itself outside the sphere of *Jus Publicum*. The discovery of America also helped to redefine Europe's relationship with the rest of the world, by enabling it to have a common identity defined outside the framework of Christianity and by contributing to the development of a "Global common law" based on a "global representation of the earth"<sup>28</sup>.

The appearance of the New World indeed opened an important phase of exploration and great discoveries, which runs from the end of the 15th century until the end of the 19th, during which a new conception of the world is developed. This role of great discoveries in the establishment of a modern identity is notably highlighted by Hannah Arendt, who sees in the discovery of America one of the events which contributed to the birth of the modern condition. The great discoveries have in fact engendered an increasingly advanced process of surveying and mapping, allowing obtaining a detailed and objective knowledge of the earth's surface. However, for Arendt, "to make surveys is a faculty whose proper is to be able to function only if the man releases himself from any attachment"<sup>29</sup>. The great discoveries thus generate a process of detachment of man from the world, even of alienation-to-the-world, during which he no longer perceives himself as an actor belonging to the environment which surrounds him, but perceives the world as an objective and quantifiable whole, capable of being exploited to draw from it a set of resources. The great discoveries, followed by colonization, therefore play a preponderant role in the establishment of a new relationship with the world based on the distance and reification of the world.

The comparison between Hannah Arendt and Carl Schmitt is thus enlightening despite their many differences, whether biographical or philosophical. The two authors perceive the central role played by the discovery of America and the colonial enterprise in the transformation of the European structure and its relationship to the rest of the world.

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<sup>27</sup> Charles C. Mann, *1491 : new revelations of the Americas before Columbus*, New York : Vintage Books, 2011

<sup>28</sup> *The Nomos of the earth*, p. 59

<sup>29</sup> Hannah Arendt, *Human condition*, Chicago: The University of Chicago Press, 2018, p. 318

Nevertheless, Hannah Arendt sees in colonization a process of reification of the world touching the very condition of man and leading, by an effect of crystallization, to the explosion of the great catastrophes of the 20th century. On the other hand, Carl Schmitt sees in this phenomenon an essentially legal process, the abandonment of which after the First World War caused the entire European structure to collapse. Unlike Arendt, he therefore defended the legitimacy of the colonial process, which he presented as a central tool that had enabled the development of modern law.

Carl Schmitt justifies the colonial process by the gap between the conquest of the land and the expansion of the sea. Unlike land, the sea presents itself as a right free, impossible to delimit territorially. However, by an effect of expansion, the territories discovered beyond the natural border that is the Atlantic Ocean found themselves assimilated to "overseas" spaces, free and susceptible to being legitimately occupied by the European powers. This assimilation is reflected in particular in the dividing lines of the world, which, from the end of the 15th century, tried to distribute the spaces open to colonization between the states of the old continent<sup>30</sup>

The territory of the New World, still largely unexplored at the time of the first colonial conquests, is assimilated to the maritime space over which no authority can impose itself. In this way, the American continent is excluded from interstate relations, which take place at the same time and will come to structure modern people's law. It thus presents itself as a free space where Western countries can act as they please to appropriate land, unlike the European sphere where the *Jus Publicum Europeanum* legally frames the process of territorial conquest. The modern conception of the law of war emerges in this way as opposed to the colonial conquest, itself assimilated to the maritime space. There is therefore, from the first discoveries, a dichotomy between metropolitan space and colonial space, which will structure modern law until the 20th century.

Carl Schmitt uses two arguments to justify the free character of the overseas territories: a legal one and a historical one. The first is based on the assertion that the United States has no state and therefore cannot integrate the European legal order based on interstate relations: "the struggle for territorial capture of the New World and the soil Extra-European still free therefore becomes a struggle between such European powers, which are "States" in this specific sense. Anyone who does not have the capacity to become a "State" in this sense falls behind"<sup>31</sup>. This argument, carried by jurists of the modern era, is nevertheless a pure petition in principle. As presented by Carl Schmitt, the state indeed appears as a legal order defined as specific to the European powers. Any non-European political system, whatever its level of legal and social organization, can therefore be considered as not being able to become a State, and therefore appear as a space open to colonial conquest.

In the same way the annexation of Poland was justified by the fact that it would be a feudal regime, the definition of the status of non-European territories falls under a purely formal judgment, more than an objective reflection on the nature of the political systems in place in the territories to be conquered. As Carl Schmitt puts it, "the decisive point is that [the

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<sup>30</sup> *The Nomos of the earth*, p. 95

<sup>31</sup> *Ibid.*, p. 130



jurists] no longer treat [the colonial conquest] at all as a problem common to all of Europe, and only aim at the rivalry between the various European land takers"<sup>32</sup>. The justification for colonization is thus entirely turned towards the colonizing States and serves as a counterpoint to the construction of intra-European law. His objective is not to define a universal condition from which a political community could be recognized as a fully-fledged State. His finality is to limited potential tensions between colonizing countries to avoid the outbreak of an intra-European, while keeping the opening of the conquest outside the European sphere.

Moreover it is revealing that the deportation of the Cherokees in 1838 took place after the Cherokees nation was recognized as an independent state with its own constitution<sup>33</sup>. Likewise, the numerous unequal treaties concluded between the European powers and the Asian states, which organize the colonization of Southeast Asia between the end of the 18th and the end of the 19th century, show that the notion of state or non-state has played a marginal role in the colonial conquest. If the conception of the New World as a space without State and free of rights could play a role during the great discoveries and the beginning of the colonial enterprise, the latter quickly freed itself from this initial paradigm to continue its policy of conquest.

The second argument used by Carl Schmitt is political and historical. It consists in justifying the colonial conquest by the very phenomenon of European discovery and its intellectual superiority. The argument is therefore no longer a simple petition in principle, making the American continent a state-free space because it is judged as such by European jurists, but an analysis of the historical reasons, which led to the development of imperialism. For Schmitt underlines the preponderant role played by discoveries as such. The discovery of previously unknown spaces justifies the annexation of land, rather than the presence or not of states characterized by a set of formal features on the spaces to be conquered. The political action that is discovery therefore produces the right to conquer these territories, and not the legal work that would produce the policy of discovery and colonization.

The argument reveals the decision-making of Carl Schmitt's position since the act of colonial conquest founds the law, contrary to Kelsen's normativist approach where the law predates political action. Here, discovery is presented as the founding moment, prior to any legal structuring, which also supposes a real dimorphism between the discoverer and the discoverer<sup>34</sup>. The specific status of the New World as a space open to conquest and colonization from the end of the 15th century is linked to its absence in political and legal representations of the Western world. Unlike countries like China or India, which will not be the target of the colonial conquest until after the first wave of great discoveries of the 15th-16th century and are in more or less distant relation with the European countries since the antiquity, the American continent does not belong to the field of representation of Western States. The discovery therefore connects peoples who had previously had no contact and therefore could not fit into a preexisting legal network of political and historical relations.

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<sup>32</sup> Ibid., p. 131

<sup>33</sup> Anderson, William, *Cherokee Removal: Before and After*. Athens, Georgia: University of Georgia Press, 1991

<sup>34</sup> *The Nomos of the earth*, p. 133

Unlike the embassies sent during the 13th-14th centuries to try to form an alliance with the Mongols, the conquest of Mexico or Peru by the Spanish was the first point of contact between these peoples. The discovery thus places the peoples in a virtually virgin relationship, devoid of previous interactions, which could constitute a political or legal precedent of link between these populations, whether friendly or hostile.

This relationship is inherently unequal. The discoverer is in a research and discovery process, and although he can completely ignore what he is discovering as illustrated by the case of Christopher Columbus discovering America by serendipity, his discovery remains the result an active and desired decision. On the contrary, the discovery is in a reactive approach to a discovery process, which it has not chosen or authorized but which it undergoes. If not all the discoveries have given rise to a military conquest, as illustrated by the expeditions of Cook or La Pérouse for example, the discoverer is the initiator of a new relationship to which the discovered can only react. Thus, if Spain and Portugal chose to continue their discoveries with a process of colonization, States like the Inca Empire never had the opportunity to expand overseas because they were never in a position to discover new spaces outside their territorial sphere of influence.

Carl Schmitt therefore justifies the colonial conquest by the discovery of America and the relationship it implies with the peoples of the American continent, both devoid of any previous legal or political relationship, and on the initiative of Europeans. In addition to this argument, there is a historical and moral dimension. For Carl Schmitt, the legitimacy of colonization is linked to the technological and cognitive superiority of the West over the rest of the world. The discovery of America is made possible in his eyes only by the technical capacity of European states not only to cross the Atlantic and to support a war effort for the annexation of overseas lands, but also to "apprehend what he discovers from his knowledge and his conscience"<sup>35</sup>. The argument therefore goes beyond the technical aspect alone, to include the idea of a certain moral superiority of the West, considered to be the only one capable of rationally apprehending the other.

##### 5. *Colonial war as total war*

Carl Schmitt presents the construction of modern European law from a double mechanism. On the one hand, within the European sphere, the construction of the modern state and the recognition of war as an exclusive privilege of the sovereign leads to a limitation of conflicts and territorial conquest. War becomes a formal phenomenon, legally framed, and limited to interstate conflicts based on mutual recognition between sovereign states. Outside the European sphere, on the other hand, the discovery of America led to a phenomenon of territorial expansion. Not considered as full states, the newly discovered spaces of the American continent are becoming the heart of a vast policy of colonial conquest on the part of the European powers, generating a movement of externalization of the conflict outside the European sphere. Thus, as Carl Schmitt puts it, "the appearance of immense free spaces and the territorial capture of a new world made possible a new European right of people"<sup>36</sup>. The

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid., p. 141

colonization of America allowed the persistence of a dynamic of territorial conquest at the very moment when this dynamic was restricted on European soil by the development of the modern state.

This dynamic of conquest is initially restricted to American soil. The European presence in other continents such as Africa or Asia is first limited to trading posts close to the coast, in particular to ensure the slave trade from Africa, and does not translate into a real colonial conquest, at least initially. The spatial dynamics described by Carl Schmitt, however, implies the persistence of territorial conquest as an engine of political life. The settlement of conflicts in the European sphere can only take place thanks to the opening of conquest in overseas territories. Likewise, the economic prosperity of European states is deeply linked to the safeguarding of supplies of raw material from the colonies, be it the silver mines of Bolivia in the 16th century, sugar and Caribbean spices in the 17th- 18th century, indigo and Indian opium in the 18th-19th century, or phosphate and rubber from the 20th century<sup>37</sup>.

The pursuit of colonial enterprise is therefore an essential issue for the European powers, both politically and economically. The disappearance of "free" spaces open to colonial conquest with the independence of the American states between the end of the 18th century and the beginning of the 19th century therefore created the need to find new spaces to maintain the process of conquest. The colonization of India between 1757 and 1858 or that of Algeria between 1830 and 1870 are thus the manifestation of this search for new spaces to conquer, which will culminate in the fray for Africa following the Berlin conference in 1885. Carl Schmitt also considers this period as the "last joint land grab in Europe"<sup>38</sup> before the dissolution of *Jus Publicum Europeanum* with the First World War and the Treaty of Versailles.

The paradigms that prevailed in the conquest of America are thus extended to the rest of the world. Carl Schmitt's thought re-situate the importance of the conquest of America in relation to the construction of the colonial system, despite or perhaps because it defends the legitimacy of Western imperialism. The colonization of Africa is presented as the continuation of the expansion movement, which, from the 16th century, has contributed to the establishment of a modern state based on law public, and the domination of Europe over the rest of the world. For Carl Schmitt, the colonization of Africa is not the starting point of a new system designated as imperialist, but rather the last moment of a process of territorial expansion started four centuries earlier.

The problem with this analysis then lies in its interpretation of the causes that led to the breakup of the European space order during the 20th century. For Carl Schmitt, the end of the European space order is linked to the emergence of American power, which established itself as a full member in the concert of nations at the end of the 19th century and generated a relativization of Europe<sup>39</sup>. However, the deconstruction of the European spatial order appears as much as the consequence of colonial processes that have reached the end of their regulatory

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<sup>37</sup> Marseille Jacques. « Les relations commerciales entre la France et son empire colonial de 1880 à 1913 ». In: *Revue d'histoire moderne et contemporaine*, tome 31 N°2, Avril-juin 1984. La France et ses colonies. pp. 286-307

<sup>38</sup> *The nomos of earth*, p. 213

<sup>39</sup> *Ibid.*, p. 225

logic, as well as as the result of the emergence of new powers on the international scene. Carl Schmitt's reasoning is based on the idea that the construction of Europe was achieved by the dual movement of limiting war in European space and outsourcing wars of conquest in colonial space. The problem is that the continued expansion of European powers at the end of the 19th century calls into question the pursuit of the enterprise of territorial conquest, because of the disappearance of land, which can be considered as free of rights.

Carl Schmitt had made "the appearance of huge free spaces"<sup>40</sup> an essential element in the construction of modern law, but at the beginning of the 20th century, these lands have disappeared. At the dawn of the 16th century, the vastness of spaces to be discovered, had opened the possibility of limiting the territorial conquest in Europe if it could continue in the New World. At the beginning of the 20th century, on the contrary, only a few countries like China, Ethiopia, or Iran still escaped European domination. The rest of the world is either a full-fledged colony or a former independent settlement. The melee for Africa is the last act of European territorial expansion because it is the last land to be conquered. The start of the 20th century was therefore the height of European domination over the rest of the world. However, despite the finite nature of the spaces to be conquered, territorial expansion remains the engine of the European economy and political integration.

The tensions experienced by European states at the beginning of the 20th century and which will lead to the First World War are partly linked to this absence of new spaces to conquer. Furthermore, the appearance of new non-European actors such as the United States or Japan in the colonial enterprise contributes to scarcer available land. Without reducing the 1914-1918 war to a colonial war, it should also be noted that the colonial question played a major role in its initiation. The colonial expansion of Germany is indeed limited by French and British influence, in particular in the Transvaal and in East Africa, where its possessions are surrounded by the British colonies<sup>41</sup>. If these colonial rivalries are not enough to explain the outbreak of war, they bear witness to the tensions that exist within the European sphere in the face of an extra-European space less and less open to conquest. Likewise, the Balkan wars fought between 1912 and 1913 show the presence of territorial tensions within the European spatial order, fueled by recently independent powers like Bulgaria, which seek to extend territorially in European space<sup>42</sup>.

The interpretation of Carl Schmitt making the United States the main cause of the breakup of the European space order therefore does not seem satisfactory. The reasons for this collapse seem internal to the geopolitics of Europe in the early 20th century, and are presented as the consequence of a system that no longer manages to regulate its own tensions. The thought of Hannah Arendt then helps us to complete the Schmittian interpretations. Defending imperialism as a driving force in the construction of the *Jus Publicum Europeanum*, the Carl Schmitt does not see how colonial expansion could have been responsible for the breakdown of European order and the return of total war on its soil. He prefers to make the United States the main culprits of the disaster of the 20th century - sparing Germany, which remains one of

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<sup>40</sup> Ibid., p. 141

<sup>41</sup> Christopher Munro Clark, *Les somnambules : été 1914, comment l'Europe a marché vers la guerre*, trad. par Marie-Anne de Béru, Paris : Flammarion, 2013, p. 152-156

<sup>42</sup> Jean-Paul Bled, *L'agonie d'une monarchie : Autriche-Hongrie 1914-1920*, Paris : Taillandier, 2014, p. 21

the main actors in this process. On the contrary, criticizing imperialism and seeing in it one of the causes of the emergence of totalitarianism, Hannah Arendt shows us how the principles of colonization were able to return to Europe by a "boomerang effect", and lead to the return of the total war on European soil<sup>43</sup>.

Unlike the conflicts who took place at the same period on the European scene, the colonial wars do not respect the parity between adversaries, which characterizes the classic European space order. The space to be conquered appears to be free, that is to say devoid of state structures, which could lead to a relationship of equals between belligerents. The peoples to be colonized are thus in the same position as could be the non-Christian peoples in the spatial order of the Middle Ages or in that of the criminal, located outside the law. The objective of the conflict is not the only victory against an adversary recognized as equal, but its submission or even its complete destruction in a war involving two protagonists considered as unequal. Colonial wars are thus akin to civil wars as described by Carl Schmitt. There are characterized by the technical dimorphism between the two belligerents, the preponderant role played by the partisans, and the importance of counterinsurgency models.

The wars waged in Algeria or Madagascar are thus counterinsurgency wars, comparable by the methods used to those used in Spain or Portugal during the Napoleonic wars or in Ireland during the Irish War of Independence. The use of semi-regular troops, such as those used by Du Pin to counter the partisans of Juarez during the Mexican expedition in 1863 is thus a form of guerrilla warfare, the objective of which is the pacification of a territory, far from the regular armies that clash at the same time in Europe in Sadowa. Furthermore, far from the model of industrial war which will prevail with the First World War but which is already in germ in European conflicts with the increase in the lethality of fire and the increase in logistical possibilities, the colonial wars are characterized by their archaism. Lacking the logistical structures peculiar to the European continent, the colonial armies are indeed characterized by their practice of loot and raiding. The conquest is not conceived as a professional military operation but as an expedition similar to a hunting party of which the hunt and the trophy, even human, constitute essential elements. The multiplication of massacres is therefore linked to this primitive violence, the result of an archaic conception of war and conquest that appear in a work like *Heart of Darkness* by Joseph Conrad.

Colonial war therefore does not take the form of a duel between states as in Clausewitzian theory but rather of a total war whose aim is the submission or the destruction of the other. This dimension of the colonial war suddenly arises on the European scene in the conflicts, which follow the First World War, such as the Greco-Turkish War of 1922, or the Soviet-Polish War of 1921, before taking its most radical form during of the outbreak of World War II. If the massacres specific to total war are not completely unknown in 19th century Europe, as evidenced by the Chios massacre in 1821 or the Bloody Week in 1870, the latter belong to the register of classical civil war, internal to a given State. On the contrary, the Second World War comes from what Carl Schmitt describes as a "globalized civil war"<sup>44</sup>. However, the main actors in its outbreak, Nazi Germany in particular, refer massively to the

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<sup>43</sup> Hannah Arendt, *The Origins of Totalitarianism*, New York : Schocken Books, 2004

<sup>44</sup> Carl Schmitt, *Political theology: the myth of the closure of any political theology*, trans. by, Michael Hoelzl, Cambridge : Polity press, 2008

colonial experience to justify their plans for conquest.

As Adam Tooze shows in *The Wages for Destruction*, the policy of expansion desired by the Third Reich, particularly in the east, is linked to an important land dimension. Hitler's goal is to annex new lands by emptying them of its inhabitants, in order to found a new German continental empire capable of rivaling in surface with the United States. Goebbels notably defends the colonial dimension of this project and writes in his newspaper "the führer considers the East as our India to come. This is the colonial territory that we must occupy"<sup>45</sup>. Military policy in the east is therefore akin to a colonial project, justified by the precedent of the conquest of the West and the destruction of the local people it engendered. In the spirit of Nazi Germany, Eastern Europe therefore appears in the same position as the New World could be in the eyes of 16th century Europeans: a space free of rights that it is legitimate to conquer, even by eliminating its inhabitants, and where the normal rules of the law of war no longer apply. In this way, by displacing imperialism directly on the European sphere, Nazi Germany has broken the principles of the *Jus Publicum Europeanum*, and generated the return of total war in Europe.

This analysis thus leads us to reverse Carl Schmitt's interpretation of the return of the just war in the first half of the 20th century. For Carl Schmitt, the United States is primarily responsible for the breakdown of the European space order and the return of the just war paradigm, bringing with it the re-emergence of total war. By emphasizing, on the contrary, that total war predates the appearance of the American superpower and obeys the same logic as the colonial war applied to the European sphere, we question the role of the United States in the breakup of the Second World War. The outbreak of total wars on the European scene therefore appears to be the result of the explosion of the European space order, arrived at the end of its regulatory logic by the disappearance of land considered free of rights.

The return of the just war then presents itself as a new geopolitical paradigm aimed at preventing the return of total war, enabled by the appearance of the American and Soviet superpowers after the Second World War, and reinforced by the disappearance of the USSR at the end of the 20th century. This situation leaves the United States in the same position as that of the Pope in Thomist theory, namely that of a supreme arbiter capable of determining the appropriateness or not of a conflict.

## Conclusion

Carl Schmitt's thinking provides us with the keys to understanding the close relationship between the law of war and the construction of the model of the sovereign state. By making the dynamics of land annexation the basis of politics and the origin of law, his analysis allows him to get out of legal positivism and to think about state building in the long term, in connection with history of Europe. The model of the European nation-state then appears linked to a double dynamic, which is set up with the two great events that mark the end of the Middle Ages and the entry of Europe in the modern era: the Reformation and the discovery of America.

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<sup>45</sup> Adam Tooze, *The Wages for Destruction : The Making and Breaking of the Nazi*, London : Allen Lane, p. 180

Within the European sphere, the end of the medieval model of just war and the legalization of war allowed the development of the sovereign state as the sole depository of the right to wage war. The establishment of an interstate normative structure regulating conflicts between states also contributes to the emergence of the idea of European balance, based on the limitation of war and territorial conquests in metropolitan space. A real spatial order is thus set up, specific to Europe, which prohibits the formation of a continental empire with hegemonic power over the whole continent, while allowing the maintenance of the belligerent dynamic between the States.

At the same time, Carl Schmitt underlines that this European spatial structure is only made possible thanks to the existence of vast territorial expanses, considered as free and therefore always susceptible of being conquered without calling into question the European balance. A double movement to limit conflicts within the European space and to externalize violence in the colonial sphere therefore accompanies the establishment of the model of the sovereign state in the European sphere. Law of war and imperialism thus constitute the double matrix of the modern European state.

However, if the thought of Carl Schmitt allows us to think about the evolutions that affect the construction of European states in the modern era, his interpretation of the causes of the end of the model of the modern state also deserves to be qualified. Like defender of European imperialism, which he sees as a tool for building the modern state, Carl Schmitt attaches preponderant importance to the emergence of the United States as a global superpower, to the detriment of internal causes and the tensions inherent in the model of colonial expansion. Like post-war thinker, his analysis ended up almost absolving Germany of its responsibilities in triggering the events that led to the two world wars and the implosion of Europe. However, based on analyzes developed by Hannah Arendt on the link between imperialism and totalitarianism, we realize that it is possible to follow the thought of Carl Schmitt while drawing a completely different conclusion, granting more importance to the colonial conquest.

From this perspective, the end of the European spatial order appears as the consequence of the tensions linked to European expansionism itself, and the paradoxes it generates in a limited world, where no free space can no longer serve as a valve to outsource the violence of territorial conquest. The emergence of the United States as a world superpower is therefore no longer the cause but the consequence of the implosion of the European space order, and contributes to the establishment of a new model of war regulation founded on the existence of a dominant power and the return of the just war paradigm.