AFTER THE MONOPOLY OF VIOLENCE

The Legitimacy of Post-national Military Intervention

J. Peter Burgess

INTERNATIONAL PEACE RESEARCH INSTITUTE, OSLO (PRIO)
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INTRODUCTION

European construction, as we know it in the early 21st century, is arguably a late phase of a long utopian project of unification and rationalization dating back to the Roman Empire, perhaps even to Alexander and the Hellenistic period. The particularly modern segment of that enterprise however begins with the innovations in the international state system brought about by the Treaty at Westphalia in 1648. The conflicts of the 30 Year War were atomized conflicts played out side by side on one great battlefield of Europe. But they were fought in the name of local, even feudal interests. The new world order at Westphalia gave content to a universal concept of sovereignty. It thereby also gave content to a universal concept of war, a concept based on new notions of sovereignty, collectivity, recognition and political rights. War was no longer war in Europe, but rather European war.

Classical international law placed few restrictions on the right of states to use force and to go to war. That right was long considered to be an inherent attribute of sovereignty and the equality of states. What was originally an unlimited right to force evolved into a doctrine of recognition in which international treaties and the general principle of non-intervention gave rise to the notion of peaceful settlement of international disputes. For several centuries the equation of state-sovereignty with the principle of non-intervention has been the anchoring point of the international community. Yet the concept of sovereignty, a philosophical idyll, has never been pure in practice. The sovereignty of one state has often served as a conceptual tool to justify the need to violate the sovereignty of another. This has never been more true than today. More than ever before it has become clear that the rights and obligations of sovereign states carry ethical imperatives that go beyond their sovereign borders. This is the basic finding of the Commission on Intervention and State Sovereignty, The Responsibility to Protect (ICISS 2001a; ICISS 2001b), convened by Canadian Prime Minister Jean Chrétien in response to Secretary-General Kofi Annan’s challenge to the international community to build new international consensus on how to respond to massive violations of human rights and humanitarian law (Annan, 1999).

Today, a bolder and more frequent use of force can be observed on the world stage as a new breed of intervention emerges. Two types of intervention set themselves apart. One uses intervention as a response to humanitarian crises in other sovereign states; the other aims at neutralizing security threats originating from the territory of sovereign states, for example those associated with non-state actors in transnational networks or simply those emanating from failed states. By their prevalence and by the power of their effect these two types of interventions are distinct. As a common challenge to the customary norms of sovereignty, they will form the primary focus of the project.

Interventions as a response to humanitarian crises

‘Humanitarian intervention’ is defined as coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the UN Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law. Since the end of the Cold War the number of such interventions has steadily risen. Yet the pre-Cold War and post-Cold War interventions distinguish themselves by the source of the legitimacy to which the lay claim. In the pre-1990 cases, the right to intervene on humanitarian grounds was claimed...
and exercised by one and the same agent, the intervener. The post-1990 cases distinguish themselves by the fact that they are legitimated either by a United Nations no longer frozen by Cold War politics (Bosnia-Herzegovina, Somalia, Rwanda, Haiti, Sierra Leone, East Timor) or by a recognized international coalition and/or NATO (Liberia, Afghanistan, Iraq).

**Interventions as a response to security threats**

Until recently, military force was used most often to achieve a state’s geopolitical goals of protecting and/or enhancing its territory, population, and other critical resources, based on customary rules and protocols of international law. This is a trend that emerged after the end of the Cold War, but was clearly punctuated by the events of September 11. It has seen the considerable expansion of the range of military operations deemed necessary in order to assure such protection.

International law outlaws the threat or use of lethal force by one sovereign state against another, with two clear exceptions. The UN Security Council may authorize states to use force, and states have an inherent right to defend themselves against unlawful uses of force and to aid other victims of aggression seeking help in collective self-defense. According to international law, such uses of lethal force must be necessary in the sense that effective peaceful alternatives are not available; and it must be proportional in the sense that force greatly excessive to that necessary to protect the state’s lawful defensive interests is not permitted. Beyond that, international law also imposes constraints upon weapons and targets.

The project *After the Monopoly of Violence* has gathered 4 interrelated threads of his political logic, in particular in relation to the continuation of the project of European Construction. The first part of the project focuses on the just war tradition of political legitimacy, asking to what extent it can be applied to European military interventions. The second part develops the notion of Europe as a moral community in order to deduce what legitimate security claims it might have based on that moral status. The third part further develops the them of the European Union as the basis for legitimacy by turning to the EU legal system as an expression of it. The forth part explores the notion of European identity in relation to the otherness which it necessarily presupposes. Finally, the fifth part analyzes the political implications of the Eastern Enlargement as a function of the complex relationship to the US.
1. **WAR IN THE NAME OF EUROPE**  
   *The Legitimacy of Collective Violence*

1.1 **War in Europe and European War**

European construction, as we know it in the early 21st century, is arguably a late phase of a long utopian project of unification and rationalization dating back to the Roman Empire, perhaps even to Alexander and the Hellenistic period. The particularly *modern* segment of that enterprise however begins with the innovations in the international state system brought about by the Treaty at Westphalia in 1648.

At Westphalia, war in Europe was transformed into European war. The notion of “war in Europe” builds upon a geographical delimitation. The conflicts of the 30 Year War were atomized conflicts played out side by side on one great battlefield of Europe. But they were fought in the name of local, even feudal interests. The new world order at Westphalia gave content to a universal concept of sovereignty. It thereby also gave content to a universal concept of war, a concept based on new notions of sovereignty, collectivity, recognition and political rights. War was no longer war in Europe, but rather European war. The modern European versions of the questions of just war and peace, from Hobbes to Michael Waltzer, build upon the conceptual tools and political materials provided in this new international system. The purpose of this paper is to formulate a special case of the question “What is Europe?” by asking “In the name of what Europe may just war be waged?”

The very old question “What is Europe?” can be reformulated in a number of ways, and answered from a number of angles. One may, for example, answer the question of what Europe is by seeking out its origin, by trying to find out what it *originally* was, and by identifying with that origin, its eternal essence. Or one may adopt a psychological approach to the question by surveying and cataloging what Europeans feel when they feel European, or a more social-behaviorist approach by studying the “impact” or change in behavior as a function of changes in the European political or social reality. Or one may adopt a more simple, geo-political approach to the question by asking what *territory* corresponds to the term Europe.

This paper will take a *pragmatic* approach (in the sense of Pierce or Dewey) to the question of what Europe is. In other words, it will reformulate the question based on the presumption that Europe is what Europe does. More concretely it will ask what acts may be carried out in the name of Europe? What institutions can be built and what concrete policies can be embarked upon in the name of Europe? Or to be brutally direct: what violence can be undertaken in the name of Europe? Not incidentally, the Treaty of the European Union takes explicit steps toward the development of a European military, by articulating the founding terms of a Common Foreign and Defense Policy for the European Union. Just how “European” is the European Union’s military policy? What is the European substrate in the notion of a European defense and security identity. Finally, and more concretely, what did the role of the European Union in the Kosovo crisis of 1989-1999 have to do with European values, culture and destiny? In many ways, this question simply boils down to a question of sovereignty in a classical sense. In other ways however the Kosovo crisis demands a new analysis, a new model of understanding of international relations, with new consequences for an equal new and un-heard-of political entity: the European Union.

What is war waged in the name of Europe? The following attempts to develop this question
and provide some contours of a response through a simple and relatively conservative reasoning. I will begin by returning to the classical principles of the Augustinian just-war tradition, and extracting one of its central principles, that of right authority. This principle will then be put into relation with the classical principles of war and sovereignty of Grotius and Hobbes. These notions will then be confronted with 20th century challenge of globalization and the so-called post-national constellation. Finally I will ask under what conditions the European Union’s ambition toward a unified European concept of security can fill the conditions of a European war. I will conclude with several comments on the European Security and Defense Identity in the context of the Kosovo crisis.

1.2 The Just War tradition

There seems to be no avoiding the notion that war is always principled. The theoretical problem arises with the notion of giving order to the principles. Even before Augustine’s well-known formulations of the principle of just war, Roman law created the categories designed to associate the notion of an ethnic or cultural collectivity and the rights provided by that collectivity\(^1\). The *jus ad bellum* tradition articulates a number of themes concerning the ways under which one may rightly or justly resort to war. In the Thomasian rendering these criteria are: just cause, right authority, right intention, proportionality of ends, last resort, reasonable hope of success, and aim of peace. I will focus on only one of the classical means to justify the use of violence for the attainment of political ends: right authority.

Right authority — which is often used synonymously with “sovereign authority” or “competent authority” — quite simply limits the right to authorise force to sovereign political entities. This core concept of right authority has the *prima facie* effect of favoring certain interventionary uses of force in the interest of internationally recognized standards of justice. From this principle, one might argue for the right to use force if necessary for such purposes as combating international terrorism, responding to other forms of international lawlessness such as the traffic in illicit drugs, or systematic and sustained violations of universally recognized human rights (Johnson 1999:31-32).

The principle of proper authority also raises questions about intervention under international auspices. Clearly, international organizations up to and including the United Nations lack sovereignty in the traditional sense. Thus the question immediately becomes: Without sovereignty, is there any right to authorize force? Classic just-war doctrine would say no, reserving that right to sovereign states. Still, in contemporary debate, international authorization for interventionary use of military force is often claimed, though on the basis of consensus (as in the Security Council resolutions relating to the Gulf War and to the United Nations protective force in Somalia) rather than sovereignty.

The question for us remains: Assuming that right authority is a legitimate source of moral justification for military intervention, to what extent can the European Union be said to possess right authority in some radically new sense? In order to develop our reasoning in the direction of an answer to this question we must first turn to the conception of sovereignty in the classical tradition, and ask in what way the globalization of the late 20th century has

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\(^1\) The Law of Nations (*jus gentium*) is the continental predecessor of the modern European notion of international law, itself providing the guidelines of to the present take the notion of sovereignty as given. What J.T. Johnson calls the “consolidation of cultural consensus”.
brought changes to that conception.

1.3 The Classical Model of Sovereignty

Grotius

In the history of political and legal theory the thinking of Hugo Grotius has endured by virtue of the fact that it formulated a new system of ideas at a conjuncture in the history of European geopolitics, namely the decline of the international order of the Middle Ages. The concept of sovereignty in the Middle Ages was based on two pillars: the ecclesiastical authority of the Church of Rome, and the political order of the emperors. But by the time Grotius wrote his principle work *De jure bellie ac pacis* (1620-1625), the economic, social, and spiritual orders which had dominated were disintegrating and the Thirty-Years War was raging across Europe.

By the conclusion of the Thirty-Years War there was clearly no chance of recovering either of the two pillars of the Middle Age order. Thus Grotius set out to formulate the principles of a new, humanized order, based on law. The new international order built upon the presumption that juridical thinking was the new science of that age, and that such thinking would be capable of founding universal principles, principles applicable across the European geopolitical spectrum. The foundation of that universal anchoring was double: on the one hand the notion of *natural law*, on the other the notion of *contract*. Like the Stoics, Grotius derived the principles of natural law from reason and the rationality of humans. And, in the shadow of his master Erasmus, Grotius developed a humanized notion of the *contract* (*pacta sunt servanda*) as the highest authority within and between states.

Hobbes

The sovereign remained the anchoring point of the political and legal system. Hobbes formulates the logic of the sovereign in its most forceful form in his writings from the 1640s and 1650s. Hobbes shares the two foundational principles of Grotius: the rationality of human enterprise based on the law of nature and the force of the social contract. Yet, as is known, Hobbes refused the notion that humans were naturally social or political. The state of nature is pre-political and pre-social. The social contract in the schema of Hobbes is thus a counter-natural moment, a rational gesture with the aim of self-preservation. The social contract is the agreement between individuals founding civil society, not to resist the commands of the sovereign.

The contract is rational only to the extent that the egoism out of which it springs, is inherently rational. The notion of justice is entirely related to the contract. It is completely humanized, independent of any transcendental authority. To be just is to heed the contract; to be unjust is to deny it. Injury is the non-performance of covenants.

This notion of justice implies a fundamental broadening of the notion of just war. Objective justification for war is no longer necessary since it is fear of one’s enemy that is the source of civil society, and thus the source of the notion of justice contained in the civil contract. In this sense Hobbes introduces an essential distinction between *justice* and *legality*. For Hobbes it is possible to speak of the legality of war without making reference to a transcendental notion of justice. The political union, just like justice and injustice are defined in terms of legality, that
is, in terms of correspondence or non-correspondence with the contract on which the Union is based.
This brings us finally to another essential innovation on the part of Hobbes: the legal fiction of the sovereign as a person. Based on his notion of the civil contract, Hobbes reasons that duty is only duty to oneself. There is no duty to any other individual. The fiction of the sovereign as a person creates a political subject with a will that can represent the will of all others. The legislation of the sovereign is the self-legislation of all political subjects. All political subjects can and should regard the actions of the sovereign as their own actions. The sovereign is the political union. How does the process of globalization, which has so marked the last two decades, effect the notion of the sovereign as a unified, singular political subject of sovereignty formulated by Hobbes?

Globalization and post-national sovereignty

The European post-war period is marked by a transformation in the notion of sovereignty as a political function to sovereignty as a function of economic variables. In the immediate post-war years the Bretton Woods system together with the IMF and the World Bank assure a regime based on a balance between nationally determined economic interests and the ideals of international market liberalism. When this system collapses in the early 1970s, a new constellation of transnational liberalism emerges in which the international mobility of capital and labor, and the post-Fordist ideology of “flexibility” are central. In this regard, multinational interests and organizations become the most well-defined competitors of the European nation state (Habermas 1998:119).
A new sociology of globalization has gone to great lengths to map out the changes in social structures and forms of society in the moment national society becomes transnational society, moving beyond the territorial boundaries and institutions of the traditional European nation-state. Ulrich Beck, for example, formulates the question of globalization as the question of what he calls “second modernity” in which the notion of global society displaces that of the national society. A broad definition of globalization would include a consideration of worldwide expansion of telecommunication, mass tourism or mass culture, mass technology, arms trade, ecological overload. A more narrow definition involves the exploding of national Borders and the obsolescence of national categories, values, controls, and rights. Globalization goes beyond the displacement of sovereignty and power from one political subject to another. It involves a change in the very concept of sovereignty, that is, in the concentration of power and the legitimacy of that concentration. The ebb and flow of money, the velocity of exchange, the resistance and pressure of convertibility replace the subject-object relation of traditional understanding of power.
Among the more radical political questions that are formulated in the wake of these changes is the following: Is democracy still the most relevant source of legitimisation in an era of declining democratic participation, progressive detachment of dynamics of power from democratic control mechanisms, failing-correspondence between national democratic political organs and trans-national political issues, re-structuring of the European polity?
First we must underscore that the post-Westphalian era of the nation-state marks not only the
emergence and development of modern juridical principles of rights and national sovereignty. It also inaugurates the development of the principles of international law, which expand and modernize the principles of the just-war tradition. The obsolescence of the nation-state opens a complex set of questions about the sovereignty of territorial states, about the protection of rights and laws based on cultural collectivity, and about democratic legitimacy in general.

In the era of globalization the nation-State is increasingly powerless with regard to control and administrative functions, traditionally based on the state. As a consequence, one can observe a general decline in the coherence of traditional systems of international collaboration such as the UN, the OECD, NATO, etc. In their place, international “regimes” emerge, informal international arrangements and accommodations steered by “soft power” become more dominant.

The question of the decline of democratic legitimacy of the nation-state clearly concerns the question of national legitimacy. The classical idea of the right to national self-determination is no longer supported by a collective national polity, but rather by sub-national units—that is, by a complex and composite cultural substrate—or by supra-national interests. In what way does the European Union enter the fray of globalization?

The European Union is neither an inter-governmental agency nor a complex set of transnational interests. It is however an aspirant for displacing, to one extent or another, the European nation-States. The degree to which such a displacement is desirable or even possible is of course a matter of considerable debate. Euro- skeptics, market-Europeans, Euro-federalists, and partisans of “global-governance” compete for legitimacy in this political, social and juridical debate. What does it mean to Europeanize war? This question boils down to asking whether or not the European Union can in any sense displace, reverse or replace the ailing nation-state as a sovereign basis for just war. Or, the more primal version of this question: In what sense can the EU constitute a sovereign body in a post-national reality?

Attempts at the reconstruction of an internally based polity as a basis for postnational sovereignty have been variable. The “return of the social” in European politics can very well prove to be the beginning of a new kind of sovereignty built upon an internal coherence of European peoples (Hoffman 2000:193-95). In post-Enlightenment political theory the notion of national sovereignty is complemented by that of universal rights. Kant’s *Metaphysik der Sitten* introduces a radical concept of freedom and a new concept of legality. Legality for Kant implies that all laws shall be simultaneously coercive (*Zwangsgesetze*) and norms based on duty (*Pflichtgesetz*). In other words, a law is duty-based coercion. It is coercion, which I in my freedom choose for myself. Sovereignty for Kant combines the force of law (*Zwangsgesetz*) and moral obligation based on universal rights (*Pflichtgesetz*). It seems to me that this Kantian formula remains viable on the European level. The universal rights proper to the European cultural tradition (*Pflichtgesetz*) fit the bill, while the question of a monopoly on power (*Zwangsgesetz*) seems to be the final element necessary in the construction of a European cosmopolitan sovereignty. What effect can this juridical pair have on the aspiration for a European military force based on European sovereignty?

### 1.4 Evolution of the notion of European Security

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3 In “The Post-National Constellation” (1998) Habermas plots out 4 immediate consequences of such decay: (Habermas: 105-122). (1) the effectiveness of State functions, (2) the sovereignty of the territorial State, (3) collective identity, and (4) the democratic legitimacy of the nation-state.
Title V of the Treaty of the European Union on Common Foreign and Security Policy opens a new chapter in the story of European Construction. Like the tradition of just war, this innovation can be traced back to the international political order established at Westphalia in 1648. Its more immediate pre-history, however, begins in the post WW II era of European construction.  

The Schuman Plan of 1950, in its principles as well as in its intentions, is the direct predecessor of the TEU. Its aim was related to the security threat posed by the lingering tension between France and Germany, and to a desire to address the possibility for repeated conflict through political union of one kind or another. The Schuman Plan was a relatively moderate approach to the problem, based on the unification of the coal and steel industries of the two countries. Security was immediately associated with economic interests.

This association became the bulwark of European construction in the Treaty of Rome and all of its revisions up until the Maastricht Treaty, when the notion of security at last saw the light of day as a matter of geo-politics rather than as a subdivision of national and international economics. Interestingly enough, this division in thought about Europeanization comes at a conjuncture in the conceptual history of geopolitics. At the very moment when European geopolitics and international economics are distinct in the Treaty, the very concept of geopolitics is completely saturated with the economic underside of globalization.

For a complex set of reasons, which we have only begun to document, the European Community from the 1950s to the 1980s evolved in the direction of an economic community. This “economization” of the early European construction begun by the Treaty of Rome in 1957 had an important side effect in the area of security: it cultivated an entrenched dependence on the United States. The attempt by France to create a European Defence Community and later the Fouchet Plan were both too little and too late.

The Delors era of the 1980s re-launches a re-invigorated European Community with the Single European Act and its famous “4 liberties” based on a principled set of economic necessities for the establishment of a European common market. Riding upon the impetus of the European economic construction the Maastricht Treaty is signed in 1991, establishing the European Union and announcing its 5 primary objectives: the standardized aquis communautaire, a common currency, the enhancement of system of interior cooperation, European citizenship and the “affirmation on the international scene of the European identity through the development of a common foreign and security policy”.

I would like to develop the meaning of this identity and its place in the logic of sovereign war and peace, on the one hand, and just war, on the other. My argument has three moments. First: security presupposes identity. Second: political economy is a viable identity formation. And thirdly, security, political economy and identity converge in the concept of security identity.

Firstly, and as we have seen, the Hobbesian model of sovereignty is based on the formation of a political identity and of the collapsing of the national interests on the persona of the sovereign. The Westphalian model of national sovereignty is impossible without this notion of the concentration of the essence of the nation onto one unified, coherent and homogeneous identity. In the post-national constellation associated with the development of the European Union, this identity remains indispensable.
Secondly, European identity has settled into a privileged form of collective expression in the discourse of political economy. Common values and interests, shared heritage and ambition find their most pronounced articulation in the economic version of these notions: monetary value, shared monetary interest, harmonization, common culturally determined economic policy such as the CAP, etc.

Thirdly, these strands of security and identity, connected and simultaneously held distinct by their mutual consolidation through the discourse of economics, have at last converged in the TEU as security identity (Hoffmann, 2000:190).

The evolution of the notion of security has been further shaped by changes in the nature of Europe’s geopolitical “others”. As Pierre Hassner and Jacques Rupnik have recently pointed out, the discourse of cultural collectivity and democratic values in relation to which the notion of European security has evolved takes another aspect from the point of view of Eastern and Central Europe. From the Western Europe point of view, the EU is understood as an embodiment of European democratic values. On the other hand, from the Eastern point of view it is NATO that is the primary purveyor of democratic values, and the EU is primarily perceived as a bureaucratic-economic organism (Hassner & Rupnik, 2000). The apparent irreducible kernel of the European troika: European identity-economy-security plays the paradoxical role of both motor behind a common foreign and security policy and its impediment.

As I suggested above, national identity in the form of a national polity, is the traditional basis for the legitimacy of military action in relation to other sovereign nation-states. Transferring that kind of legitimacy to a European level implies reformulating the concept of polity in European terms. A clear strategy for such a reformulation was clearly by way of the notion of a European identity. Indeed the theme of collective interest and shared values recurs again and again in the official documents related to the construction of a European common foreign and defense policy.

To be sure, the concept of European identity has had an intriguing career in the post-WWII process of European Construction. It is first launched in the Commission’s 1972 Declaration on European Identity, which defines European identity based on three pillars: (1) common heritage, interests and special obligations within the community, (2) the “dynamic nature” of European unification, and (3) the extent to which the Nine were “already acting together in relation to the rest of the world” as it is formulated in the 1972 Declaration on European Identity (CEI 1973:492). All three are based on internal unity, heritage, and internal coherence with regard to the rest of the world. That 1972 Declaration was part of a tactical effort to re-launch the process of European construction, which was however floundering in the economic crisis of the early and mid-1970s.

In the subsequent lull in political activity from the 1970s to the late 1980s, the concept of identity went undercover only to re-emerge later as the anchoring point for the notion of a European defense, in Article J (Title V) of the Maastricht Treaty, and simultaneously in the negotiations between the Western European Union and NATO in conjunction with the ratification of the Amsterdam Treaty in 1997. In the Maastricht Treaty, the notion of European identity is inscribed in the discourse of the “third pillar”, the “common security and foreign policy”, attached to the logic of international strategic otherness of Article J. The Common Foreign and Security Policy includes “the eventual framing of a common defense policy, which might in time lead to a common defense.” (Article J.4). This implementation should serve, according to the preamble, to reinforce European identity and its independence
in order to promote peace, security and progress in Europe and in the world. Up until Maastricht, “European identity” was used to denote the cultural unity-diversity of Europe, thus informing in widely divergent ways the legitimizing weave on which the European Union was to be constructed. Maastricht reduces the concept of identity in the best case to a basis for international diplomacy or, in the worst case, to a quasi-militarized kernel, a celestial fix from which to navigate a defense policy in an increasingly complex global battlefield. Parallel to the launching of the Maastricht Treaty the Western European Union — the conglomerate of EU nations that belong to NATO — makes its own declaration of new principles coining the expression “European Security and Defense Identity”, which it declares as its responsibility to develop. ESDI is conceived as a sort of conduit with the North Atlantic Alliance, and at the same time an assertion of difference, of unique interests, aspirations and capabilities, also on the military level. The final brick in the evolution of the concept of European identity the most recent development of the European Security and Defense Identity. The European Council, in its meeting in Cologne in June 1999, made bold use of the post of High Representative to appoint Javier Solana, former Spanish Foreign Minister, Secretary General of NATO during the Kosovo Crisis, and later Secretary General of the Western European Union (Hannay 2000). The Kosovo crisis brings the European Union face to face with the realities of its role of its new “security identity”. A new Europe meets a new concept of security.

1.5 The Kosovo test

In best dialectical fashion, the Kosovo crisis was both the test of the new European security policy and the reality that created the policy. The short version of the story is that the European Foreign and Security Policy was extremely weak when put to the test. The crisis underscored among other things the disunity among the European nations, the discontinuity between the EU and NATO, and, not the least, the continued dependence on the Americans, both militarily and diplomatically. The principle facts of the crisis are well known. In 1989 Kosovo is for all practical purposes erased from the Serbian political map. With it disappear the political rights of Kosovars. In the period 1989-1998 Belgrade refuses any form of dialogue with the moderate Kosovar Albanians, provoking the formation of the UCK. By 1998 Belgrade was thus furnished with a justification for the repression of the UCK, making no distinction between partisans and non-partisans and civilians. This lead to UN Resolution 1203 in October 1998 demanding a ceasing of hostilities. The hostilities nonetheless continued through the negotiations at Rambouillet, which ended in February 1999. After the Raçak massacre on January 15, and repeated threats of bombing, NATO forces began bombing on 24 March 1999. The run-up to the bombing in April 1999 was framed by a complex network of competing institutional and state competencies. This included a strange interplay of diplomacy, humanitarian reasoning and more or less impotent military posturing between Richard Holbrooke, mandated by the UN Security Council, the OSCE mandated by the EU, and NATO which boldly forged the new concept of “humanitarian air strikes” in order to grant legitimacy for its own military action. All the major international bodies swiftly condemned the action by the FRY/Serbs, but no coherent action was taken to back up that condemnation. No action was found to be adequate to the principled charges of injustice. The question thus stands whether such “coherent action” to “back up” moral condemnation is at all possible. Is there a concept of security which adequately embraces a set of moral principles and at the same time the set of military
tools capable of enacting them?
The Kosovo crisis is for all intents and purposes the child of the Westphalian international system. Yet we can stretch the point further by saying that the Kosovo crisis was an unavoidable consequence of the Westphalian international system. For the irreducible paradox at the heart of the crisis is that both the principles put into practice by the Kosovar Albanians in forming the UCK and the principles deployed by the Serbian leadership were derived from that system. Both were “legal” in terms of international law. Both were based on rights and rule of law. According to the tenets of international law, Belgrade’s intervention in Kosovo was legal in the sense that it fell within the bounds of national sovereignty and of the right to exercise a monopoly of state violence within that framework. The UCK’s assertion of Kosovar Albanian rights was also legal based on the tenet of “national” self-determination of peoples. It must be added however, that the original intention of the latter principle is to protect the rights of peoples under colonization.
The NATO bombings — the “humanitarian bombings” — were considered illegal by most because they were not sanctioned by the Security Council, the only organ considered capable of providing legitimacy to such international action. Those who ordered the bombings argued simply that they responded to the spirit of previous resolutions, if not to the letter. From another point of view the Western allies argued that the strikes were legitimate because they were carried out in the name of preventing humanitarian catastrophe. From the point of view of international law, this argument is simply invalid.

It is not at all clear that the Common Foreign and Security Policy, which was finally formulated in the Maastricht Treaty will become a “defense ministry”—the legitimate military wing of a sovereign State in the classically modern manner. Indeed, the more likely evolution of the post-national constellation in Europe is the further transformation of the discourse of economics as the discourse of security. Despite the fact that the European arm of NATO, the Western European Union, announces its future European military entity as an identity, the economic power of the European Union, seems to be the weapon of global politics. Long before it gave itself an official Foreign and Security Policy, the EU was involved in foreign and security policy. The tool of that policy, aside from traditional diplomacy, was economic encouragement and sanctions, humanitarian aid, promotion of dialogue and encouragement of the respect of human rights. Yet without a doubt the EU inhabits a middle ground between civic power and military power. Foreign policy identity has always been articulated as economic identity. This is part and parcel of the structural logic of the European public sphere. Those with legitimacy in a certain area of policy cannot act, those without it do act. At the very moment when the European Union is eager to posit its security identity, that Identity seems to belong to another plane. The interpretation of the Kosovo situation by the international community was schizophrenic in just this way. All considered Kosovo the “powder keg” of the Balkans. Yet precisely this realization lead to hesitancy. (Weller 1999:33). The emerging international constitutional system has a negative feedback loop: the need for action leads to the impossibility of action. The classical explanation of the failures of Europe in this dark hour of its 20th century history would argue that there is only a shaky coherence in international politics because of a complex network of crossing interests. An

5 Still, one of the many lessons of the war was that military approach used was largely ineffective, that diplomatic efforts on the European level, in the name of Europe, could have had more effect than they did. As has been suggested the discourse of economic unity been engaged in order to reward the respect for cosmopolitan values in a way that displaces the discourse of military power (Adam et al., 1999). A Europe of defense must also become a Europe of diplomacy (Adam, 1999:189; Hoffman 2000:193-95).
alternative explanation would be that these inconsistencies are imminent in the very concept of security. The post-Westphalian concept of security, in order to be security, must harbor and even nurture the tension between the unity of interests and the disunity of the sovereign self.

Utopia is just not what it used to be. Primarily because war and peace are not what they used to be, and thereby security is not what it used to be. The EU failed in Kosovo, not merely because it had a bad policy, or lacked political will or military muscle to back it up --NATO had all these and failed as well—but also because the post-national constellation is still forging a new understanding of what peace and security actually mean.
2. THE (IN)SECURITY OF MORAL COMMUNITY

2.1 Introduction

In the conclusion to his book *Community* (2001), Zygmunt Bauman affirms:

...you hear little about ‘existential insecurity’ or ‘ontological insecurity’. Instead, you hear a lot and from everywhere about the threats to the safety of streets, homes and bodies, and what you hear about them seems to chime well with your own daily experience, with the things you see with your eyes. The demand to cleanse the food we eat from harmful and potentially lethal ingredients and the demand to clear the streets we walk of inscrutable and potentially lethal strangers are the ones most commonly heard when the ways to improve our lives are talked about, and also the ones that feel more credible, indeed self-evident, than any other. Acting in a way that contradicts these demands is what we are most eager to classify as crime and want to be punished, the more severely the better. (Bauman, 2001: 146)

Bauman’s observation builds upon a distinction between *safety* and *security*. The concern for *safety*, which Bauman illustrates with a number of examples, refers to *objective* danger. Security is a protection from danger which *already* exists, which is observable, identifiable, conceptualizable, but which has not yet touched us. *Security*, on the other hand, implies the human pathos of our relation to the unknown. It is thus both a reference to the world of possibilities and a self-reference, a reference to the humanity which lies at the basis of the experience of danger that is not yet identified, articulated or conceptualized. Security is in this way *self-reflective*, it is constitutive of the self. It contributes to fundamentally to the The fundamental difference between security and safety is the ethical pathos that inhabits the former. Likewise, the answer to concerns about safety is law enforcement, the instrumental application of rules and regulations that respond to the objective materiality of danger. What is the answer to insecurity?

This paper is intended as a contribution to the discussion on European integration, in general, and European Security and Defence Policy (ESDP) in particular. It is organized around a particular interpretation of the notion of *community*. It takes as given that the European Union, both in its present and historical forms, conceives of itself as a kind of community. It asks on what grounds a community can be understood and what consequences the experience of community relative to what is understood as not being a part of the community. It will focus on one particular category constituting community, namely *moral* community, then turn to one particular correlate of community, namely *security*.

2.2 What is a community?

In its transition from High Latin to Medieval vernacular the term *communis* retains an ambivalence between its first and secondary meanings: that is, as a quality or state, shared by members of a human group, and as a body of individuals. In the primary meaning it is “a quality appertaining to or being held by all in common, joint or common ownership, tenure liability, etc.” Alternatively, it is a “common character, quality in common, commonness, identity” In the second meaning it is “the body of those having common or equal rights or rank as distinguished from the privileged classes, the body of commons or commonality” or, lastly the political body itself, “a body of people organized into a political municipal or social
unity”. *(OED, 1971: 702)*

This definition of *community* presupposes: a discourse, be it academic or popular and a political position relative to that discourse. What is the discourse of community? The division of labor of academic fields, particularly in modernity, has given rise to a number of differing, sometimes overlapping discourses of community. We might name *social, cultural, political, technological, and economic*, in addition to the object of this reflection, *moral* community. The differences between discourses of community rests upon their differing systems of reference and valorization, and their differing logics of inclusion and exclusion. Variations in discourse thus give way to a politics of community. Academic debates within these fields turn not only around the content of supposed communities but around the borders that articulate them.

From a phenomenological point of view, the rise in the concept of community responds to a generalized sense of crisis in the social sphere, that is to a sense of loss of community. The timeliness of the concept of community is related to its crisis. Communities multiply and overlap, producing criss-crossing identities and loyalties.

Neither the predicates that determine communities are stable nor the body-political that represents them to both community members and non-members. This sense of crisis is associated with the rise of a certain kind of “multiculturalism” and the notion of multi-layered awareness known as *glocalisation*. Because of migration and refugee movements, cultural identity becomes more intermingled, making community boundaries more porous. Global awareness has given force to local legitimacy and cultural sovereignty. The local is legitimiated against a wider supra-local horizon. In terms of the semantic or symbolic structure a community is not only a social praxis, it is a system of meaning. *(Anderson, 1991; Cohen, 1985).* Both access to community and access to understanding a community are determined by codes of conduct and semantics of the community’s actions.

### 2.3 What is moral community?

A moral community is a community whose belonging is determined by a shared set of values. This plays out differently relative to the two axes of community mentioned earlier: community as a set of predicates and community as a body. A community is as set of predicates. The predicates of a moral community are *values*. The catalogue of shared values becomes distinct in relation to other communities which do not possess the same values, or which possess a different composition of values. Thus values are relative to the Other, to the non-community member, to the immigrant, to the other religion, the other culture, etc. No community of values is based on one value alone. Predicates are always multiple. The interplay of values forms the unique character of the community as body: the composition of the community has a value in itself on par with the constitutive values.

A community of values is also a thing in itself, actively implicated and involved in the formation and mutation of values. The community itself has a certain value, both to members and non-members of the community. The community is inherently conservative, regardless of the actual values involved in its constitution. A community, including a community of value, tends toward its own self-preservation.

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6 Hobsbawn: “Never was the word ‘community’ used ore indiscriminately and emptily than in the decades when communities int he sociological sense became hard to find in real life” *(Hobsbawn,1994: 428).*
By value we understand an abstract notion whose concrete realization is estimated, by common consensus, relative difference, or absolute authority, as being of significant worth. Without endorsing a politically relative view of value, it must be admitted that no value has absolute worth. Something is a value from the moment it has more worth than something. Whether the source of this worth is implicit or not does not change the relative nature of its value-ness. The source of values of communities is inevitably occult. This fact contributes to preserving its relativity, by assuring that any absolute reference, historical or otherwise. These basic ideas and definitions open on to the first paradox of the community of values: Values are both universal from point of view of the community and particular and situational from the point of view of moral communities. As abstract concepts, values, are only meaningful to the degree they are considered universally valid. If a value is not everywhere and always a value for the members of the community then it is not a value at all. The community as a whole is defined by its values as against other entities, other groups, individuals and communities, which do not possess its values. In this sense the universal nature of the given values depends upon there particularity, on the opposition to the situations where they are not valid. Supposed universality makes visible internal divergence or particularity. The value principles upon whose consensus the community is formed does not guarantee their concrete universality, their universality in effect. Indeed the very presence of the universal principle is a reminder that the reality to which it refers is not yet universal. The moral community is always disjointed with respect to its own boundaries. Moreover it is both lesser than and greater than its boundaries. Any moral community is characterized by internal heterogeneity, strife, disagreement, political friction, etc. On the other hand, moral community always exceeds the political boundaries of which it is constitutive. Any moral community constitutes itself by relating to others. It there by lies partially beyond its own conceived borders. In other words, the existence of the moral community depends upon the negative relation to its other. Based on its supposed universality the moral community aims at the other as an object of action. It must relate to the other individual, the other community, the other moral ideal, even though it is foreign to him/her. It is the essence of a moral community to fail to be a moral community. Moral community is the movement of non-correspondence between the conceptual, that is, the level of ideas, and the empirical. A moral community is therefore one which is constantly self-interrogating, constantly forming a new idea of itself based on the ever changing empirical landscape of that which it seeks to encompass. The movement is dialectical, swinging from the articulation of moral or norms to the identification of the empirical reality of existing, valid values.

2.4 In what sense is a moral community (in)secure?

Security is the condition of being secure, of being protected from or not exposed to danger, “freedom from doubt […] from care, anxiety or apprehension; a feeling of safety or freedom from or absence of danger” (OED, 1971). Security is thus a negative category, a state of absence on two different level. It is both the objective absence of (or “freedom from”) threat and the absence of anxiety or apprehension of threat. As noted earlier, security, in contrast to safety, refers to a sphere of potentials. It relates to a field of presumed, though actually unspecified danger. This virtual association of security link it with its other aspect. The relationship to an unspecified field of dangers is inseparable from the experience of this danger. Thus a kind of phenomenology of security
comes into play. Security is a lived phenomenon, an experiential concept. By chance or necessity, Deutsch’s classical definition of “security community” is a response to both these axes of the general definition of security: the presence of unspecified danger and the experience of the presence of that danger:

“A security community is a group of people, which has become “integrated”. By integration we mean the attainment, within a territory, of a “sense of security” and of institutions and practices strong and widespread enough to assure...dependable expectations of “peaceful change” among its population. By sense of community we mean a belief...that common social problems must and can be resolved by processes of ‘peaceful change’” (Deutsch, 1957: 5).

In Deutsch’s political theory security community is an integration process of community. It is a dialectical movement between the experience of security that enables the creation of institutions, that, in turn, reinforce security. Security community is thus simultaneously a self-understanding, a perception of one’s own community in relation to certain dangers, specified or unspecified, and the ability to adapt institutionally to the changing security environment. Community in this classical model is a process of change, the evolving relation between the identity of the security community and its institutional response to its environment. In these terms community has an organic nature: it modifies itself through by virtue of the modification of its self-understanding, its understanding of threats to it.

To what extent does the classical model of security community relate to the concept of moral community developed above? On one level, a security community and a community of values are essentially different: on another they are similar. Their difference relates to the threat to which they are opposed. A security community, according to the classical definition, is one whose common basis is the threat from which it offers freedom. The threat is generalized according to any number of categories, provided that the threat is an existential one, that is, that it’s achievement potentially leads to the dissolution of the community. A moral community is of a different order, though its security is based on a structure analogous to that of the security community in general. It is related to the existential threat of dissolution.

The common basis of a moral community is a set of values. The perception of threat to moral values is the basis for the creation and evolution of institutions that secure such values. These institutions are the prime force for changing the self-understanding of threat to the values of the community. The common basis of the moral community is a set of values. What would the destruction of such a community mean? If security is to be understood as the presence of unspecified threat and the experience of that threat, what would the result of the collapse of the security community mean? What does the threat to which security refers actually threaten? What would the execution of such a threat actually mean? Two strange and disconcerting answers impose themselves.

First, the logic of security does not contain a logic of destruction, only a disposition for the unspecified potential for destruction. It is the threat of danger and not danger itself which constitutes the essence of security. Threat, in the security community, has no real referent, only a virtual or potential one. Or, to put it another, the threat at the basis of a security community is self-referential. Threat refers only to threat. There is no external or transcendental danger, at least not relative to the security community, which would be the outcome of the collapse of the security community. (Agamben, 1993; Badiou, 1998).

Secondly, what would the collapse of moral community actually mean? The key to understanding the life of moral values in time is the insight that values cannot be pulverized.
No objective violence, no degree of absence of concrete incorporation of values can serve to annihilate them. If we understand moral values to be purely principled, timeless, placeless concepts then it goes without saying that no empirical change, creation or destruction can threaten them. One might imagine that those individuals who share the moral values which constitute the common basis for the moral community are dispersed, killed, or otherwise eradicated, but the values themselves are never exposed to threat. Thus the reactionary battle cry of popular politics: “We must militarize in order to protect our values!” rings empty. Values themselves are never under threat, can never be eradicated. If the moral community is threatened, this threat surrounds only the cohesion of those who share the moral values in question. Neither the subsistence of the shared values nor their sharing is empirically in doubt, only the cohesion of those who hold them. That cohesion is extra-moral. It does not belong to the community as such, but precedes it and remains external to it. Consequentially, the only community which can actually be utterly and outright dispersed is one in which the there is no common basis, in which there are no common predicates or properties.

What, then, is the security of the moral community? Against what must the moral community be secured? To make a moral community secure would not imply eliminating the objective threat to the moral values. The insecurity of moral community would correspond to the menace of disruption of the self-constituting dialect between value and reality. The only menace to the community is values, is the loss of the process of its self-constitution, the play of community: idea-reality, value_institution. To eliminate insecurity would be to eliminate the possibility of freezing the internal dynamic of community. The menace to the moral community is thus not the destruction of its moral values. It is rather the interruption of the link between the abstract values and the institutions large and small that first concretize them, then contribute to the dynamic of their evolution. The threat is logically double: either calcification of the relation between ideal and concretization at the heart of the community, or its uncoupling. The ability to act as a moral community, and the ability for the members of a moral community to act individually, depends on their ability to take cognizance of the values they are enacting. The moral community is a community that knows itself as such, reacts to the scope and limits of its own application. The moral community is thus not the static existence of the set of values that makes up its foundation, it is rather the process of questioning of the application of its own principles. The moral community is thus by necessity insecure. If it were not insecure, it would cease to be “moral”. The threat to the community concerns the openness to moral questioning, to moral ambiguity. The moral community is not a collective attachment to a normative checklist. It is a formation confronting the ethos of threat implicit in any question of values. What is the relationship between a community of values and its security? What does it mean to say that a community is insecure? The consequence of these reflections is that a moral community is necessarily insecure. The morality of the moral community lies precisely in its insecurity. If it were not insecure it would cease to be “moral”. The morality of the moral community lies in its very insecurity.
3. **AFTER THE COMMUNITY OF VALUES**

*EU and the new nomos of Europe*

### 3.1 Introduction

On 9 May 1950 of the very same year as the publication of Carl Schmitt’s *The Nomos of the Earth*, Robert Schuman rose before a press conference at the Quai d’Orsay in Paris and pronounced what was to become known as the *Schuman Declaration*. Carl Schmitt a Weimar jurist and Robert Schuman a high-level French government technocrat had little in common in terms of their careers or convictions. Nonetheless they share a notable sense of the close of a global era and the opening of a new one, they both detect a mutation in the world order, and an evolutionary ripple in the very notion of civilization.

The *Declaratio* is widely regarded as both the spiritual kernel of the EU and the political foundation of the process of European construction. It proposes creating a community of shared interest in peace, though the tools proposed by the *Declaration* are pragmatic—the creation of a High Authority under which French and German coal and steel production would be placed—it does not, in doing so, shy away from formulating a noble civilizational project.

The *Schuman Declaration* lead swiftly to the signing of the Treaty of Paris one year later, effectively creating the European Coal and Steel Community, the forrunner of today’s European Union. The Treaty, signed by the founding members of the European Union—France, Germany, Luxemburg, Italy, Belgium, Netherlands. Its core principle was a simple philosophy of peace: Instead of the tireless coordination of national interests in order to keep them ending in conflict with one another, it argues that it is preferable to fuse national interests. The reciprocal integration of the coal and steel industries was seen as the first and most obvious step toward such a fusion.

European peace would thus be assured not by diplomatic scrambling between nation-states, but by dismantling of the political-economic sovereignty of nation-states, albeit gradually and only in selected areas. The Treaty was envisaged as the first step in a long and continuing process building-down of sovereign national borders, based on the notion that the values of the European nation-states no longer map onto those nation-states. They both exceed and precede them.

In style and approach Carl Schmitt’s *The Nomos of the Earth* represents a departure from his previous writings. Written between 1942 and 1945, thus framing the stunning battle of Stalingrad in 1943, it focuses less on immediately contemporary constitutional and political issues, shifting instead to a study of the broad lines of intellectual history. In the *Nomos* book, Schmitt seeks to situate European jurisprudence with respect to its origins, permitting himself to speculate on its destiny. For years he had argued that European jurisprudence was all but obsolete, cut off from its sources and under the negative influences of an increasingly...
technological culture (Balakrishnan, 2000: 5). The theme converges with the array of political positions that mark his career. He is by and large indifferent to traditional left/right oppositions of traditional politics, seeing them as secondary to his project of refounding contemporary jurisprudence. Through his career he adamantly argued for the autonomy of the sovereign state, seeing in its decline the loss of legitimacy, the weakening of economic integrity and, the detachment of law from its historical roots.

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

What is innovative about Schmitt’s historical demonstration of the decline of the European jurisprudence is its correlation with the decline of a certain European spatial order. According to Schmitt, the long evolution in the relation between humans and the earth has been decisive for the nature of traditional legal order. The historical links to European international jurisprudence (*ius publicum Europaeum*) have decayed with the old world order that supported them. Territoriality, once the foundation of the nation-state has evolved, causing a parallel change in the nation-state paradigm of sovereignty and the fabric of international law which has its basis in that paradigm.

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

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

### 3.2 The Watershed: From International law to international relations

The European nation-state began to make its appearance in one form or another already in the
15th century. Its primary characteristic was that it constituted a political entity based on the idea of sovereignty. In other words it was a special kind of group or community, either endowed with or considering itself as holding rights to discrete borders, national armies, national language, a national university and, the development of categories and procedures of international law. In the geopolitical process culminating in the Treaty of Westphalia (1648), the nation-state also constituted a political-religious unity according to the principle *cuius regio eius religio*. The Reformation (in Germany, Scandinavia and Switzerland) and the Counter Reform (in Italy, Spain, and Portugal) are by and large political matters forming along the contours of the state. The evolution of international law not only follows the same state-based categories but serves in a perhaps unforeseen way to consolidate and strengthen them. Two events, widely spread in time, fundamentally disrupted the organization of European geo-politics in the post-Westphalian: Firstly, the Monroe Doctrine was essentially a warning to European powers that the era of colonization of the North American territory was over, and that any interference in American affairs would be considered an aggression. Reciprocally, the US would agree to not interfere in European geopolitical affrays. The Monroe Doctrine constituted a splitting of the hemispheres, and a definitive end to European colonization in the Western hemisphere. The Doctrine left its trace in trans-Atlantic including the NATO pact, signed in 1949. Secondly, the system of international law is irreparably damaged by the events of the First World War. The Russian Revolution of 1917 caused a division in Europe which shattered the tenets of international law. What was once equilibrium between sovereign states, reflected in the doctrines of recognition and reciprocity decayed into a pragmatics of international security.

3.2.1 *The Nomos of the Earth*

Carl Schmitt’s concern in *The Nomos of the Earth* and a number of other writings is to underscore and draw the consequences of the historical specificity of international law, to map its historical determinations and the parameters of its validity in the course of world history. It is an attempt to historically link fundamental changes in the nature of international Jurisprudence with changes in the cultural, social, political and spatial order of the world. The provocative and innovative historical analysis of the Nomos book would be impossible without the equally ground-breaking conceptual tools it deploys. In particular Schmitt’s analysis of the evolution of international law and the European legal order grows out of his singular interpretation and application of the concept of *nomos*. In ancient Greek, *nomos* can be defined as ‘that which is in habitual practice, use or possession’. It is thus variously translated as ‘law’ in general as ‘ordinance’, ‘custom’, derived from customary behavior, from the law of God, from the authority of established deities, or simple public ordinance (Liddel & Schott, 1940). (The title of Plato’s well known book *The Laws* translates *nomoi.*) *Nomos* is also ‘law’ understood in the sense of rationality, the ‘reigning’ order of things, or what we would today call ‘discourse’. Finally, it derives from the word *neimô*, which means ‘to deal out’, ‘distribute’ or ‘dispense’. It is thus also the distribution of rationality, both physical and metaphysical, the logical organization of things in space and time. It is the spatialization of rational order. (In modern Greek a *nomos* is a prefecture or county, that is a the distribution of authority valid for a given place. *Nomos* thus implicitly includes an aspect of power, which can, as Schmitt himself underscores, lead to confusion about or the dimension of power. It can designate the subject of power, the holder and exerciser of power, but should
not be limited to this sense (Schmitt, 2003c: 338). Nomos thus refers to both territory and their rationality or discursivity of the order that organizes it. It designates the order established through an appropriation of land, a land seizure (Nahme), which orders the earth and the relationship between subjectivity and power, ownership and action on and around it. It also designates the act of establishing order, of logic or rational discourse through the original partitioning of land (Schmitt, 2003b: 341). Yet more importantly, nomos is not fixed, but rather, it constitutes the reality of territorial order. The partitioning or dividing or spatial organization of land is never simply a moment of crystallization of territory and the administrative laws that organize it, but rather it is a productive shaping of the dynamics in and above and all around the territory.

Indeed, Schmitt’s development of the concept of nomos is meant as a polemical alternative to the positivistic understanding of legal order that he saw as bureaucratically encroaching on European jurisprudence in his own time. ‘The situation établie of those constituted dominates all customs, as well as all thought and speech’, reiterates Schmitt in the Nomos book. ‘Normativism and positivism then become the most plausible and self evident matters in the world, especially where there is no longer any horizon other than the status quo’ (Schmitt, 2003b: 341). Nomos must therefore not be understood as an instrumental prescription of law, which precedes its application, which somehow exists prior to the territory over which it has jurisdiction. On the contrary, the fundamental meaning of territory, of inhabited or uninhabited space, the territoriality of the territory arises with its nomos. This is what Schmitt understands when he calls nomos constitutive, it constitutes the very territoriality of territory through its organization of it. It is indeed an ordering of reality, but one, which orders reality by constructing it. The geographical reality constituted by land acquisition is in turn plays a role in determining the shape and form of international law.

3.3 The new territoriality and the birth of international law

Schmitt draws his understanding of the term nomos from a distinct historical transitional period, that from wanderer society to the society of fixed and land-based households, from the nomad existence to the oiko-nomein, the land-based order of the household. In these terms Schmitt marks off three distinctive historical spatial nomoi, orders of the earth. The first is the mythological stage, from pre-history to the 15th century age of discovery, the second is the period from the 15th century to the early years of the 20th century; the last is the last period, still unconceptualized, according to Schmitt, extends from the Treaty of Versailles and forward. In the era before the planet was conceptualized as a finite totality, space was ultimately free. The question of organizing it in terms of international law never occurred since it was never conceptualized as a thing in itself. It was reality itself, the ultimate and transcendental backdrop of all things. According to Schmitt, this situation began to evolve in the 15th century. The ‘Age of Discovery’ opened the face of the earth to apparently infinite land seizure, thus transforming the essence of space itself. Instead of the geopolitics of discrete and finite territory, a geopolitics of open territory began. Land appropriation throughout the 15th to 17th centuries went effectively un-opposed. This change in spatial and thus geo-political consciousness was, in Schmitt’s view, decisive. Even the pre-Renaissance spatial consciousness which saw Rome- or Jerusalem as its center knew that such a religious or political geography related to an enemy other, be it invading Germanic tribes or Islam. The Renaissance period, on the other hand, was characterized by a lack of opposition to spatial appropriation (Schmitt, 2003b: 87).
During the Middle Ages, Europe was of course not divided into states in the modern sense. For this reason and others international law in the modern sense was not possible. In the modern sense we think of states as having undisputed political control over their own territory, independent of external political control. By contrast, Medieval kings shared power across a number of axes: internally, with their barons each of whom had a private army; externally, they were obligated to show some sort of allegiance to the Pope and to Rome. The discovery of sea routes to the Far East and the (re)discovery of America, the European sea powers transcended the Medieval political limits on their power, disrupting the political order and leading to the emergence of the concept of the sovereign state in the modern sense, first in theory, in the 16th century by Bodin, then in effect in Spain, the France. The Treaty of Westphalia inaugurated *ius foederationis*, giving approximately three hundred political entities, essentially made up of the remains of the Roman Empire, the right to enter into alliances with other political entities under certain conditions (Malanczuk, 1997: 10-11; Cassese, 2001: 20-21). Although number of European states emerged as dominate (France, Sweden, Netherlands), in terms of the right to form alliances and engage in state-to-state diplomacy they were approximately equivalent in juridical terms. A legal order emerged based on the diplomatic and political structure of these equivalencies: the *ius publicum Europaeum* (Koskenniemi, 2002: 418-425).

The fundamental consequence was the re-casting of war as secular. The complex mix of religious, sectarian, inner political power struggle was replaced by a system in which territory became the primary demarcation of political power, and where the logic of inside/outside took hold. The ‘humanization of war’ was the direct consequence of the redrawing of political lines in terms of nation-state territory. Modern international law was founded upon the codification of the new norms of war as interstate instead of religious.

“It was a true European achievement that every aspect of war as limited to conflicts between sovereign European states, and that war could be authorized and organized only by state. This was made possible by the overcoming of creedal disputes which, in the religious wars of the 16th and 17th centuries, had justified the worst atrocities. War had degenerated into civil war” (Schmitt, 2003b: 141).

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

### 3.4 *Ius gentium* and *ius inter gentes*

The notion *ius gentium* stems the 3rd century B.C. at a time one Roman law was primarily

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9 For a critique of the logic of inside/outside in the Westphalian period cf. (Walker, 1993; Teschke, 2003)
Based on civil law. During the time when foreign visitors were relatively rare, Roman law resorted to the fiction that the occasional foreigner was a citizen in order to bring his/her case under the aegis of civil law. Following the Punic Wars however, the Romans rules over most of the Western Mediterranean. Consequently the number of foreigners in Rome increased drastically, such that a new category of law and legal administration was introduced. Civil law was as always reserved for citizens, while *ius gentium*, the collective agglomeration of what was considered to be the laws of all civilized peoples was essentially universal. Based on the pretext of the common rationality of all natural (civilized) beings, *ius gentium* was often called ‘natural law’, being based on the natural rationality shared by all humans (Villey, 1945: 55-56; Stein, 1999: 12-13). Though we speak today of a ‘law of nations’ but it might better be translated as ‘law of tribes’.

When Pope Alexander VI claimed in 1493 to possess the authority to divide the New World between Spain and Portugal, the Dominican Fransisco de Vitoria claimed, in *Relectiones de Indis* (1532), that the sovereignty of the Pope did not extend to Barbarian s, arguing that the *ius gentium* of the Roman texts (the law shared by all peoples) should also be understood as *ius inter gentes*, that is, as a set of rules governing the relations between one people and another (Vitoria, 1989). *Ius gentium*, he suggested, was based not on a sharing of religious belief but on the very nature of mankind. Therefore the relations between Spain and her newly acquired territories had to be governed by this general law of nations (Stein, 1999: 94-95).

Prior to the Treaty of Westphalia, diplomacy had traditionally been in the hands of civil lawyers who negotiated with each other on the basis of an informal and commonly held set of legal ideas. The theoretical consequence of the Treaty of Westphalia was that the new international order, legal or otherwise, had to be separated from Christianity. The newly developing states of the 16th century quickly required the development of a public international law, with the notion of *ius inter gentes* as articulated by Vitoria, as a model. Francisco Suarez who was instrumental in developing Vitoria’s notions, articulates the basis for international law as *ius inter gentes*, in the following way:

> “However divided into different peoples and kingdoms it may be, mankind has nevertheless always possessed a certain unity, not only as a species, but also, as it were, as a moral and political unity, called for by the natural precept of mutual love and mercy, which applies to all, even to the foreigners of any nation. Therefore, although a given Sovereign State, Commonwealth, or Kingdom, may constitute a perfect community in itself, nevertheless, each of these States is also, in a certain sense ... a member of that universal society; for never are these States, when standing alone, so self-sufficient that they do not require some mutual assistance, association and intercourse, at times for their greater welfare and advantage, but at other times because of some moral necessity or lack, as is clear from experience. For this reason, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association. And although this is to a large extent effected by virtue of natural reason, such natural reason is not provided in sufficient measure and in a direct manner. Hence, it was possible for certain special rule of law to be introduced through the practice of these same nations. For, just as in one State or province law is introduced by custom, so with the human race as a whole it was possible for laws to be introduced by the habitual conduct of Nations” (Suárez & Pereña, 1971, II, 20 §44, 1)\(^\text{10}\).

This postulated equivalence between *ius gentium* and *ius inter gentes*, is the starting point of

\(^{10}\) Translated in (Simma, 1995: 7).
the legal world order that forms the basis of Schmitt’s Nomos book. It is a geopolitical reality in which the sovereign state is an impermeable legal subject, on par with all other members of the global community, themselves similarly impermeable legal subject. War is waged between sovereign states, each with legal personality in the eyes of inter-‘national’ law. There is no ‘people’ (gente), which is not at the same time covered by the rights and obligations bestowed upon it by law. All law among peoples is law between peoples. International law is bound in this tradition of conceptualizing the state.

3.4.1 The decline of the old legal world order as the split between ius gentium and ius inter gentes

‘The Owl of Minerva’ only flies at twilight’, Hegel once proclaimed. A world order only discovers the tools to conceptualize and understand itself at the moment of its ultimate decline. The modern world legal order, declared and theorized by Vitoria and Suarez, only comes to expression at the moment of its impending demise. The period from the Treaty of Westphalia to the late 19th century was a period of growing discord between the two conceptions of law of nations. The reality of the world order has, in Schmitt’s view, left it far behind. In The Concept of the Political (1932) Schmitt describes the end point of this long process of decline in which,

“...the entire structure of state-based concepts, that the Eurocentric political and legal sciences had built up through 400 years intellectual labors. The state as model of political unity, the state as bearer of the most astonishing of all monopolies, namely that of the monopoly of political decision, that glimmering work of European form and occidental rationality, has been dethroned” (Schmitt, 1932a: 10).

Yet the quandary that characterizes our time, according to Schmitt, is that we seem unable to dispense with the ‘classical’ political and legal concepts forged in the 16th and 17th century and developed without imagination through the centuries since then. According to the classical model, he argues, one differentiates clearly between the interior relations of the state and external relations, domestic affairs and international affairs. Once upon a time, the state was the privileged arena for the exercising the political, where ‘the political’ was understood as determining interstate relations. According to the classical model, the state was an integral political actor, turned toward the outside, toward relations with other states. Domestic order and security were the responsibility of state controlled police. The criminal was clearly distinguished from the enemy, peace from war. In The Concept of the Political, Schmitt underscores that the concept of the political presupposes a plurality of political units. There can be no political unity without the opposition of that unity to another (Schmitt, 1932a: 54). This essentially Hegelian insight is the basis for Schmitt’s understanding of the situation of the international system. The political world is a ‘pluriverse’, not a ‘universe’: no state represents humanity. Indeed, in Schmitt’s notorious formulation, ‘whoever says ‘humanity’ is deceiving’ (Schmitt, 1932a: 55):

11 In the earlier essay, ‘The Problem of the Domestic Neutrality of the State’, Schmitt explains how the already dominant practices of economic laissez-faire liberalism were not adequate to insure the non-politicization of domestic life. The state today—meaning above all, but not exclusively, Germany—is an ‘economy state’, but it is not equipped with an ‘economic constitution’ (Schmitt, 1930a: 42). The way out of this predicament is, in true Schmitt form, to strengthen the state sovereign, and dampen the party-political pressures (Schmitt, 1930a: 57).
“When a particular state fights its opponent in war in the name of humanity, it is not a war of humanity, but rather a war for which a particular state seeks, against its opponent, to occupy a universal concept in order to identify itself (at the expense of its opponent), in the same way that peace, justice, progress, civilization can be misused in order to vindicate itself and to dismiss the enemy” (Schmitt, 1932a: 55).

3.4.2 The League of Nations and United Nations as institutionalization of ius gentium

Well before his extended commentary on the League of Nations in the Nomos book, Schmitt considered the international institution from both a historical and philosophical perspective. From a historical perspective he saw the League of Nations as playing a roll in the hegemonic struggle against monarchical institutions or as an ideological instrument erected to oppose the imperialism of another state. Philosophically speaking it could have logical coherence under the condition that it be an oppositional association. A League of Nations whose aspiration would be to represent humanity, without any polemic, or ideological counterpart has neither coherence nor any pragmatic role to play in world politics. For such an organization would have to be fully de-politicized and thereby would be no state at all, the equivalent of statelessness.

Schmitt was therefore skeptical to the prospects of the actual League of Nations, founded in 1919, regarding it as ‘contradictory construction’. It is a mere ‘interstate’ organization, not an ‘international’ organization, in the sense that it presupposes the state as an integral and territorially impermeable entity. Where an international organization would create a true universal society, the League of Nations as an interstate organization simply guarantees the status quo of the present territorial borders. In Schmitt’s eyes, the League of Nations belongs to the past in the sense that it ignores the actual permeability of nation-state borders, through common economic, social and culture values. A true international organization, such as the Third International, would ignore the presumed impermeability of territorial borders. Indeed, not only does the League of Nations not eliminate the possibility of war, according to Schmitt it introduces new possibilities for war, encouraging coalition Wars eliminating a number of hindrances to war, there by sanction and legitimating Certain wars. The League is not an institution in which authentic politics can be practiced. It is rather a venue for technical administration of already dominant politics. In contrast, a ‘league of nations’ (Völkerbund) as concretely existing, universal organization of humanity would have to fulfill the difficult task, first, of effectively removing ius belli from all existing human groups and, second however, not undertake any ius belli itself, for otherwise universality, humanity, depoliticised Society, in short all essential characteristics would fall away again (Schmitt, 1932a:

For Schmitt, the League of Nations is just another step in the long process of neutralization of European values and de-politicization of international (European) politics. Here Schmitt goes even farther than his simple critique of the structural change in the world order. He reproaches the League of Nations for its part in the demise of international law in its classical form. Schmitt regarded the United Nation of the Cold War period with largely the same eyes. In a 1962 lecture delivered at the Madrid Instituto de Estudios Políticos, entitled ‘The Order of the World after the Second World War’ Schmitt described the UN as exemplifying the same type of malaise in the international order as its predecessor, the League of Nations:

“We are conscious of the fact that the UN is nothing more the reflex of the existing order and, unfortunately, of its disorder. The UN constitutes nothing. As we can see, it does...
nothing other than complete the turn in the development of the Cold War. No one will dispute that its methods and procedures possess a certain value, however the true problems and objective phenomena cannot be solved with normative or trial-like discussions” (Schmitt, 1990: 13).

Whereas Schmitt’s attack on the United Nations points to the same structural weaknesses, it also underscores that the geopolitical reality onto which the UN, like the League, fails to map is a fundamentally different one. The new geopolitical reality which crystallizes the inadequacy of the UN resolves around the Cold War geopolitical deadlock. Yet from the point of view of European intellectual traditions, and above all the tradition of ius publicum Europeaum, the Cold War saga of international law is a slightly different one.

In the Madrid lecture, pronounced one year after the launch of the Moon Race by President John F. Kennedy, Schmitt focuses his analysis on three distinct problems of the world order: ‘anti-colonialism’, the conquering of space and the industrial development of the underdeveloped world. However, the secondary motifs of war and peace, enemy and criminal remain as supports for the classical form of international law, the ius prublicum Europeaum supports a rigorous distinction between war and peace, between enemy and criminal, as a way of preventing the criminalization of opponents in war. The Cold War continues to permit, even encourage, a grey zone, a blurring of the distinction between warring states and non-warring states, combatants and non-combatants, military and civil (Schmitt, 1990: 13, 18; cf. Hurrel, 2000).

These are timely observations in the age of the War against Terror, the scope and vigor of which would have shocked even the thinker of the ‘state of exception’. The War on Terror has all but erased the distinction between enemy and criminal. The political choice, in the wake of 11 September 2001, of declaring war against Al-Qaeda and Osama bin Laden instead criminalizing him and his collaborators illustrates this transformation. Al-Qaeda is a very loosely organized collective of activists, with virtually no similarities with a state. There is no identifiable enemy in the sense understood by classical international law. The nature of the campaigns, the norms and guidelines adopted by those who wage the wars, the distinction between combatant and non-combatant, police work and politics have disappeared without a trace. The ‘Guantanamo effect’ has washed away any remnants of rights and obligations of prisoners of war in the terms they have been laid out in the Geneva Convention.

3.4.3 The European Union and the ius publicum Europeaum

The question toward which we are moving is the following: Does the European Union, with its institutional make-up and trans-national acquis communautaire, simply extend the trend of ius gentium as distinct from ius inter gentes, which Schmitt decries in the two 20th century attempts to establish a new global nomos? Does the system of European Union law offer something new?

Before turning to our analysis of the EU legal system, we linger at another late text in which Schmitt considers the notion of a European legal order after the League of Nations: ‘The Plight of the European Legal Sciences’ from 1943 (Schmitt, 1957). In this essay, written at approximately the same time as The Nomos of the Earth, Schmitt evaluates what he sees as the state of the art of the European jurisprudence and, in doing so, comments on the nature of European community in terms of actual and possible legal framework. The article is both an evaluation of the relationship between the centuries-old European jurisprudence and the European scholarly traditions into which it is situated, and a diatribe, typical for this period in
Schmitt’s life, against legal positivism (Carrino, 1999).

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

Schmitt then unites his critique of the state of jurisprudence in Europe with parallel attack (in the *Nomos* book and elsewhere) on the destitute tradition of *ius publicum europaeum*, European law of nations (Schmitt, 1957: 386). From the perspective of legal positivism state law and international law have fallen completely from one another. They have, according to Schmitt, two completely distinct sources of law and procedural principles. The internal and the external are thus alienated from each other and a kind of political realism has become the abiding theory of politics (cf. Koskenniemi, 2000: 22-24). The domestic and international belong to two utterly different spheres, have no conceptual or even practical communication with each other. Contracts and agreements made between European states have, for the positivist, formally speaking, nothing at all distinct in comparison with contracts and agreements made with non-European states. The fact that two European states might enjoy an international agreement, as opposed to having one with a non-European state is strictly a matter of coincidence (Schmitt, 1957: 388; cf. Slaughter, 1995; 1997).

“Since the 17th to 19th centuries the European spirit has developed a specific international law, now at the turn of the 19th and 20th centuries, international law has dissolved into countless indistinguishable inter-state relations of 50 to 60 states around the whole world, in other words into a frameless universality” (Schmitt, 1957: 388).

Here the assumption upon which Schmitt bases his lament over the absence of a coherent (non-positivist) legal order is precisely the same assumption he criticizes elsewhere in his assessment of the international legal order (League of Nations and UN), namely that it is an amalgam instead of an interconnected, organic legal system. The strange reality, however, as Schmitt underscores, is that the European states share similar or identical legal systems to form the basis of a legal community. The more or less absolute juridical equivalence of the individual state international legal systems, the identical ethical, political and cultural status of their legal personalities renders *ius publicum europaeum* obsolete by also uninteresting for the present.

The new European *nomos* will not be a legal order in which all European nation-states adopt one and the same parallel legal system, thus sharing a single tradition that is unaffected by national particularity. Not like a re-transmition of Roman law as a ‘spiritual and intellectual Common Law of Europe’ (Schmitt, 1957: 392-393) This would be the opposite of the ‘atomization’ of the nation-states which Schmitt so vehemently attacks in his evaluation of the League of Nations and the UN. Yet a true *ius publicum Europaeum* will need to be both more and less than a shared tradition, passively adopted. It will need to repose upon *both*
shared traditions and national, individual and case-based particularity. As it happens something like a trans-sectorial legal order has indeed begun to emerge in Europe and continues to develop.

3.5 European jurisprudence in the flux of European sovereignty

The process of European integration has advanced farther than any of the historical European utopians had dreamed. Both the presentation in Thessaloniki on 20 June 2003 of a draft Constitutional Treaty for the European Union and the most recent Eastern Enlargement undertaken on 1 May 2004 constitute bold and decisive steps toward the creation of a sturdy institutional unity. Yet what does it mean for a given institutional set-up to be European? Just how European is the European Union Legal System? (Niess, 2001: 9-10; Burgess, 2002: 469-470) The question of the fundamental sense of Europe and what kind of institutional set up it calls for is far from resolved (Pageden, 2002; Passerini, 2002a). European unity remains something other than the unity of Europeans. Nor is it constituted by the unity of its political institutions, government, legislatures or courts. It is something more, though clearly something less as well.

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

As we will see, European Union Law occupies a strange and complex position between an international law model and a federal model. It belongs to the spirit of European construction to develop a kind of jurisprudence which communicates with national legal traditions in the tradition of Common Law, based in culturally determined norms and customs, and that it appeal to universal principles and the formalism of international civil code. Where international law has four interrelated types, a) treaties and conventions, b) customary law, c) general principles, d) standing court decisions (Cairns, 1997: 71). European jurisprudence, as well shall see, has an even more complex set of sources. The recurring challenge for the European Court of Justice (EJC) has been to navigate the terrain between the general scope of international law, law established between member states, law established between member-states and non-member states, and the growing corpus of law established sui generis between the EU and member-states.

This is not the place to rehearse the many utopian histories of European construction, some more viable than others. A unique chronology can be charted according to whether one is concerned with the geographical conceptualization of the European continent, the ebb and flow of something called the European spirit, the seemingly unavoidable economic nature of its institutions or the contours of its legal institutions. Each is constructed upon a myth of origin and shared destiny, of alpha and omega; each is teleological in design, aiming, with varying degrees of pragmatic fulfilment of an integral ‘Europeanization’ (Burgess, 2003).
3.5.1 The spatial determination of European history

European history has never been a chronicle of facts and events that unfolded in a place called Europe. The history of Europe is a cosmology, a myth of foundation that unites heaven and earth, the geographical continent and the people who have inhabited it (Passerini, 2002b: 21). It is narrative bound together as a system of ideas, constituted through traditional, physical, moral and encyclopaedic history. It has never simply been the story of politics played out on a continent already constituted, already shaped. The history of Europe is the history of the interpretations of the myth of Europe, including the geographical one. Though no less indeterminate than other narratives, the geographical narrative of Europe is primordial among narratives. The ‘great events’ of European history, that is, those deemed worthy of inclusion into the canon of histories, official or unofficial, of Europe are both trans-national and transterritorial (Duroselle, 1990; Delouche, 1992; Venner, 2002: 11-14). Long before the notion of a European spirit or intrinsic destiny become dominant, Europe was a place. The confines of Europe trace a region of peculiar geographical characteristics, which influenced the lives of humans who came to it. A certain number of conclusions can thus be drawn on a strictly material basis, without being tempted by a historical determinism. The geographical particularity of the European peninsula most often counts among the founding characteristics of the abstraction ‘Europe’. Yet oddly enough, as a peninsula it is not singularly set apart. Notwithstanding the Ural mountain range and river, only a great plane separates it from central and the East Asia. Aside from its most northern regions, continental Europe enjoys a relatively temperate climate. In contrast to the other continents of the world, Europe contains a mosaic of landscapes, providing a vast geological and archaeological. Its topology contains everything from mountain ranges to river basins, volcanoes to mountain plains (Duroselle, 1990: 15-18).

This geographical specificity of Europe has determined the character of the migrations that have traversed it and continue to do so. Particularly in its eastern regions, the territory was overrun by waves of invaders from Asia: Celts, Indo-Europeans, from the second millennium B.C., the Germans in the 4th and 5th centuries, the Huns, the Bulgars, the Avars, the Magyars and the Mongols, all entered Europe cross the broad Eastern plains. In addition to significant immigration, Europe’s cultural landscape has always been determined by important internal migration, from the Greeks in Western Mediterranean to the Vikings in the British Isles, to the Danes on the northern Continent. The metaphorical meaning of Europe first arose out of its geo-spatial orientation. For anyone standing on the Eurasian continent, the European peninsula lay in the direction of the travel of the sun. The sun set over Europe. Europe was thus the Evening Land, Abendland, the land of the setting sun. Europe was at the extreme of time, the end of the day, the end of light, thus easily associated with transcendence and progress, spirit, the course of life, etc. Yet all in all, the ancient Greeks did not look beyond their local geography to seek insights into the geographical significance of the European Continent. Likewise, Romans were far for preoccupied with the cosmos constituted by the Empire, ‘East’ and ‘West’ were terms that applied to the space already under Rome. Indeed, in the long perspective, the Eastern/Western division, and even up until today, has carried far greater political consequences than the general geographical one. According to Denis de Rougement, it is the chroniclers of the Battle of Poitiers (754) who first conceptualized (in writing, to be sure) the notion of Europe as ‘a continental community, one which includes the nations living north of the Pyrenees and the
Alps, sharing the task of defence against the common enemy’, namely Islam (Rougemont, 1966: 40-45).

Debates over the geographical determination of have not foundered. European construction has always been synonymous with geographical expansion, which has in turn opened questions of cultural and political determinations linked to space. The most recent and remarkable illustration of the abiding misprision between physical geography and cultural topography is the long-planned, if rather hastily executed Eastern Enlargement of the European Union. The ‘belongingness’ of the 8 new member-states is beyond doubt, yet it requires a rationale is more difficult to articulate: geography, culture, moral, history, politics, tradition? According to the official European Commission pamphlet on the Enlargement:

“All 10 newcomers are joining because they see their natural place within the EU and they share its goals of freedom, democracy and prosperity. Enlargement finally heals the rift in Europe opened up by World War II, the East–West confrontation and the Cold War” (More Unity, 2003).

New Members States share a set of values: freedom, democracy and prosperity, which are more or less concretized in their own national political systems. None of these values is autonomous. All lie in networks of power, economics and global culture, which lie beyond the borders of the communities in which it is the aspiration to see them implemented. Indeed it is the incompleteness of this Community of Values which made the operation a provisional success. It is the extra-communitarian character of global culture which enables the enlargement. The Community of Values, which is the beacon of the Enlargement, is in effect an open one, it is a community that surpasses itself, which is closed, in effect, because it is open. The values which form the community, exceed it as well. By the very logic of value, if not by the political reality of enlargement, the European topology of value is not identical to the European geography.

3.5.2 The European nomos: a topology of value

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

“Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, democracy, equality, freedom and the rule of law, Believing that Europe, recruited after bitter experiences, intends to continue along the path of civilization, progress and prosperity, for the good of all its inhabitants, including the weakest, most deprived, that it wishes to remain a continent open to culture, learning and social progress, and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity through the world, convinced that, while remain proud of their own national identities and history, the peoples of Europe are determined to transcend their ancient divisions and, united ever more closely,
Europe’s past is conceived of as the foundation for the values of its present and its future. There is, according to the Preamble, inspiration to be found in the past, inspiration which also contributed to developing the inviolable and inalienable ‘universal values’ of our present. Those values, though universal, must be posited again as the basis of the Europe of today, in order to both overcome the divisions of the past and forge together the common ‘destiny’, which, even though it is the destiny of Europe, appears to be sufficiently threatened to require inspiration from the past in order to safeguard it. An insistent though fundamentally unstable notion of universality inhabits these opening aspirations. One the one hand, the cultural inheritance of Europe’s past is the origin of the universal values of the present, the basic political principles that guide the European construction of our time. On the other hand, however, that past is one of division and clashes, division which must be overcome in order to deploy the values, which nonetheless were valued before, toward the unifying of our present, which finds itself under the inspiration of the past. Thus the strange logic of universal value: Universalism of the past is fissured and must be transcended in order to achieve universalism. This is the tension between a transcendental notion of universality, a notion whose origin and destiny are doomed to remain invisible like Schmitt’s mystical origin of International law, and a kind of normative universalism, a universalism-to-be, a universalism understood as in some sense already here, but nonetheless necessary to effectuate and operationalize in and through European construction. Despite its ‘bitter experience’, and with no implicit knowledge of the future, Europe will continue along its path, choosing its unavoidable destiny.

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

Thus the themes of ‘territoriality’ and ‘territorial cohesion’ recur again and again in the Constitution’s provisions. Though the European Union remains a geopolitical entity whose physical boundaries are beyond dispute, the cohesion of its territorially is explicitly posited as an object to be reinforced. Among the EU’s objectives, formulated in Title I is the promotion of ‘economic, social and territorial cohesion’ (*EU Constitution*, 2004: 16). At the same time the Union will seek to maintain and respect the ‘territorial integrity’ of the member states, ‘maintaining law and order and safeguarding national security (17). EU citizenship includes the right to work and reside freely within the territory of member states (19), to enjoy rights of EU citizens in the ‘territory’ of third states. It becomes evident that, on the one hand, the classical notions of nation-state self-constitution and relation to others is clearly valid and in vigour; on other hand, the repeated reaffirmation of the notion of territoriality nearly reads like a throwback to a time when the notion had far less anchorage in time and tradition. The notion of territoriality is reiterated precisely because the Draft EU Constitution comes to the fore in a moment when territoriality has never been so precarious, never so distant from its own self-evidence.

In this sense it is also remarkable that a new figure of spatiality emerges from the draft constitution, equally marking the *nomos* of the EU. The value abstractions announced and
confirmed in the draft constitution are repeatedly associated with an area. Thus, ‘the Union shall offer its citizens an area of freedom, security and justice without internal frontiers’ (15, 48). In terms of its neighbouring states the European Union shall ‘also promote an amorphous space of influence, ‘an area of prosperity and good neighbourliness, found on the values of the Union and characterised by close and peaceful relations based on cooperation’ (58). It shall also ‘… constitute an area of freedom, security and justice with respect for fundamental rights and the different legal traditions and systems of the Member States’ (187). The values of the European Union are not positively and indistinguishably attached to singular individuals or intuitions, not even to particular determinations of space such as borders and walls. The European values to be institutionalized in the Constitution of the EU constitute semi-amorphous areas, zones of value, non-linear and non-discrete.

The Charter of Fundamental Rights contained within the Constitution, lays out an unsurprising set of traditional European values, based on the UDHR tradition of humanist principles, supplemented by global capitalist notions of free movement of goods and market liberalism. Values, moreover, is a central theme through the text. Most significant for our purposes is that despite the distinct European tradition, geographically discreet and territorially sovereign, nonetheless constitutes and amorphous ‘zone’ of values and rights (EU Constitution, 2004: 15-17). This ‘area of freedom, security and justice, without internal frontiers, and an internal market where competition is free and undistorted’ does not map onto the political geography of Europe, rather it draws its own value-topology in a Heideggerian fashion. Simultaneously the draft Constitution insist on one of the primary inter-national values, namely the maintenance of ‘territorial cohesion and solidarity’ amongst Member States.

This is only one form of the great paradox of our time, cooked down to the term ‘glocalization’: globalization opens the horizon for ubiquitous experience of ideas, which by the reverse-awareness of the particularity of the local, are overturned in their universality. This is the truly Hegelian moment of global society: the universality of universal precepts is overturned by the universally valid experience of their specific application and applicability in particular settings. Market liberalism, to take the most prominent example and a central tenet in European construction, is only universal to the extent it can be applied in the individual global settings that were completely unforeseen by those who first formulated the principle. In terms of the Preamble, the European values will be spread to all Europeans, all who fall under the same umbrella of Europeaness will be respected for their difference, precisely because they are different, weak, deprived.

By the same token, national individuality is not opposed to European identity. The national schisms that brought the European wars of the past are not in some sense exceptions of history, a temporary derailment of the true European history. Nor are they inferior moments in the construction of a higher order of civilization. The dialectical experience of conflict-in-unity is the very essence of European thought, both on the political level and in the domain of jurisprudence. Without the geographically based cultural heterogeneity on this otherwise homogeneous peninsula, the notion of a European unity would be unthinkable. This set of ideas stands in contrast to what Schmitt rejects in the League of Nations model of international organization, namely that it homogenizes the member states, reducing their political subjectivity and legal personality to mere straw men. They become mere political and juridical atoms, with no internal politics or interpretive jurisprudence. The far more dialectical self-understanding of the draft EU Constitution conceives of the political subject and legal personality of Member States and the EU as a whole at large as permeable.
3.5.3 Spatiality of the new European nomos

The same can be said of the European legal order. Indeed the space of international law—its organizing *nomos*—has always been severed and incised, cut and engraved. The fundamental mutation that Carl Schmitt sees after the Second World War can also be characterized as a lateral cut along the geographical East-West line. This cut does not, however, hinder further cuts and divisions on different levels, traversing different planes, zones and spheres. These cleavages exist in both space and time. International Law, during the Cold War, is simultaneously universal, bipolar and heterogeneous. In Europe, in particular, there is a distinct ‘north-south’ distinction, separating Greece, Portugal, Spain, Southern Italy and Ireland from the rest of Europe. The European system of norms is also torn in two across the trans-Atlantic axis. After 1990 the abiding bifurcation dissolves, the fall of the Berlin wall brings with it the end of communism, the unification of Germany, the collapse of East-West European multilateralism, and fresh Eastern European aspirations to join the economic development of the rest of Europe (Gautron, 1999: 6-7).

Moreover, the 1990’s brought with them a new landscape of both states and inter- and non-governmental organizations. The former Soviet Union had broken into a number of states, Ex-Yugoslavia and Czechoslovakia has brought new states on to the scene, all of which make transitions to both market rules and legal norms at differing speeds. The juridical questions related to borders, monetary zones, trade and taxes, armaments, security, and rights of individuals and citizens become geometrically more complex.

Simultaneously a new juridical cosmos of inter- and non-governmental organizations has become more and more dominant, supplanting, in some settings, the legal and economic society at large (Cambodia, Malaysia, etc.) To this can be added the expansion of the Council of Europe and the Organization for Security and Cooperation in Europe, a still-un-finished revamping of both NATO and the Western European Union, the Organization for Economic Cooperation and Development, and lastly, of course, the previous and most recent enlargements of the European Union.

Each of these institutional changes has its own set of political, economic and juridical consequences in each of the European states. These political and institutional changes in European ‘architecture’ signal the shift in the *Nomos* of European jurisprudence.

3.6 Anthropology of the new European nomos

Though debate among political scientists surrounding the question of what kind of political entity the European Union actually is has not abated, there is consensus among legal experts that it constitutes a *sui generis* phenomenon of jurisprudence. EU jurisprudence distinguishes itself from both classical international law and all types of federal jurisprudence. As the Court of Justice of the European Communities stated in the oft-cited 1963 judgments by ECJ Van Gend & Loos.

“The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit with limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations in individuals but is also intended to confer upon them rights which become part of their legal heritage.
These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community” (Van Gend en Loos, 1962)\(^\text{12}\).

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

“by contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply” (Costa/ENEL, 1964)\(^\text{13}\).

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

**Genealogy of the new European nomos**

European law flows from a number of different sources, on different layers, international, European and national. It is an amalgamation of ‘sources’, but also a synthesis of *kinds of* sources of varying hierachization (Hunnings, 1996; Winter, 1996; Cairns, 1997; Chalmers & Szyszczak, 1998; Evans, 1998). Writ large, the ‘sources’ of EU law consist of three levels of authority and legitimacy. The ‘sources’ are ordered in a hierarchical manner. The two primary sources of European Union law are (1) primary law, the treaties creating the EU and (2) the treaties entered into by the European Community with third states. The Treaty of the European Community, Article 249 then identifies the formally recognized ‘secondary sources’ or ‘secondary legislation’ of community law: (1) regulations, (2) directives, and (3) decisions. Finally, a set of tertiary sources of European law are associated with the practices of jurisprudence of the European Court. Such sources are decision fill out the areas not directly covered by the secondary and primary sources. These are (1) Acts adopted by representatives of Member State governments, (2) the case law of the European Court of Justice (ECJ), (3) Member State national law, (4) general legal principles, and (5) principles of public international law (MacLean, 2000: 91-92).

These three layers of source material for EU law, differentiated into two, three and five sublevels form the substantial sources. The treaties represent the most general or universal level of legal sources. They dialogue with the grand principles and philosophical traditions, questions of design and destiny of the European project.


Here the scope of legal interpretation is broadest and the politicization the most salient. The secondary sources integrate the technical and technocratic elements to be covered in any regulatory construction. The third level sources provide space for politics on all levels, though predominantly they open the way for inter- and intranational politics. Member state national government expresses political identity by asserting the legal validity of governmental acts. The case law of the European Court of Justice particularizes the palette of legal sources by bringing non-state groups, corporations, classes and individuals to the corpus of law. To these are added conventional principles of national law and international public law, as well as the general philosophical principles of legislation. The ‘mystical’ sources of law, proclaimed by Schmitt at the outset of Nomos of the Earth, might very well be structural (Derrida, 1994; Schmitt, 2003a).\(^\text{14}\)

### 3.7 Topography of the new European nomos: competence, metacompetence, para-competence

These dilemmas and conundrums gave birth eventually to the theory of competences, itself also particular to the EU, and designed to navigate the treacherous waters between the bare Schmittian universalism of international law and the federal law of the hitherto close approximations of legal community. Competence is not an extra-legal attribute, but rather the fundamental attribution of law. Competence designates the foundation of jurisdiction, the basis of authority and legitimacy for any given field of legal issues. Yet, like legitimacy and authority, competence is necessarily the object of attribution. Competence can only be attributed through competent authority. Thus a meta-competence becomes the precondition of competence itself. This ‘Kompetenz Kompetenz’ question, which by no means seals the fate of competence or arrests the natural quest for the final (mystical) origin of competence. The EU does not idly wait for competence to be naturally evolved through national court procedures. Rather, it possesses the right of attribution of competence (a.k.a. ‘transfer of sovereign rights’).

Like other aspects of the inter-national EU project the theory of competences finds unavoidable the division legal though into internal and external. Yet across the EU external border and through its internal borders, there flows a complex of extraterritorial flows of cultural meaning, legitimacy, and competence. However, instead of aligning itself with the model of federal law, whereby competence is attributed according to substance, the attribution of Community or Union competence follows the lines of the aim of the treaties, doing so with ‘variable intensity’. The EU thus possesses a mechanism for the distribution of legal power which has a géométrie variable. As a function of this intensity one can distinguish the situations in which the Community has at its disposition competences which are substituted for those of states, situations in which the Community has at its disposition a coordinating competence, itself susceptible to varying degrees of coordination (Gautron, 1999: 113).

The European legal order bends and stretches the traditional concept of legal personality and does not a little mischief to the notion of the political subject. At the moment of Schmitt’s caesura at the end of the Second World War, the sanctity and autonomy of the individual is set for epiphany in the Universal Declaration of Human Rights (UDHR). In other words, the individual is constituted on the international scene in terms of his/her rights. The document is also the inaugural use of the term ‘human rights’ in an international setting, adopted by the

\(^{14}\) Cf. also Derrida (1994).
General Assembly of the United Nations. The individual and the human rights attributed to it thus acquire the legal force of international law. Although international law does not come close to exercising universal jurisdiction, there hardly exists a more encompassing expression of universality in the sense Schmitt wishes to construe it in the new *nomos* of the earth than the notion of human rights. Few dispute its validity, though interpretations of its precepts are *legio*. The Declaration refers both to rights of nations and individuals. Nations are guaranteed the right to self-determination and to property; individuals are guaranteed the rights to life, liberty, freedom, freedom of thought, expression and assembly in addition to a wide set or rights involving access to legal process (UN, 1948).

The self-evidence of the formal validity of a fixed set of principle of human rights has been tested with increasing frequency. End of millennium multi-culturalism has put into question the special version of universalism embodied by the UDHR (Beck, 1999; Grimm, 2000). Political disdain for the UN and the impracticality of human rights have grown in kind with the US global hegemony (Guantanamo, Abu Ghraib). In Schmitt’s eyes the United Nations suffers from the same untimeliness as the defunct League of Nations. It is essentially the institutionalization of a covenant regulating the relationships between sovereign states, one which remains incapable of conceptualizing their porosity. Though it is clear that the UDHR concerns most directly individuals its mode of application has typically been through the authority of the nation-state.

In terms of European Union politics the UDHR provided the inspiration for the drafting of the European Convention on Human Rights, which was adopted in 1950, less than two years later (Cohen-Johathan, 1989; Alston & Weiler, 1999: 3-66). It plays a central role in both the Treaty of Rome (establishing the European Community) (1957) Article 13 specifies the European Community and European Council will seek to ‘combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation’. Article 177 mentions ‘human rights’ explicitly, admonishing that ‘Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms’ (*TEU*, 1992 Articles 13 & 177). The Treaty of Amsterdam (1997) reaffirms these general notions of human rights in the foundation of the European Union, stipulating it as ‘founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States’ (*TEU*, 1992: Article 11). The notion of human rights is also object of a wide array of legislation in force and in preparation.

The Treaty of European Union also plays the role of bringing the Common Foreign and Security Policy (CFSP) into formal existence. Remarkable in this context is that object of securitization is not only to assure the security of Europe in a conventional sense, but also ‘to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter’. Lastly, the TEU sets out the conditions of membership to the Union, which include an acceptance of the principles of human rights as set out by the UN Charter (*TEU*, 1992: Article 49).

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

Three other recurring principles have marked the singularity of the European legal order: direct effect, supremacy and subsidiarity. Direct effect can be defined in broad terms as the mechanism whereby a European citizen can rely upon a provision of EU law before his or her national courts. The national courts are required to acknowledge, protect and enforce the rights conferred by the provision (Cairns, 1997: 84). The notion of direct effect thus sets EU law aside from other international institutions in the sense that relates directly to the individual. Whereas international law and international organizations confer rights and obligations on nation-states, EU law has the ability to exercise jurisprudence in an individual capacity. Individuals have a set of transnational European rights, which at the same time are protected by the jurisdiction of the national courts. Supremacy assures the precedence of EU law in cases where it comes into conflict with national law.

These structural principles are not formally assured in EU treaties. On the contrary, they have grown informally through the corpus of case material that has developed throughout the construction of the European system. The principles of supremacy and direct effect have a clear impetus: they move the center of gravity of European jurisprudence away from the nation-state level, and toward the EU level. This shift was perceptible throughout the 1980’s and woke the concerns of the European public sphere, yet most were convinced that its national institutions would not be threatened by EU construction (Cairns, 1997: 96-97). In this atmosphere the concept of subsidiarity was developed, both in legal cases and in the political discourse surrounding the Delors presidency in the European Commission. It was codified in EU law through Single European Act (1986). The Act stipulates that the European Community should act only to realize the objectives of its environmental policy where these objectives could not be attained better the level of the national authorities it was later. The principle was later codified in the TEU in terms of competence, specifying that ‘in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community’.

The triple mechanisms of direct effect, supremacy and subsidiarity thus put into place a regulation of the porosity of nation-state sovereignty. They organizes an international legal order in which the currents of universality are supplemented and supplanted by those of particular rights and obligations. It thus transcends the classical ‘monist’—‘dualist’ dilemma which Schmitt bemoans in the ‘Plight’ essay of 1943. That controversy pits those who, like Kelsen, see national legal orders as ‘creatures’ of international law (monists) against those who, like Triepel and Anzilotti argue that national legal orders were separate legal orders which resisted the penetration of international norms (de Witte, 178). The European legal system, if only by default, resists both poles of the debate.

3.8 Conclusion

The new nomos of Europe: the continental system of value.

In Schmitt’s vision the European legal sciences have already survived its own fissuring into legitimacy and legality. The true danger threatening Europe’s legal sciences does not come from the metaphysics or theology, but rather from ‘unbridled technicism’ that simply uses
laws a tool to carry out concrete aims.
We have seen the present structure and substance of the EU legal system may very well shield the legal substance from the technicalities.

“The ‘lexification (Vergesetzlichung)’ of law in the French Style and its transformation into state legality and into a function mode of state justice and administration held the danger of paralysis or, for Germany as the most strongly industrialized country, the danger of mechanization, technification and termitization. Its destiny accelerated it in the growing motorization of the law-making machine. The saying about the legality that kills, the ‘légalité qui tue’, announces the danger of this perversion of law in the network of constantly ever more ‘legalized’ rules of duty. All that remains for us is the appeal to the legal sciences as the last protector of the pointless emergence and develop of law” (Schmitt, 1957: 423).
4. **IDENTITY AND THE INTOLERABLE**

**4.1 Introduction**

The European Middle Ages, while essentially dominated by the monotheism of Christianity, was not unaware of its silent rivals. European Jewry was an important dimension and Islam was known to the learned. Moreover, the trace memory of Roman persecution remained alive among church authorities, creating space for the question of toleration. A minority of Christian authorities in the 13th to 15th centuries supported some notion of religious toleration, though Inquisition remained the preferred instrument for suppressing religious dissent.

The Enlightenment was the intellectual heir to the Reformation and the Thirty-years War. From the earliest years of the 17th until the Treaty of Westphalia in 1648, European states fought each other in the name of religious convictions. At the same time as international conflict wracked Europe, conflicts broke out within European states, mirroring the religious conflicts on the international scale. Religious dissent challenged the uniformity of regimes based on the unity of church and state. The Westphalian order left individual nations faced with the problem consolidating political unity in an environment of confessional disunity. Religious belief was increasingly seen as something that should not dominate in the same way a foreign power might do. A rising tide of support for religious toleration became the characteristic of Enlightenment.

The concept of toleration is alive and well today in the field of philosophical ethics, safely inserted into debates between liberalism, cosmopolitanism, and communitarianism. In these debates however, it is assimilated to the traditional question of liberty (what liberties are just and affordable in a society where not all can be free?).

I would like to repose the question of tolerance as a question of identity, both individual and collective. While canonical debates about toleration take the identity of the individual or group as a starting point for a reflexion about the nature of toleration to be ascribed to them or claimed by them, I would like to pose toleration at the very foundation of identity itself, and order to work toward a response to the troubling question, which indeed surrounds this discussion: “What is the intolerable?”

**4.2 What is identity?**

When we speak of being French or American or Norwegian, we refer to a category, to a kind of community, a community which is far more complex and far more rich, but also far more ambiguous. Therein lies the problem. If we are something, if we have, at a given moment, an identity, a cultural identity, then it is this ambiguous community which is the source and the determining force of that identity. It is what makes us what--or who--we are. That community is our sign, our identity, our cultural identity. It identifies us for others, it is what permits others to identify us. What is fascinating, however, is that this cultural community which identifies us for others, identifies us also for ourselves, makes us who we are, determines our very--identity. It functions as if it were an other, as if it were a kind of external authority, an authority or agency which directs and determines our identity, our cultural identity. Even if we are Norwegian by right, we are obliged to understand that Norwegian-ness (in relation to

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the criterion for Norwegian-ness) which does not belong to us, is external to us, in effect belongs to someone else.

So when we go to ask the question, "what is an American?" the first question which imposes itself is, "To whom do we pose the question?" To ourselves? To someone else? And if we pose it to ourselves, what is the sense? Don't we already know? If we pose it to another, what is the sense? Does that other know us? All this being said, it is obvious that the question of cultural identity imposes itself more today than at any other time in recent history. It is the great imperative of our time. Never, since the Second World War has the notion of Europe and of the cultural identity of Europe in its totality been more incessantly interrogated than today.

The urgency of the question of Europe manifests itself by the confluence of two particular phenomena: On the one hand, we are living a Europe of unification, a Europe which has organised itself, both in its way of thinking and in its political forums, in concert with a number of unifying forces, centralising forces, forces which are doubtless nourished by economic interests, but also determined by a real will to unity and to cultural homogenization. This movement of unification is clearly seen in the question of the European Union, in the question of the future form of the Eastward expansion, of the possible entry of Norway into the Union, of the general geopolitical changes in Europe.

On the other hand, we are living a Europe of disintegration: witness the decomposition of the Soviet Union, of Czechoslovakia, of Yugoslavia, the Greco- Macedonian conflicts, Hispano-Basque and Anglo-Irish conflicts all testify to the gravity of the internal crisis of national identities.

### 4.3 Characteristics of identity

Identity can be differentiated along two axes, vertical and horizontal.

On the vertical axis, identity refers to a hierarchy of generality: we speak of personal identity, family identity, institutional identity, national identity, global identity, etc. In this way identity is understood as a set of concentric circles, one identity encircling the other in a rising order of generality. One type of identity is more general than the next.

On the horizontal axis, identity also refers to a range of complexity. We speak of sexual identity, moral identity, professional identity, political identity, racial identity, etc. In this sense identities overlap, supplement and at times compete with one another, as well as with the vertical axis of identity.

This understanding of identity can now be further developed. Identity is not merely what we think we are; it is also what others think we are. It has, in other words, both subjective and objective aspects. It is subjective in the sense that it is a representation of the way a certain individual or group understands itself. It is objective in the sense that it is a representation of how others see the group. Clearly these two sides are co-determinate. In other words, an individual or group identity is in part formed by how it or its member sees itself, and in part by how others see it. In the case of groups, individual identity is also determined by how the individual members of the group see one another.

In this sense, identity of an individual or a group is always connected to an other. It is always associated with a someone or something which is not the individual or the group. I am never entirely the author of my own identity. I am who I am only as far as others see me and recognize. The others can be another group, another individual, or—and here is the difficult part of the structure of identity—the other can be myself. The other can be my past or my
imagined future. One always has some idea of oneself. But when we look at ourselves, when we look in the mirror, when we ask what our own identity is, what do we see? Do we see another—an object, a thing that is other and foreign to us, a thing that we can conceive of with objectivity? Or do we see something that is identical to us, something which is the same, has the same experience of being itself. The thing we see in the mirror is both us and other, both a object that is seen, and a subject that sees. In order to be ourselves we require the Other who perceives us, even if that other is ourselves. This is the fundamental paradox of self-consciousness.

Thus, identity is the incidence of both subject and object. It is simultaneously the experience of seeing and being seen, hearing and being heard, recognizing and being recognized. In order to understand ourselves as ourselves, be it on the individual or group level, we require the other who is different from us. The other can be other individuals or other groups, (or the other in ourselves). In other words, difference is an essential trait of identity. The experience of one’s identity—individual or group—is intimately bound together with the experience of being different from others. Indeed, our difference from other identities is part of our identity. Our opposition to other groups, or differences with respect to other identities, are fundamental to the formation and evolution of our own. Identity is always identity in relation to other identity. Unless there is an other, any other, or perhaps many others, there is no self. If all human were Norwegians, the concept of the Norwegian would incomprehensible. Understanding oneself in relation to others is the toleration of others, the experience of difference from others as a part of us, of what we are.

This is where our reflexion upon the nature of identity rejoins the notion of tolerance. In short, the assurance of our own identity, both individual and group, is based upon our tolerance of others.

The consequence of this conclusion is brief and direct: The very survival of our group identity is not assured by asserting its predominance over others, or in the extreme by by erasing others. On the contrary, the survival of our identity is based upon our tolerance of other.

### 4.4 What is toleration?

Toleration is the action of allowing something, which in essence is not allowed, which is discredited, devalued, frowned upon. Toleration is allowing the un-allowable. In other words, toleration (like identity) contains a double, self-contradicting Movement. On the one hand, it represents recognition of a norm, a rule, a structure, a value or of set of values, a person, a group, institution, etc. On the other hand, it takes exception to that which it recognizes. It resists the person, group, norm, value, etc. It disputes the validity of the thing recognized while at the same time recognizing it.

Clearly, toleration is a response to difference. It is a response to something that is not me, not us, not this, something that is implicitly in opposition—possibly in open conflict—with my identity. This opposition can range from a simple perception of difference to an existential conflict. Difference is a strange thing. It is a kind of reference to the empty space between two things. Like tolerance, it is a substance but it has no content. It lies between the two things in opposition. It is neither the one, nor the other. Tolerance is tolerance of difference. Tolerance is not just the experience of the religion I find insulting, the ethnic songs that I find offensive to my people, the attitude I find reprehensible, the pair of shoes I find ugly. Rather, it is the

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16 On the relation between *ipse*-identity and *idem*-identity se (Ricoeur 1990:11-15).
17 (Kristeva 1988:283-284). Cf., also (Kristeva 1990)
experience of the difference between my religion and the other, my music and the other, my shoes and the other.

The burden of tolerance is the recognition of the validity of religions, songs, and shoes and the rejection of that religion. In order to reject a religion (or a folksong, or a pair of shoes) we must in our case believe in the general value of religion. We must believe in the religiosity of religion. We must have respect—indeed a very pronounced respect—for the religiosity of the religion, the musicality of the music and the shoe-ness of the shoes, while at the same time a negative experience of the way the concepts that I share are treated by others. I cannot not be offended by, nor be required to tolerate a phenomenon that has no counterpart in my identity. In this way toleration always lies in a strange, perhaps impossible place between full recognition of the other and full rejection. It gives life and meaning to both that which we oppose and our opposition. Tolerations is both an expression of the right of something other to exist, and the assertion of the right of opposition to that other. It is the place in-between. Tolerations says “yes, because no”. Tolerations takes place on many levels from the individual to the global. The precondition and guarantee of toleration is simple: the existence of another subject (alterity). On the personal level I can experience toleration of my brother, who has Dreadful taste in music. At university I, or a group of students can experience toleration in our attitude toward the curriculum. In any given community, certain political interests and desires must coexist with others. In religious settings—the historical origin of the very concept of toleration—certain sub-groups must tolerate others. Ethnic groups coexist in different settings. The examples can be multiplied.

4.5 Identity and the intolerable

If tolerance is the essence of identity, what is intolerance? What is intolerable? We can distinguish between two types of intolerable\(^\text{18}\). The first is simple intolerance, the expression of the enthusiasm and the violence of our convictions with respect to alternatives. The other meaning of the “intolerable” goes to the extreme of what can be recognized. It defies recognition because it does not recognize us, does not recognize others. However the consequence of this discussion is that the identity that defies toleration is not an identity. The intolerable is the refusal of identity, of subjectivity, of humanity. The intolerable is not only the refusal of the other, it is the refusal of oneself. Based on this set of paradoxical premises, I conclude by formulating four axioms of identity and tolerance.

a. **There is no identity without conflict.** The very condition for being something, for having an identity, either individual or group is the same as the precondition for conflict. It can never be a question of learning to have a “good” identity, which is not opposed to others. And we should not seek nonconflictual identities.

b. **In cultural, ethnic or religious conflict, the shared value is tolerance.** Identity conflicts only take place when there is common ground, common interests, common goals, commons desires despite the differences. In other words, conflict reposes upon the notion that two parties in conflict are unified in their conflict. Regardless of what other shared values might incidentally be involved, tolerance itself, is always a shared value. It is what permits two identities to coexist. No identity conflict is so absolute that it does not require tolerance on one level or another in order to continue to be an identity conflict.

\(^{18}\) (Ricëür 1989:307)
c. **The experience of the intolerable is the loss of identity.** The intolerable appears when respect absolutely disappears. The absence of respect for the other, deprives one of the recognition of the other and the loss of identity.

d. **Tolerance is never the same as indifference.** Two parties brought together by conflict thus always share a minimum of tolerance. This does not mean they are indifferent to the identities differences that they are capable of tolerating. If there is tolerance there is never indifference.

The concept of toleration serves as a tool, a container, which permits to hold conflicting, often contradictory notions alive at once. This is the challenge of resolving conflicts between groups. It is not by *eliminating* the conflict, but, indeed, by *prolonging* it in a form which does the least injury.
5. **Eastern Enlargement between Americanization and Europeanization**

The notions of West and East in the European self-understanding are as old as the notion of Europe itself. From a cosmopolitan, European historical perspective, Europe is the place of the setting sun, *aftenland* as the Norwegians put it. History—again according to an old European myth—travels, like the sun, from the far reaches of Asia to the west and beyond. For the classical thinkers of European tradition, history was spatially determined, moving from East to West in one single great sweep of progress, rationality and civilization. Indeed for Hegel, the great systematic thinker of the Prussian Empire, the New World was the future of European rationality. Though he naturally considered his own era as the most rationally in tune with the movement of civilization, he was convincing that North America would be the civilization heart of the future. While civilization was equivalent to 19th century Europeanization, it was to be equivalent to the Americanization of the 21st century.

With the upheavals in the wake of 9 November 1989—the fall of the Berlin Wall—the spatial orientation has been shaken up. The East-West axis is suddenly disrupted and the democratic modernization that characterized the post-WW II Transatlantic axis is suddenly given a new perspective as the hidden historical and cultural treasures of the East Block countries erupt into the Transatlantic public sphere. The westward train envisaged by the 19th century European utopists has braked. The European center of gravity has shifted. The Central and Eastern European perspectives on history, culture, democracy, and security have woken to life.

At face value, these perspectives do not harmonize well with the self-understanding of the European public sphere in its relation to the United States and the nation states of the old East Block. Tensions over support for the allied intervention in Iraq highlight a complex relationship between what Secretary of State Donald Rumsfield called ‘New Europe’ and ‘Old Europe’. Several former Soviet Block states gave explicit or implicit support in the run-up to the Iraq invasion, among them Poland, already a solid member of the New-Old-NATO. Yet the geo-politic and strategic aspects of this tension are less visible in the transatlantic dialogue on NATO expansion and the role of allied forces in operations in Iraq, Afghanistan and elsewhere, than they are in the process of the European Union’s eastern enlargement, which will take its next great step on 7 May of this year. The strange thing about the Eastern Enlargement is that it takes the form not of and enlargement, but of a *reunification*. Nothing is more evident in fusion then fracture.

For never before have we seen such significant *philosophical* fracture than what appears through the process of Europe becoming its fully-fledged continental self through the reunification of the Old and the New. The European Union’s official information brochure on the Eastern Enlargement tells of ‘an enlargement based on values’. Against the background of these values, the EU ‘invites’ new members to apply while at the same time insisting that these new members respect the values of the EU. These values are primarily understood as the Union’s *acquis communautaire*—the fundamental norms, rules and procedures that provide the framework for European institutional construction. The Enlargement is thereby conceived as carrying the ‘EU’s fundamental character’. Thus if we assume that that new member states are invited to apply essentially because they are already European, already actors on Europe’s geopolitical stage and carriers of the European cultural heritage.

Despite the apparent cultural gulf that seems to separate them, the US and Europe have one thing in common: a common forgetfulness of how they have determined each other’s
histories. On the one hand the American national project was in its time a completely European enterprise. Forgotten and repressed, the European in the American has always survived in concealment. What is less evident but thereby all the more important to notice is that European construction, in the form it has come take, is a typical American project. This is true both banally and on a more symbolical plane. First, the functionalist visionaries of 20th century European construction, Monnet and Schuman, found their institutional terra nuova in American models.

Symbolically, however, we can see that the mystery of the American is returning in the new European Construction. The repressed utopian unconscious of the European project returns as the American cultural spirit pronounced by the new member states, first and foremost Poland, but also Czech Republic, and Hungary.

First, these states were among the first new members in a US dominate NATO expansion to the east. Second, they were among the most sympathetic to the US-led Iraqi campaign. Thirdly, in the most recent Intergovernmental Conference on adoption of the draft EU constitution, the former Soviet Bloc Poland has resisted whole-heartedly a voting system which appears to give priority to the Franco-German axis. The countries of the former Soviet Bloc have long been more on the same wavelength with the Americans than with the Europeans of the Old school. With the new expansion of NATO, official on 26 March, drawing together 7 more Eastern European states the NATO-EU rivalry becomes more evident.

Secretary of Defense Rumsfield’s trivializing differentiation between the Old and the New Europe thereby bears the odd secret of the uncanny logic of European enlargement. Secretary Rumsfield did not understand how right he was when describing the EU’s culture-historical cabal. Indeed according to the logic of enlargement, the Old Europe is to become new by taking in the old. Paradoxically, however, the New Europe is actually the old. Thus the New Europe must adapt itself to the old such that it can again, sometime in the near future, become part of the Old, and Europe can at last be reunified and become what it once was.

Europe’s reunification through the Eastern Enlargement is thus far from unproblematic. It involves a kind of coming-to-terms with its continental past in a way which does not necessarily harmonize with the glorious future it tends to envisage for itself. That future is based on the cultural heritage of humanist thought, rationality and cosmopolitan human values. This cultural heritage was of course born not in the 21st, but in the 19th century, at a time when the political needs of Kerneuropa did not dominate the European cultural landscape. Today, France and Germany tower above the project of European construction, both for historical, if not traumatically opposed reasons: Germany must turn from its bellicose and bloody past while France seeks to regain the cultural hegemony that made it the cradle of the Enlightenment. This places the European project in an uncanny relation with its great historical counterpart, the United States.

Americans by and large perceive the European public sphere as a gaggle of unrealistic, hamstrung, cappuccino sipping, cigarette smoking utopists. It is therefore interesting to note that it is in fact the American global experience that is utopian. It is utopian but, paradoxically, in an entirely realistic way. In the American geopolitical imaginary the utopia has already been realized. Utopia is completely possible, and it realizes itself again and again in the American culture-political self-understanding. Alternative conceptions are simply not possible.

But what causes difficulties in the European self-perception is that that American utopian thought is the grandchild of European political thought. The US is what Lacanian psychoanalysis calls ‘the return of the real’. The fundamentally European reality that Europe
doesn’t manage to represent for itself, that Europe cannot imagine, the US represents for it. We are in other words witness to a kind of return of the European subconscious in the form of American political culture. Psychoanalysis teaches us that whenever the repressed content of the subconscious returns, through dreams, slips of the tongue, or other forms of representation, it is both foreign and strangely familiar, both amazing and horrifying. Thus the European Real comes spouting back in unexpected ways through the every recurring key roles US foreign policy plays in European history: Versailles, Yalta, Nuremberg, Dayton, and there are many more. These are all places where the potential of the European utopian project meets both its failure by Europeans, and its realization by the US. The disdain of the cultureless Yankees is in its roots selfdisdain, realization of what the European project was supposed to have been. It is disdain for the utopian Europe, the Europe that is still unrealized, for the US foreign policy that gives the European self-aspiration a concrete reality, but always in a way that seems foreign to the European self-image. It is precisely this project self-disdain that is prolonged in the historical Eastern Enlargement.

The Madrid bombings on March 15—the European 9/11 as it is called by some—changed this symbolic constellation. The attack contributed to the fall of the Us-friendly Aznar center-right government. But it also created a new sense of imagined unity in Europe, reviving talks on both a common anti-terrorist strategy and on the European constitution. The Polish-Spanish Atlantic romance had to return to the everyday European fantasy of cultural and political autonomy, dominated by the Franco-German axis. Irreversibly weakened by the changed climate in Brussels and by encroaching unpopularity at home, Polish Prime Minister Leszek Miller resigned on 26 March. Clearing the way for the consensus on the European constitution. The US cultural and political proximity is relegated to oblivion.

In the middle of the 18th century the cultural vision of European Civilization at last found its expression in the utopian resistance and self-realization of the American nation-builders. Today Europeans gaze across the Atlantic, shocked and amazed by noisy, superficial American lack of history and culture. They are so shocked that they fail to see that American culture is a European creation, the realization of the European utopia. First when the other of the other of Europe finally becomes European can the American Europe at last have its moment in the sun. The Eastern Enlargement reminds us of the long forgotten Western Enlargement nearly three centuries ago. Disdain for America makes its return as European self-disdain.
References


Biography of Author and PRIO profile

J. Peter Burgess

Peter Burgess is research professor at the Peace Research Institute in Oslo and editor of Security dialogue. Philosopher by education, he is author of many publications in which he analyses the relationship between identity, culture and ethics and the conditions under which it can lead to conflict. Inside this framework of analysis P. Burgess deepens the theme of security. Among his publications: *Culture and rationality. European framework of norwegian identità* (Oslo, 2001); *Den europeiske identiteten og den skandinaviske* (Volda, 2001); *Cultural politics and political culture in postmodern Europe* (Amsterdam, 1997).

PRIO profile

PRIO was founded in 1959 and became a fully independent institute in 1966. It was one of the first centres of peace research in the world, and it is Norway’s only peace research institute. Its founding and early influence were instrumental in projecting the idea of peace research. PRIO is independent and international in staff and perspective. Scholarly research is at the core of all institute activities. Research at PRIO concentrates on the driving forces behind violent conflict and on ways in which peace can be built, maintained and spread. In addition to theoretical and empirical research, PRIO also conducts policy-oriented activities and engages in the search for solutions in cases of actual or potential violent conflict. This combination of scholarship and practice has brought PRIO closer to meeting the normative ambitions of peace research: to apply high-quality academic standards to the study of peace and conflict, and to help diminish violent conflict in practice. PRIO hosts the editorial offices of two international journals that are published by SAGE in London: *Journal of Peace Research* and *Security Dialogue*. PRIO’s scholarly work is disseminated through publication in peer-reviewed journals, as well as through books, reports and conference papers.