Chapter 12:
From *Großraum* Theory to the Escalation of World War II (1939–1942)

Unrestricted *ius ad bellum*, which Carl Schmitt had championed, was also a key foreign policy doctrine of the Nazi state. Preparations for war, intensified from the summer of 1937 on, laid the groundwork for the first practical military operations initiated only a few months later. On 12 March 1938, Germany invaded Austria. The next step was directed against Czechoslovakia. In late September 1938, the Munich Conference sanctioned Hitler's policy of violence toward Sudetenland and agreed to German troops invading parts of Czechoslovakia. This was followed by the invasion of rump Czechoslovakia in March 1939 and the establishment of the Protectorate of Bohemia and Moravia in violation of the Munich Agreement, which had been signed six months earlier.

This was the atmosphere in which a high-level conference on the occasion of the 25th anniversary of the founding of the Institut für Politik und Internationales Recht (Institute for Politics and International Law) in Kiel took place from 31 March to 3 April 1939; on 1 April, Schmitt gave a lecture there titled "Der Reichsbegriff im Völkerrecht" [The concept of the Reich in international law]. The conference provided a "model for the German professors who could make themselves useful to the war effort by providing concepts and catch phrases for educated opinion" (Balakrishnan 2000, 234).[1] This was also true of Schmitt. He explained to his audience that he had recently taken a major step forward in his own understanding of international law. After he had given his lecture on the turn to the discriminating concept of war in 1937, he had been asked what exactly he was able to offer in place of the existing order of states since he "at the time, neither wanted to remain with the old concepts, nor subject [himself] to the concepts of the Western democracies" (Schmitt 1939a, 110). Now, two years later, Schmitt said, "I can give the answer to that question. The new concept of the order of a new international law is our concept of Reich, which proceeds from a *völkisch Großraum* order upheld by a nation." (Schmitt 1939a, 111) Schmitt also mentioned the crucial historic event that prompted replacing the state with the Reich as the key power of a *Großraum* (literally "large space," inherently linked

1 On the context of this lecture, see Blasius (2021).

to geopolitics and Nazi Germany's expansionist policies; see Glossary): "the action of the *Führer* has lent the concept of our Reich political reality, historical truth, and a great future in international law." (Schmitt 1939a, 111) Schmitt's audience doubtless understood what Schmitt meant by "action of the *Führer*"[2]: the German invasion of the rump Czech lands two weeks earlier.

Schmitt's lecture caused a sensation reaching beyond academic circles. It seemed so significant for understanding the current situation that all the major German newspapers ran lengthy reports that included quotes. Two leading British dailies, *The Times* and the tabloid *Daily Mail*, reported on it at length four days later and characterized Schmitt as the theorist behind Hitler's expansionist policy (see Bendersky 1983, 257–259). Outside of Germany, the lecture was generally noted as a quasi-official signal of Germany being on the threshold of a new imperialist era (see Stolleis 1999, 390), which had in fact already begun as far as Austria and Czechoslovakia were concerned. In the years that followed, Schmitt wrote a number of books and articles on international law and politics. Even from New York, Kirchheimer was keen to follow the writings of his former doctoral advisor and political adversary during the Weimar Republic on these subjects. Both Schmitt and Kirchheimer retained their sensitivity to the specific contexts of their writing on international law and politics. Below, I will also embed these works in their particular political contexts.

1. Early critical theory's disregard of international politics

There is no greater contrast to Schmitt's preoccupation with international politics than the subjects at the center of the Frankfurt School's early critical theory. In view of the global political turbulence in the 1920s and 1930s, it is astonishing that none of the works by this first generation of the Frankfurt School were notable contributions on international politics.[3] Occasionally, the *Zeitschrift für Sozialforschung* ran reviews of books on international politics, but these were not written by members of the Institute of Social Research (ISR). Neither the inner circle including Max Horkheimer, Theodor W. Adorno, Friedrich Pollock, and Leo Löwenthal nor the outer circle with Erich Fromm, Franz Borkenau, and Walter Benjamin had much to say about questions of international politics. Whenever institute members did in fact deal with other countries, it was in order to analyze the internal social problems there.[4]

This thematic gap is all the more striking as proponents of the early Frankfurt School placed the Hegel-Marxist concept of critical theory, which they pursued with aplomb, between what they saw as rigid social democratic progressive thinking and the revolutionary Marxism of the Soviet Union, which they also criticized as dogmatic. During the Weimar Republic, however, both the Social Democrats and the Communists in Germany

2 German original: "*Die Tat des Führers.*"

3 On the following, see Buchstein (2022, 112–117).

4 This is the case with Friedrich Pollock's analyses of the Soviet planned economy, Karl August Wittvogel's studies on agricultural economy in China, and Felix Weil's work on the American New Deal.

had clearly taken internationalist positions on questions of foreign policy. The SPD and its foreign policy theorists espoused a type of international politics that we now call the liberal paradigm: an internationalism that relied on a policy of reconciliation with neighboring countries and that sought active participation by Germany in the League of Nations. In his Weimar writings, Kirchheimer, too, had supported this approach.[5] In contrast, not only the Stalinized KPD but also the Trotskyists who remained outside the party (often in literal agreement with the right and with the right-wing extremists) criticized the alleged "disgraceful peace" of the Versailles Treaty and propagated the proletarian world revolution as their version of internationalism. Marx and Hegel cannot have been role models for the silence at the ISR on questions of international politics—there are far too many theoretical considerations and original individual observations about the international *Lage* in their works.

Was it perhaps a certain Frankfurt provinciality that was responsible for this silence, regardless of the sophisticated and worldly lifestyle of some in Horkheimer's group? That could be assumed for the early years of the institute, but certainly no longer for the period from the mid-1930s, when the émigrés who had been forced to flee to various countries looked anxiously at the German Reich, and certainly not after Germany's attack on Poland and the military events that escalated into a world war. The many letters that have come down to us from this period show that most of Horkheimer's group definitely expected a new war in Europe from 1935 onwards. Horkheimer's pessimistic credo from the essay "The Jews and Europe," written in the first few days of September 1939, speaks volumes about the mood at the institute: "Nothing can be hoped for from the alliance between the great powers." (Horkheimer 1939a, 93) At the same time, this statement by Horkheimer documents his great helplessness in view of the international developments at the time. However, helplessness is not a disgrace. It is better to admit that you do not know the right thing to do than to hasten to come up with some new and strange interpretation or theory. At least in this respect, it was wise of the core group of the Frankfurt School to remain silent in public on questions of international politics.

It was not until after Germany had started the war that Horkheimer and his group began to include international politics in their research agenda. In October 1939, Horkheimer reported to his correspondent Franz Bischofswerder, who lived in Seattle and was researching the situation of Jewish refugees, about the institute's work: "This year we have weekly meetings on foreign policy issues." And he added: "The reason for this event is the realization that we, the members of the Institute, have far too little precise knowledge of foreign policy to make more than just amateurish statements about the meaning of current events."[6] Horkheimer's firm expectation in the summer of 1941 that the German military would defeat the Soviet Union in the shortest possible time and Friedrich Pollock's prognosis of an imminent war between the Soviet Union and the US, which he expressed at the same time, are evidence of how difficult it was to assess the current events of the war from the other side of the Atlantic.[7]

5 See Chapter 4.

6 Letter from Max Horkheimer to Franz Bischofswerder dated 2 October 1939 (Horkheimer 1995, 651).

7 See letter from Max Horkheimer to Leo Löwenthal dated 26 June 1941 and letter from Franz L. Neumann to Max Horkheimer dated 23 July 1941 (Horkheimer 1996, 81, 107).

The only exceptions to this public silence of the Frankfurter School in exile can be found in some of Otto Kirchheimer's writings during his time at the ISR and in 1942 with the publication of the book *Behemoth* by Franz L. Neumann. Almost a fifth of this book is devoted to the foreign policy of the Third Reich. Kirchheimer collaborated with Neumann on the chapters on Nazi *Lebensraum* ideology. Carl Schmitt's theory of international law and his *Großraum* theory received a prominent place in the book.[8] Kirchheimer continued to follow Schmitt's writing on international law and politics inasmuch as he had access to it in his exile in New York.

2. Schmitt's *Großraum* theory

Following the extraordinary public response to his lecture at the Kiel conference on 1 April 1939, Schmitt wasted no time finalizing the text for publication, and the printed version was already available three weeks later. It immediately caused even more of a stir because Hitler proclaimed the idea of a "Germanic Monroe Doctrine," which Schmitt had laid out in his lecture, a matter of days after its publication in a programmatic foreign policy speech in the Reichstag in Berlin on 28 April.

Hitler reacted in his talk, which of course was broadcast by the German radio stations, to an urgent appeal by US President Roosevelt to him and Mussolini on 14 April 1939 to give a ten-year guarantee of nonaggression to a list of 31 countries in Europe and the Middle East. Following his tried and tested pattern, Hitler's speech was full of avowals of peace and the harmlessness of his intentions. At the same time, he demonstrated all his sarcasm, suggestive logic, and persuasive power, which prompted some contemporary historians to call it the presumably most brilliant speech he had ever given (see Fest 1973, 795). One rhetorical highlight was the idea of a German Monroe Doctrine, which had been formulated by Schmitt. Hitler provocatively asked Roosevelt how he would respond if a German chancellor asked him to change his policy in Latin America:

> In this case, Mr. Roosevelt will certainly invoke the Monroe Doctrine and reject such a demand as interference in the internal affairs of the American continent. It is exactly the same doctrine that we Germans are now advancing for Europe, but in any case, for the area and the interests of the Greater German Reich.[9]

Yet Hitler's speech conveyed not only rhetorical effects, but also an important political decision. Hitler terminated the Anglo-German Naval Agreement with immediate effect as well as the Reich's contract with Poland, and he eliminated the pledge included in such contracts and agreements to resolve all disputes peaceably. From then on, recourse to a German Monroe Doctrine was part of the fixed repertoire of propaganda in Nazi foreign policy, for example in Ribbentrop's meeting with Sumner Welles, the US representative, in March 1940. Constant references to this doctrine served to pursue a practical political

8 See below in this chapter.

9 Hitler's speech is quoted in Gruchmann (1962, 11).

goal: keeping the US out of Nazi wars of conquest in Europe. Hitler held fast to the notion of a German Monroe Doctrine right up until his final days.

There is some disagreement in the historical scholarship whether Hitler actually adopted the formula of a German Monroe Doctrine directly from Schmitt.[10] The latter had examined the Monroe Doctrine in other, earlier publications—some of them already during the Weimar Republic—and had mentioned it time and again after 1933 in his criticism of Anglo-Saxon imperialism. It is most probable that Hitler heard about the idea of a German Monroe Doctrine, a term coined by Schmitt, from high-ranking Nazi legal experts and that he considered it his own creation from then onward. After Hitler's speech, Schmitt was telephoned by his patron Hans Frank, who pointed out how highly the *Führer* valued the originality of his own thoughts and deliberations on the Monroe Doctrine in his speech of 28 April (see Bendersky 1983, 258)—a blunt instruction to Schmitt not to claim in public that he was the one who had originally come up with the idea.

The fact that Hitler and Schmitt's speeches were in harmony contributed considerably to Schmitt regaining his reputation in the Nazi system and to his renown abroad. In December 1940, the Swiss *Die Weltwoche* wrote that Schmitt with his *Großraum* theory was for contemporary Europe what Rousseau had been for the French Revolution (see Neumann 2015, 457). The extended version of Schmitt's lecture appeared in April 1939 as a short book titled *Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte* (The *Großraum* Order of International Law with a Ban on Intervention from Spatially Foreign Powers).[11] Three additional and slightly revised editions were published before the attack of Germany on the Soviet Union in 1941, but none thereafter. Schmitt explicitly addressed the US. The doctrine named after US President Monroe had been proclaimed in December 1823 and was directed against violent interventions by European states in all of North and South America. It was a reaction to the alleged threat against the US and the Americas by the Russian expansion south of Alaska. In addition, the US feared that the counterrevolutionary Holy Alliance on the European continent, under the leadership of France, would recolonize the new republics that had been established following the Latin American wars of liberation against Spain. The ban on interventions claimed by the US in the Monroe Doctrine was thus of a primarily defensive nature (see Gruchmann 1962, 146–162).

Schmitt interpreted the doctrine differently. Although he had criticized it in his writings from the 1920s as the epitome of American imperialism, he now interpreted it in a positive light, viewing it as the historical precursor of a new type of principle of order in international law, "the precedent for a *Großraum* principle" (83). The basic idea of this doctrine, he stated, was also transferable to other friend-enemy constellations, to other historical situations, and to other geographical *Räume*; specifically for Germany, this meant to the central and eastern European *Raum*. Schmitt's intent in establishing the German counter-doctrine to the American Monroe Doctrine was to be able to claim the core of its

10 For the different views, see Winkler (2001, 37) who states that Schmitt did have had a direct influence and Maschke (1995b, 348) who sees only indirect connections.

11 See Schmitt (1939a).

legitimacy for the German Reich, too. He believed he had found a principle in international law supporting the German Reich's policy of expansion which the US would not be able to contradict because it claimed the same for itself.

It is difficult to render the Nazi German definitions and connotations of terms such as *raumfremde Mächte* (powers foreign/alien to the *Raum*) or *Großraum* accurately in English. To Schmitt, the concept of *Raum* was not identical to space, its literal translation. It was also related to *nomos* and *Ort* (place). Schmitt translated the Greek term *nomos* as *Lebensgesetz* (the law of life), thus adding an existential element to it. He republished his book on *Großraum* three times during the Nazi period, constantly adapting it to the events of the war.[12]

His theory of the *Großraum* order of international law had multiple components.[13] Schmitt did not select *völkisch* or biologistic terms but rather purely technical language for his definitions of *Großraum*. A *Großraum* was the result of an "economic-industrial-organizational development" (119) of expansion and was based on a "*Großraum* economy" (79) typical of the modern energy industry. Schmitt considered the origin of the *Großraum* to be in the industrial, organizational, economic, and technical fields, referring to a *Leistungsraum* (the *Raum* required for a country's desired economic performance, thereby providing an economic justification for expansionism) (79). The size of the *Großraum* went far beyond the borders of a traditional nation-state. He contrasted the concept of the *Großraum* order with imperialism, which he characterized as Anglo-Saxon. Imperialism, Schmitt claimed, was based on extending invisible domination to include apparently independent regions. It ruled as an indirect power with indirect methods. In a *Großraum*, in contrast, political power was exercised as direct and publicly visible domination.

The transition to *Großraum* theory had serious consequences for Schmitt's theory of the state, which he had championed since the 1920s. Schmitt had vehemently advocated for the theory of the sovereign state in all his works since the beginning of the Weimar Republic, but now departed completely from the concept of the state as the primary category of political order. The new concept in its place was the Reich. His hypothesis was that the Reich would counter the state, previously the key concept of international law, because it was practicable in international law and, being up-to-date, superior. After the "action of the *Führer*" (111)—the term used by Schmitt in his lecture in Kiel to describe the invasion of German troops in rump Czechoslovakia—he thought that the traditional concept of the state was no longer appropriate to the "political reality and the historical truth" (111) of the political world of the day. According to Schmitt, traditional international law was founded on the postulate of the legal equality of all independent and sovereign

12 Timothy Nunan's 2011 English translation is based on the fourth edition of the book from 1941. There are only minor substantial differences between the 1939 and 1941 editions. Overall, it is a very good translation. However, Nunan chose more literal translations of some Nazi German terms that do not always properly convey their ideology and connotations, e.g. "on the basis of nation" (102) for *volkhaft* and "species-determining" (124) for *artbestimmend*; see Translator's Preface and Glossary.

13 See Schmitt (1941e). The following page numbers refer to this text, On the following, see also Gruchmann (1962, 51–65), Maschke (1995b, 343–364), Elden (2010), Benhabib (2012), Neumann (2015, 457–473), and Minca and Rowan (2016).

states. He believed the actually existing real hierarchy of subjects of international law was no longer captured by the traditional vocabulary of international law.

Schmitt gave two reasons why state-related international law was to be laid to rest. First, the technical progress of the previous decades had meant that it was no longer the case that all the states of the world would be able to pass the test of being able to establish and sustain a sovereign state apparatus. Here, he was addressing the capabilities to wage war. Only a few states were in a position to wage a modern war of material on the basis of their own industrial, technical, and organizational power. The idea in international law that territorially small states were sovereign was nothing less than absurd in light of recent developments, for example, in aviation. The attributes of traditional statehood necessary for sustaining such states—internal organization and the capability to defend themselves militarily—could now only be achieved by a few political entities, the *Reiche*. Schmitt's second argument referred to the reality of global politics of the day. The truly fundamental variables shaping the coexistence of *Völker* (peoples/nations in a racial sense, of common blood and with a common destiny; see Glossary) were a few major powers exercising political influence beyond the territories of their states in various ways. In other words, in Schmitt's works, "Reich" referred not only to the German Reich; he also used the term to denote other major powers such as the US or the Soviet Union. The size of the *Großraum* resulted solely from the reach within which the political concept of the Reich could prevail within the *Großraum*. To be precise, the Reich alone determined its reach. The new global *Großraum* order Schmitt had in mind thus consisted of multiple *Reiche*, each of which exercised direct domination over other states that had previously been independent. For continental Europe, Schmitt considered Germany, not France, as having the historical role of hegemonic central power. The German *Großraum* order was legitimized through the ability of the Reich's *Volk* to dominate the *Völker* of the neighboring states within the *Großraum*.

It is striking that when Schmitt defined *Großraum*, he avoided the *völkisch* term *Lebensraum* (*Raum* necessary for autarchic economy of an increasing population, *Raum* assigned to a people by racial destiny, see Glossary) used by Hitler in his speeches and writing as well as by other ideologues of the Nazi system. Schmitt's conceptual parallel term was the "*Leistungsraum*" (Schmitt 1941d, 319) (the *Raum* required for a country's desired economic performance, thereby providing an economic justification for expansionism), which was held together by a strong political will. Consequently, some scholars emphasize the marked differences between his *Großraum* theory and the allegedly official Nazi ideology when interpreting this piece by Schmitt.[14] In fact, however, the differences between them were not so great. First, because Schmitt adopted the "new concrete concept of *Raum*" (123) from the German biologist Viktor von Weizsäcker according to whom any spatial order is produced by activism and movement. In Schmitt's view, a strong political will was the human equivalent to the movement of other biological species. A second reason not to overinterpret the differences between Schmitt's and the dominant Nazi ideology is that he himself also used the term "*Lebensräume*" (Schmitt 1941d, 278).

The similarities between *Großraum* theory and Nazi ideology are even more striking if we move away from Schmitt's idealized conceptualization of the *Großraum* and in-

14 See Maschke (1995b, 358–364), and Neumann (2015, 487–489).

stead focus on the German Reich's practical policies which Schmitt explicitly listed and praised as examples of German *Großraum* policy in the various editions of his text up to the summer of 1941. In these cases, the political idea behind the German Reich was not any supposed respect for the individual *Völker* in the *Großraum* but the cultural genocide of Czechs, Poles, and other Slavic peoples as well as the ghettoization and murder of Jews. In later editions of the book, Schmitt explicitly welcomed the deportation of Poles and Jews in the General Government, which had been newly established by the Reich (see 100). Schmitt's statements about "*der Jude*," which are scattered throughout his writing, expressed his antisemitism downright obsessively. The relationship of a *Volk* to its *Raum* and its soil had to remain incomprehensible to "the spirit of *der Jude*" (121). Moreover, the "*artfremd*" (99) (foreign/alien to the *Volk*, in an exclusionary and antisemitic sense) Jews did not even want to understand it; this mindset would allegedly enable them to promote their intellectual and abstract theories of international law even more successfully and subversively (see 121–122). Schmitt also took care to preface Harold Laski's name with the words "*der Jude*" (see Glossary) (108).[15] The former opposed any kind of "assimilation" or "absorption" and the "idea of […] melting pots," (99) using racially charged language in this context multiple times. He accused the Western powers of seeking to oppress the German Reich using an abstract and individualistic theory of international law.

The connection Schmitt thereby construed particularly between the US and allegedly Jewish thinking gave him the opportunity, as Timothy Nunan stated, "to repackage his enemy, the Jew, in a discourse of Great Powers and *Großräume*" (Nunan 2011, 16). Thus, Schmitt's image of the US and the Monroe Doctrine served as an "ersatz for a deeper-seated fear of Jews" (Nunan 2011, 16). Yet the core of Schmitt's theoretical construction of the *Großraum* did not require the *völkisch* or biologistic arguments he himself had made, quoted above. This distinguished his approach from the other two Nazi *Großraum* ideologies. The *Lebensraum* ideology as advanced by Reinhard Höhn, Werner Best, and Werner Daitz defined the *Großraum* exclusively based on a biological essence, namely ties of common blood. For this reason, both Höhn and Best attacked Schmitt for not fully representing the pure doctrine of Nazism.[16] Schmitt's concept also deviated from the concepts of the *Großraum* put forward by Karl Haushofer's geopolitical school, which delineated the borders of a *Großraum* on the basis of geographical characteristics such as oceans, rivers, or mountain ranges.[17] To Schmitt, neither blood nor soil defined a *Großraum*, but only the political will of a *Reichsvolk*. In other words, the boundaries of a *Großraum* were determined in practical terms by the Reich alone, in the case of Germany, for example, by the "action of the *Führer*" mentioned above. At the same time, the vague category of political will indicated the point where, because of its elasticity, Schmitt's *Großraum* theory could easily be squared with the fundamental views of the inequality of human beings inherent to the Nazis' theories of *Rasse*. What Schmitt borrowed from *völkisch* terminology was irrelevant for his theoretical construct; however, it enabled links from his own to the other two major Nazi *Großraum* ideologies.

15 Laski had helped Kirchheimer and Franz L. Neumann come to the LSE after they had to leave Germany in haste; see Chapter 7, p. 178.

16 See Herbert (1996, 271–298), and Blasius (2021, 470–472).

17 On the two other schools, see Gruchmann (1962, 20–24) and Maschke (1995b, 358–363).

3. Schmitt and the further escalation of the war

Schmitt published the first edition of his *Großraum Order of International Law* four months before Foreign Ministers Ribbentrop and Molotov signed the non-aggression pact between Nazi Germany and the Soviet Union on 23 August 1939. His concept of German regional hegemony was comparatively moderate and did not yet envisage Germany directly dominating the remaining eastern European states. When the Hitler-Stalin Pact and its secret protocol regarding partitioning Poland were concluded, the *Großraum* that Germany had set its sights on expanded considerably. On 1 September 1939, the German armed forces attacked Poland and established the General Government of Poland after a brief period of warfare. In April 1940, Germany attacked Denmark and Norway, and the German western offensive began on 10 May 1940. The Netherlands and Belgium capitulated, and following the rapid victory over France, a ceasefire agreement in the West was finalized on 22 June 1940.

Schmitt adapted his *Großraum* theory to the new *Raum* conditions as rapidly as the Germans advanced into neighboring countries. The *Großraum* theory with a regional hegemon, which he had presented in Kiel in the spring of 1939, was transformed into the concept of a giant, German-dominated Fortress Europe extending from the Atlantic to central eastern Europe. Schmitt advanced his *Großraum* theory in the next two years in multiple publications and numerous lectures. In 1940, at the time of the German invasion of Denmark, which was followed by the invasion of Norway, the Netherlands, Belgium, Luxembourg, and France, he embarked on a lecture tour, speaking in Bremen, Kiel, Rostock, Halle, Naumburg, Cologne, and Berlin. His *Großraum* theory was compatible with this expansion of German power in Europe.

Schmitt made other additions to the text indicating a transformation of the meaning of his *Großraum* order. His preface to the fourth (and final) edition, dated 28 July 1941, one week after the invasion of the Soviet Union, called it a "document" that was not to "take up a foot race with the events themselves." The new events required "their own treatment" (Schmitt 1941a, 77). The new additions he made in this edition show that the invasion of the Soviet Union, Operation Barbarossa, and the immense eastward expansion it entailed went far beyond the limits of Schmitt's concept of the *Großraum*. It is obvious from other published works, too, that in 1941, Schmitt wanted to limit the war to a struggle with Great Britain and that he hoped that neither the Soviet Union nor the United States would get involved. In his opinion, the *Großraum* world powers were the United States, Germany, Japan, and the Soviet Union.

The limits of the territorial framework of his understanding of the *Großraum* were shattered not only by the German attack on the Soviet Union on 22 June 1941. The war in the Far East was developing in a similar way. Schmitt had expressed admiration for the Japanese military success against the colonial European outposts in Asia and the Pacific. He interpreted it as additional confirmation of his *Großraum* theory (Balakrishnan 2000, 239). However, the subsequent Japanese air raid on Pearl Harbor on 7 December 1941 meant that the war had expanded beyond the territorial dimensions of his envisaged *Großraum* and had become a world war between the Axis powers and the Allies. Schmitt was intensely distressed about this global expansion of the war. From then on, he no longer attempted to adapt his concept of the *Großraum* to the new territorial constel-

lations. He considered the German invasion of the Soviet Union a disastrous overstepping of the boundaries of any *Großraum*. When the fourth and final edition of Schmitt's Großraum *Order of International Law* was published, the German army had just invaded the Soviet Union. Schmitt's concluding comments in the preface, dated 28 July 1941, expressed his concerns about being overwhelmed by the turn of the war: "May the reader understand when I give this writing the following motto: 'We resemble navigators on an unbroken voyage, and every book can be nothing more than a logbook.'" (Schmitt 1941a, 77)

Nonetheless, Schmitt continued to examine questions of the *Großraum* economy, not least in an academic advisory function. From 1941 on, he belonged to the scientific advisory body of the Gesellschaft für europäische Wirtschaftsplanung und Großraumwirtschaft (DeWG, Society for European Economic Planning and *Großraum* Economy), which had been newly established in September 1939, at the same time as the invasion of Poland (Teschke 2016, 396). Headed by Werner Daitz, the director of the Nazi party's Division of Foreign Trade, the DeWG was tasked with plundering the territories conquered in the expansion of the Reich. In the remaining war years, however, Schmitt's academic interests turned more to the US than to Europe. In place of an American *Großraum*, he now spoke of the "Western hemisphere" as a part of the world dominated by the US. An "American century for our planet" (Schmitt 1943, 447) was looming, with worldwide American pan-interventionism. In his writing and lectures from 1942 to 1944, he commented on the role of the US as a world power, which was becoming even clearer as the war progressed, with a mixture of aggressive hostility and admiration for successful power politics.[18]

4. Kirchheimer on Schmitt's apologia for the Nazi wars

US government agencies as well as a few scholars of law and political science in the country keenly observed the development of German ideologies used to legitimize waging war. American international law scholar Josef Laurenz Kunz, who had immigrated from Austria in 1932, made the following observation on Schmitt's latest U-turn in an article titled "Germany's Lebensraum" in the *American Journal of International Law* in the autumn of 1940: "Carl Schmitt, professor of law, has, of course, never been a jurist, but a politician" (Kunz 1940, 170). Those driven into exile after 1933, who had been meticulously observing Schmitt's activities from then on, paid far less attention to his shift to *Großraum* theory than to his previous contributions to establishing the Nazi state in Germany and to his antisemitic diatribes. Kirchheimer was among the few who took note of these shifts in Schmitt's political thinking at an early stage. But he did not initially react directly to Schmitt's latest political theory ploy because he was too busy with works commissioned by the Institute of Social Research in the years 1939 to 1942. Yet even in these works, it is possible to find indications that he continued to pay attention to Schmitt's writing—provided he could get his hands on them at all in New York shortly after publication.

18 See Chapter 13.

The first direct indication of this is to be found in the article "Changes in the Structure of Political Compromise," published in 1941 (see Kirchheimer 1941a).[19] Kirchheimer presented his interpretation of what can be called the methodological primacy of domestic policy. How could the relative stability of the Nazi regime be explained even though the social groups within it were wrestling for power and influence? The current compromise structure of Nazism had brought an old question to the fore: How could the interests of the five main partners to the compromise—the monopolies, the army, industry, agriculture, and the Nazi party—be brought to a common denominator? Kirchheimer stated that it had become apparent that the *Führer* had been able to establish political authority acting as an ultimate arbiter in all cases where the monopoly groups involved were not able to reach a compromise by themselves. He thought that the party under Hitler's leadership was able to resolve intergroup differences "with relative ease" (287). According to Kirchheimer, Hitler's decisions were possible "with a minimum of resistance only because of the unfolding program of expansion" (287). German expansion by means of war had given the various groups the opportunity to extend their activities and to satisfy their desires and interests with little need to get in each other's way. The existence of the authoritarian regime in Germany was intimately connected to the execution of Germany's imperialist program. At this particular point at the end of his article, Kirchheimer made a subtle reference to Carl Schmitt: The form of domination which "the large-space (*Grossraum*) imperialism of Germany" (287) represented was not compatible with the fiction of sovereignty limited to the domestic realm. He quoted the following from an article by Ernst Rudolf Huber, his fellow student in Bonn with Schmitt: "The developing large-space order might, contrary to earlier imperialism, constitute a system of direct and open domination" (288). A closer look at Kirchheimer's source shows that Huber's sentence was a practically verbatim quote of Schmitt (see Huber 1941, 14).

Two more, albeit smaller, direct indications are to be found in two book reviews Kirchheimer wrote in 1941 and 1942. In an omnibus review of several books published in the US on the Nazi regime's economic policy, Kirchheimer devoted his attention to the Reich's foreign economic relations. On the basis of the import and export figures for 1929 and 1937, it could be stated that the balance of trade "has not been basically altered by the conquests made up to the spring of 1941" (Kirchheimer 1941b, 363). The parallels to Schmitt's *Großraum* theory, which also argued along economic policy lines, are striking. A "Nazified Europe, the sphere of domination which ends at the Channel ports and at the confines of the Russian Empire," had developed into an integrated economic area. Commenting on the tables in the economic policy analyses of the Brookings Institution, Kirchheimer wrote, "it looks as if Hitler's advisers had studied the same figures" (Kirchheimer 1941b, 364).

Kirchheimer published a review of Leopold Schwarzschild's book *World in Trance* in the 4 December 1942 issue of the *Aufbau* in which Schmitt was also discussed, at least indirectly. The *Aufbau*, a weekly founded in New York in 1934, was considered the most important source of information for Jewish and other German-speaking refugees in the US; it was also a place where they could publish. With its readership of up to 300,000 in forty-five countries around the world, it was the leading periodical for German-speaking

19 The following page numbers refer to this text.

Jewry. Its authors best known today include Hannah Arendt, Gershom Scholem, Max Brod, and Thomas Mann.[20] Institute of Social Research members Max Horkheimer, Theodor W. Adorno, Felix Weil, and Paul Massing occasionally wrote for the *Aufbau*, too. Leopold Schwarzschild was one of the best-known German-speaking émigrés in New York at the time. He was from Frankfurt am Main and had been one of the publishers of the left-liberal weekly *Das Tage-Buch* up until 1933. After fleeing Germany, he founded *Das Neue Tage-Buch* in Paris, which became the most important cultural-political magazine of the German-speaking émigré community. In 1936, Schwarzschild was involved in the efforts of the Lutetia Circle in Paris to establish an anti-fascist people's front; this was where Kirchheimer met him personally. After fleeing to the US in the summer of 1940, Schwarzschild tried to make a living as a writer and journalist in New York. His book *World in Trance: From Marseille to Pearl Harbor* is a kind of sequel to his 1934 *Ende der Illusionen* [End of illusions] in which he lamented the many misconceptions of German politics during the Weimar Republic at the time (see Schwarzschild 1934).[21]

Kirchheimer began his review[22] with the expectation that "the defeat of fascism […] is approaching" (331). He praised Schwarzschild's book as the best-written, most gripping argument with the most logical structure that had ever been penned criticizing both German imperialism and the aimlessness and leniency of Allied policy. It included an exemplary portrayal of the "continuing parallelism between Germany's systematic hegemonic ambition and Allied weakness" (331). Yet he did not hold back his fundamental criticism that Schwarzschild's work suffered from two misconceptions. First, his strict separation of domestic and foreign policy was incorrect. The "constant interaction" between foreign and domestic policy had never been more manifest than in the period between the Paris Peace Conference of 1919 and the Spanish Civil War with the accompanying appeasement efforts. Methodologically speaking, it was important to take account of the "class constellations" in society and the "social and economic forces supporting them" (332) when analyzing these interactions. Second, Kirchheimer believed that Schwarzschild had misinterpreted the role of France as a guarantor of peace in Europe following the war from 1914 to 1918. France's military hegemony in a pacified Europe would have necessitated "France's willingness to use most of its national product for policing functions" (332). Yet it had become apparent that "none of France's social groups wanted to shoulder the sacrifices that would require" (332). Kirchheimer wrote that it was Europe's undoing that at no point since World War I had there been governments of the same political orientation in France and Germany that could have achieved reconciliation between the two countries.

Kirchheimer's analysis of the Third Reich's structure of compromise found its theoretical culmination in his hypothesis that the existing compromise could not draw on its own resources to generate a stable equilibrium. It was sustainable only because decisions were made by the dictatorial head of the regime. And these were successful only if and only as long as every sacrifice by a group could be balanced out by other benefits. Nazi Germany was thus virtually programmed toward an expansive foreign policy that was not at all concerned with existing international law. The decision-making power of the

20 On the history and the authors of the *Aufbau*, see Kotowski (2011).

21 On his political diagnoses of the present while in exile, see Papcke (1993, 13–37).

22 See Kirchheimer (1942). The following page numbers refer to this text.

political leaders in Germany "rests on its ability to compensate every group sacrifice with advantages which, however, can ultimately be got only in the international field, that is to say, through imperialist policy" (Kirchheimer 1941a, 289).

In order to understand the causes of this imperialism, Kirchheimer insisted on reconstructing the constant interactions between domestic and foreign policy on the methodological level. This included an empirical analysis of the class constellations in society and the particular social and economic forces supporting imperialism in foreign policy.

5. Kirchheimer and Neumann's *Behemoth* on the concept of *Großraum*

An even greater, albeit indirect, indication of Kirchheimer's sustained interest in Schmitt's works on international law is to be found in Franz L. Neumann's 1942 book *Behemoth: The Structure and Practice of National Socialism*, which ran to more than 500 pages. *Behemoth* was the first comprehensive description and analysis of the Nazi system. Soon after its publication, it became a standard work on the Nazi system in the English-speaking world. An updated version was published in 1944. The book became a kind of handbook for the American military forces after the victory against Nazi Germany.[23]

This book was written while Neumann worked at the ISR. Both Gurland with his knowledge of economics and Kirchheimer with his legal and economic expertise had contributed to it in large measure. As Ossip K. Flechtheim, Neumann's research assistant at the ISR at the time, recalled, his brief acknowledgments in the introduction of the book (see Neumann 1944a, 18) were a "colossal understatement"[24] of the actual scope of Kirchheimer's contribution. According to Flechtheim, Kirchheimer was also involved in the analyses of the economic order in *Behemoth*, and Neumann and Kirchheimer discussed Carl Schmitt's more recent works multiple times. In Neumann's book, many passages on the new theories of international law and on various original sources from the German Reich were taken from the book by Eduard Bristler (John H. Herz) that Kirchheimer had previously reviewed.[25] Whereas Neumann's passages on the constitutional law of the Third Reich largely echoed his work *The Rule of Law. Political Theory and the Legal System in Modern Society* (see Neumann 1935), which he had completed when working with Harold Laski in London, his writing on how Nazi international law provided legal legitimacy to the various stages of Nazi foreign policy was new; this further supports Flechtheim's statement that Kirchheimer was heavily involved in preparing it. To a large extent, the passages in the book that deal with Schmitt can be attributed to Kirchheimer as the co-author.

The extensive chapter in *Behemoth*[26] on the Nazi theory of the Greater German Reich read like a black book on Carl Schmitt. It opened with excerpts from Hitler's Reichstag speech of 28 April 1939 in which he had hurled the German Monroe Doctrine, which

23 See Chapter 13.

24 Ossip K. Flechtheim in a conversation with the author on 13 February 1988.

25 See Chapter 11, p. 289–291.

26 See Neumann (1944a). The following page numbers refer to this text.

Schmitt had invented, at the international community. Commenting on the German Reich, Neumann stated: "The ideology of expansion is not complete with tradition, geopolitics, and pro-natalism. A new international law is needed too; more correctly perhaps, a new one at each stage in international relations" (150). He called Carl Schmitt "the leading voice in the National Socialist revisionist chorus" (152).

The first stage of Nazi foreign policy was about deterring foreign interventions and breaking the fetters of the Versailles Treaty. In his 1934 piece "Nationalsozialismus und Völkerrecht," Schmitt had introduced natural law as the leitmotif of his argument, a concept that the Nazi legal theorists had categorically ruled out for the realm of domestic law. Schmitt invented a catalog of natural rights that had to be granted to every state, such as the self-determination of states, equal treatment of states, and the right of states to life and defense. Neumann rejected such an argument for alleged natural rights of states as "purely arbitrary […] reasoning" (153).

As in Kirchheimer's previous writing, the discussion of Schmitt in *Behemoth* examined his deliberations about the League of Nations and the Soviet Union in more detail. Schmitt and other international law theorists of the German Reich had "duped the civilized world successfully" (153). They and the Nazi propaganda machine knew how to place their hypotheses in renowned international law journals abroad. Their argumentative "trick of excluding Soviet Russia from the international community" (153) was useful in this regard, too. Nazi international law doctrine was borrowed from the domestic policy doctrine according to which a democracy could function only if a certain amount of homogeneity existed within its borders. Neumann claimed that Schmitt analogously championed the hypothesis that "membership in the international community requires homogeneity, a number of common features and beliefs" (153). Although it was possible to make such assumptions of homogeneity plausible at the domestic level, a void at the international level remained in Schmitt's theory: "Just what the elements of this international homogeneity are is never made clear" (153). Yet one thing was crystal clear to Nazi theory, namely its assertion that the Soviet Union shared none of the characteristics of the civilized world and thus was outside the boundaries of international law from the outset. At this point in *Behemoth*, Neumann again made the connection between Schmitt's theoretical deliberations and the policies of the German Reich. Schmitt's "excommunication of Soviet Russia" (153) in his 1934 essay "Sowjet-Union und Genfer Völkerbund" found its counterpart in Hitler's speech at the 1936 NSDAP party convention, which further delegitimized the aspirations of the League of Nations to global legal influence.

Behemoth then critically examined the Nazi regime's supposedly official theory of war. Again, it was Carl Schmitt whose role was considered particularly prominent in this regard. Neumann first reminded readers of the renaissance of the theory of just war in the more recent British and American literature on international law. He drew on the deliberations of former US Attorney General Robert H. Jackson, who had emphasized again in April 1941 that the neutral states had to provide military support to nations that had been attacked by other countries. Neumann argued that a theory of just war had to be compatible with and acceptable to German legal philosophy. Nonetheless, he asserted, Schmitt was attacking the theory of just war, and he was using the oldest and most strongly rationalist arguments of all. "The same Carl Schmitt who invented 'thinking in concrete words' to replace abstract, rationalistic thought has devoted many articles to combating

the new theory of war and neutrality. He denies the distinction between just and unjust wars, and that neutrality can be 'halved'" (154). Either, Schmitt asserted, war was merely a policing measure implemented by any supranational authority or it remained a legal institution, and in this case, if a neutral state took a side, this made it a party to the war on one side or the other. Schmitt's attack on the theory of just war and discriminatory neutrality was characterized in *Behemoth* as "nothing more than part of the preparation for the new World War" (156).

Neumann also traced Schmitt's most recent turn in international law theory and placed it in the context of the new expansive stage of Nazi foreign policy: "With the coming of the present war, however, a completely new pattern of international law has been developed: The Germanic Monroe Doctrine" (156). Referring to Schmitt's 1939 brochure *The* Großraum *Order of International Law with a Ban on Intervention from Spatially Foreign Powers* and his 1940 essay "Raum und Großraum im Völkerrecht," Neumann first laid out the broad lines of Schmitt's *Großraum* theory, placing the greatest emphasis on the economic, technological, and organizational aspects of Schmitt's definition of a uniform *Großraum*. Because of the cartelization, monopolization, electrification, and rationalization of German industry, the creation of a far reaching *Großraum* had become imperative. Neumann stated that Schmitt did not view the integrating function of modern technology within the framework of a world with a territorial division of labor. Instead, he considered technology to be an integrating factor for far-reaching territorial expansion of the Reich, which was to be big enough for the products of the large companies: "The intrinsic connection between a monopolistic economy and territorial conquest stands fully revealed" (157).

This interpretation of Schmitt's *Großraum* theory not only saw it as a direct contribution to legitimizing Germany's attacks on neighboring countries but also placed it within his theory of organized/monopoly capitalism. An important issue in Neumann's explanation of Schmitt's theory in *Behemoth* was its antisemitic aspects. After replacing the state with *Raum* as the primary basis of the international order, Schmitt condemned traditional international law as a "creation of Jews" (157) and "a cloak for British imperialism" which, he claimed, was the system of Anglo-Saxon world imperialism lurking behind a facade of general norms of international law. Jewish universalism and abstract thinking were replaced by "thinking in 'concrete orders' and the most concrete of all orders existing is the *Grossdeutsche Reich*" (157). Works by international law scholars from the German Reich no longer referred to a single uniform international law, but to many international laws; their number equaled that of the *Reiche*, that is, *Großräume* with the capability to prevail. Thus, the Greater German Reich claimed the right to create its own international law for its own territory, with a strict ban on other states intervening.

The consequences arising from Germany abandoning universalist standards of international law were described in *Behemoth* using the examples of minority policy and Germany's actions against the population in the areas it had conquered. Schmitt and his followers fundamentally rejected calling the legal relations between the rivaling *Reiche* international law, limiting the term exclusively to the law of the *Volksgruppen* (minorities belonging to non-German *Völker)* living within the *Großräume*: "The ideological aim is clearly to give the German solution of the problem of racial minorities the sanctity of international law" (160). The political consequence was the abandonment of traditional minority

protection under international law in favor of the *Volksgruppenrechte* (rights of minorities belonging to non-German *Völker*).In *Behemoth*, Neumann compared and contrasted in detail the differences between a system of minority protection intended to guarantee the legal and political equality of all citizens in a state on the one hand and Nazi *Volksgruppenrecht* (law pertaining to the rights of minorities belonging to non-German *Völker*) on the other. The latter dispensed with all of the individual guarantees for citizens from minority groups. Schmitt's construct of *Volksgruppenrecht* within the *Großraum* made the motherland the arbiter of disputes between the state and the minority living within it. In place of the international community intervening on the basis of rational norms and procedures, Nazi theory propagated arbitrary intervention by the motherland. Or, in other words "racial imperialism" (163). Neumann then went on to describe the racial imperialist measures taken by the German Reich in the conquered areas of Czechoslovakia, Poland, Belgium, Norway, the Netherlands, and northern France in detail. *Volksgruppenrecht* in the areas dominated by Germany meant that the German minority was granted the status of a dominating majority, whereas all that remained for much of the population was the powerlessness of a minority.

The significance of Schmitt discovering the US Monroe Doctrine to legitimize the political interests of the German Reich was highlighted explicitly in *Behemoth*. Neumann acknowledged that the postulates of a German Monroe Doctrine "seem convincing at first sight" (158). More careful examination, however, would reveal that claiming the Monroe Doctrine for Nazi ambitions was entirely misguided. The doctrine had been created to repel European interests in conquests in the Americas. In the early twentieth century, it had briefly been repurposed as the ideological basis for US imperialism under Theodore Roosevelt. Since the 1920s, however, the Monroe Doctrine had begun to lose its interventionist and imperialist sting. During Franklin D. Roosevelt's presidency (from 1933 to 1945), rudimentary forms of pan-American solidarity had developed that had nothing in common with Nazi ambitions of domination. Still, as a result of the collapse of the League of Nations and the numerous violations of international law following this, Schmitt's criticism of existing international law had the advantage "of appearing to be realistic" (158) in the eyes of many of his readers.

Neumann took a staunch position against this purported advantage. Giving up the universalism of international law because of its practical failings to date would be akin to abolishing civil rights because they helped legitimize and obscure class exploitation or democracy since it concealed boss control. Considering corrupt administration of justice, reasonable people would not demand reverting to a war of all against all but would fight for an honest system. "Likewise, when we have shown that international law has been misused for imperialistic aims, our task has begun, not ended. We must fight against imperialism" (159). Neumann affirmed that Schmitt's theory did have a rational core inasmuch as it articulated changes in the international capitalist system: "The decline of the state in domestic as well as international law is not mere ideology; it expresses a major trend" (160). Schmitt's *Großraum* theory was, of course, a particularly unattractive response to the challenges of the contemporary capitalist transformation of the economy. It was not convincing simply because creating a European *Großraum* would be unable to liberate Germany from the pressure of the world economy long-term. The

protective function was illusory because even if continental Europe were dominated by Germany, it would remain dependent on foreign trade, especially for raw materials.

It was correctly emphasized in *Behemoth* that to Schmitt, a *Großraum* emerged mostly from economic and military events. It is striking that Neumann's explanations and analyses of Schmitt's *Großraum* theory did not mention differences in emphasis compared with the purely *völkisch* and racist *Lebensraum* theories of Werner Best and Richard Höhn, legal experts of the SS and masterminds of extermination. This has been criticized in some of the secondary literature. Schmitt's confidant George Schwab assumed in an interview forty years later that Neumann took revenge on Schmitt, so to speak, in the historical context of the height of the World War II: Neumann had "sought to settle a score"[27] by presenting the theory in an intentionally simplified way. Volker Neumann believed it was more plausible that Franz Neumann, working intensely on *Behemoth*, did not discern where works by Schmitt and those by Best and Höhn differed; he also had an issue with the fact that although Franz Neumann's other criticisms of Schmitt were justified, he had not paid attention to the major "difference between deprivation of rights and murder" (Neumann 2015, 491). This criticism also applies to Kirchheimer as the likely co-author of the sections in the book on Schmitt. Volker Neumann certainly has a point. This becomes clearly evident if we recall once again the racist passages in Schmitt's book in which he had approved of the deportations in the occupied territories, freely vented his antisemitism, and welcomed the Germans' cultural genocides of Czechs, Poles, and other Slavic minorities as examples of the "new order based on national groups" (Schmitt 1939a, 100).

6. Schmitt lying in wait again

From a political and propagandistic perspective with the intent to prevent powers from outside continental Europe from intervening in central Europe, Schmitt's *Großraum* theory was coherent. Viewed in terms of international law, however, it was hardly suitable for interpreting the war against the United Kingdom and even less so after Germany and Italy declared war on the US on 11 December 1941.

Even before the US entered the war, Schmitt had attempted to grasp the new and foreseeable situation by inventing new categories of international law. In early February 1941, he gave a talk with the title "Staatliche Souveränität und freies Meer" [State sovereignty and the open sea] (Schmitt 1941b) in which he presented an initial attempt to further develop a planetary theory. In this text, Schmitt dated the beginning of statehood to the second half of the sixteenth century. The opposite of the concept of the cohesive territory of the state surrounded by boundaries, which had developed on the European continent, was the open sea, which was not traversed by any state borders at all. In Schmitt's thinking on intellectual history, England now stepped onto his stage as the great adversary. With this new version of his politics of ideas, Schmitt was now able to declare an enemy; Hitler had already done so in the run-up to the German invasion of Poland. Hitler had long wished to cooperate with the United Kingdom. It was only in

27 Schwab in an interview with Rainer Erd, quoted in Erd (1985, 51).

1939 that he finally abandoned his overtures, which the island empire had rejected, and concluded that he would always face this country as an adversary in his efforts to conquer a *Großreich* in the east, for which reason he would have to conquer it first (see Fest 1973, 793). This reorientation became the basis of the German alliance with the Soviet Union.

Schmitt construed more abstract political concepts in his deliberations, but they were no less intensely programmed toward confrontation. England had opted against the state and for the sea because of its geographical situation as an island. Its imperialist methods of domination were indirect. What was new in this text of Schmitt's was the accentuation or idealization of this alleged dichotomy, making it a dichotomy of land and sea covering the whole world and all of history. Schmitt drew far-reaching conclusions from this dichotomy he had asserted. Land and sea, with their different ideas of *Raum*, corresponded to two "entirely different orders of international law" (Schmitt 1941b, 405). On land, the state was vested with providing order, progress, and humanity, and it was the only subject of international law as well as of constrained laws of war. International law relating to the sea, in contrast, engendered a completely different concept of war, for naval warfare was not a war of combatants. Naval warfare was based on a total concept of the enemy which considered all citizens of the enemy state and even everyone who sought to do business with them to be enemies, too. According to Schmitt's theory, two concepts of war and the enemy that were so contradictory could not be reconciled in terms of international law.

As the US entered the war and by the time the German army was defeated in Stalingrad in the winter of 1942 at the latest, the Nazis, too, realized that the war would be lost. It is striking that from that time on, Schmitt largely refrained from publishing new works on international law. Scholars disagree whether this lapse into silence was due solely to the fact that Hitler's Germany was going to lose the war it had started or whether it also indicated that Schmitt was creating a certain distance to the war Germany was waging in the east, which was growing ever more brutal as a war of extermination and genocide. Schmitt increasingly withdrew from offensively legitimizing the foreign policy of the Third Reich. If he said anything at all about international law at this time, then it was mostly about its history. During the final war years, his studies on the history of international law, which he had begun in 1940 and most of which he did not publish until after 1945, became his main occupation besides teaching and administering examinations at the university in Berlin. Yet a transformation can be observed in the few works he did publish after 1941. Whether Schmitt's reasoning ever strictly followed international law is debatable. In any case, it certainly no longer did after the advance of the German military had been stopped by the snow during the war against the Soviet Union in the winter of 1941. In the last three years of the war, Schmitt selected literary narratives as the form for presenting his new conceptual constructs and speculations.

The high point of this literary production was his brief book *Land and Sea: A World-Historical Meditation*. Initially a series of newspaper articles from March 1942 on, it was published as a standalone work in the autumn of that year.[28] The book was presented

28 The postwar second edition of the book in German from 1954 contains substantial alterations to the first edition of 1942. The differences relate mainly to Schmitt's characterization and depiction of Jews and of the British. See Chapter 15.

as a narration told to his 12-year-old daughter Anima. Schmitt interpreted the war as an elemental event, the elements being land, water, air, and fire. The general idea of the book was based on his literary article "Das Meer gegen das Land" [The sea against the land], which was first published in March 1941 for the weekly newspaper *Das Reich* (see Schmitt 1941c). Founded by Minister of Propaganda Joseph Goebbels in 1940, *Das Reich* was his favorite propaganda vehicle and, with its circulation of 800,000 copies, it soon became the single most important journal read by the Nazified German political and intellectual establishment (see Herf 2008, 21). Schmitt also delivered early versions of the book as lectures in occupied Paris in October 1941.

Schmitt claimed in *Land and Sea* that human beings had a privileged relationship to the earth because they were "land-dwellers" (Schmitt 1942a, 5). The central argument of the book involves fundamental tensions between land-based and sea-based cultures. The mythic repetition of the irresistible conflict between terrestrial and maritime worlds was constructed as a backdrop for the battle of the day: Germany versus "Anglo-America," as it was known in Nazi German. It was the battle between the order and stability of solid earth against its disorderly, chaotic, threatening, and anarchic counterpart, the sea. In Schmitt's view, the United Kingdom was the archetypal maritime country, and the United States represented the principle of the sea, too, even though it spanned an entire continent. In the 1942 version of the book, Schmitt's concept of the human being excluded the British people because they had decided against being land-dwellers and instead lived on the water. Schmitt also excluded Jews, claiming they were landless wanderers who lived in tents (see Schmitt 1942a, 10).

What was new in this book was Schmitt's idea of *Raumrevolutionen* (*Raum* revolutions, i.e., major changes in *Raum* orders), which was characterized by the various elements. He asserted that the first *Raumrevolution*, with the transition from land to sea, had occurred during the age when European powers had discovered America and colonized the world. England had evolved as the leading power in this epoch and had revolutionized international law to meet its maritime interests. Schmitt provided a kind of counter-history to Marx's theory of original accumulation by stating that British colonial policies had provided the resources for its industrialization. The industrial revolution of maritime modernization had become a worldwide battle between Great Britain and similarly highly industrialized Germany from the late nineteenth century on. In the meantime, with the invention of electric technology and electrodynamics, a new, second *Raumrevolution* and a new distribution of global *Räume* had begun (see Schmitt 1942a, 89–91).

Schmitt concluded his book with a prognosis: in his day, the battle between the elements would be decided by domination of the air. At least in his newspaper articles on *Land and Sea* of February and March 1941, Schmitt seemed to hope for a new *Raum* order in which Germany might surpass British sea power with the aerial supremacy of the German *Luftwaffe*. In light of the persistent bombing of German cities by the Allies throughout the summer of 1941 and into 1942, however, Schmitt revised his view of the distribution of airpower in the book *Land and Sea*. It did not end with the *Raumrevolution* from the element of water to the element of air, which would have been logical, but with one into the element of fire. In Germany, the aerial war had brought about a collision of the elements: flames were raining down onto the land from the sky, and enemies were invading from the sea.

7. Kirchheimer's career problems

While Schmitt used the secure position of his professorship in Berlin to provide his audience in Germany with legitimacy based on international law for the expansion of the Reich and later with morale-boosting slogans, Kirchheimer had to contend with an existential lack of professional and financial security in his US exile. He was also in trouble at his job at the ISR. He did not have an easy time with the core of the group, Max Horkheimer, Friedrich Pollock, and Theodor W. Adorno. For one thing, relations were strained because of their conflicts about the theory of state capitalism advocated by Pollock and Horkheimer.[29] For another, discord at the personal level dimmed the prospects for continuing his employment there. Besides Franz L. Neumann, his best friends at the institute were Arkadij Gurland and Herbert Marcuse. Yet Kirchheimer had to justify the subjects he was interested in working on to the heads of the institute. He explained to Pollock that he was primarily at home in the field of "political science" (a field that was just emerging), not in economic statistics.[30] Although Horkheimer had informed Neumann in the summer of 1939 "that I would be glad to support every step that could lead to him [Kirchheimer] remaining here,"[31] Kirchheimer was notified by the institute shortly thereafter that he would soon no longer be able to work there.

Kirchheimer's precarious professional situation briefly improved in late 1939 when the Emergency Committee in Aid of Displaced German/Foreign Scholars (EC) agreed, after negotiations that had dragged on for months, to cover 1,200 dollars for the year 1940, i.e., fifty percent of Kirchheimer's salary at the institute. The reason given in the funding proposal was the importance of Kirchheimer's analyses on Nazi Germany.[32] The remainder of his salary was paid by the Oberlaender Trust in Philadelphia and the institute's own funds.[33] One year later—again after lengthy negotiations—the EC approved a one-off extension of his funding for 1941; this time, however, the Oberlaender Trust withdrew from the funding because of a change in its guidelines, and Kirchheimer was left with nothing because the EC made matching funding a condition for its payment. It was mostly Franz L. Neumann who wrote multiple letters to potential funders and colleagues at US universities to ask for support for Kirchheimer.[34] In the end, Felix Weil,

29 See Chapter 9, p. 251–253.

30 Letter from Otto Kirchheimer to Friedrich Pollock dated 6 August 1939. Otto Kirchheimer Papers, Series 2. Box 1, Folder 127.

31 Letter from Max Horkheimer to Franz L. Neumann dated 10 August 1939. Max Horkheimer Papers, Letters VI, 11, page 216.

32 Letter from Betty Drury (EC) to Friedrich Pollock dated 1 December 1939. Emergency Committee in Aid of Displaced German/Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto). —The reviewers of the proposal for Kirchheimer were Thorsten Sellin and Carl J. Friedrich. On the EC's funding policy, see Krohn (1987, 28–37).

33 The Oberlaender Trust funded many diverse cultural activities for immigrants from 1931 to 1953 and had supported the ISR before then on other occasions (see Gramm 1956, 65–66).

34 Neumann turned to David Riesman and Nathaniel Cantor (both at the University of Buffalo) as well as Carl J. Friedrich. He wrote in his letter to Friedrich: "I have known Kirchheimer since 1927 and always found him a true friend and excellent scholar. In fact, I brought him over from France to the United States and got him the job at the Institute." Letter from Franz L. Neumann to Carl J. Friedrich

the philanthropist supporting the institute, agreed to make up the difference.[35] The EC's published *Report* for the year 1941 listed Kirchheimer alongside Ossip K. Flechtheim and Erich Hula as one of fifteen scholars in the category "Law" receiving funding.[36] Even if this meant that Kirchheimer again had part-time financing at the ISR, it changed nothing about the basic constellation: since he had no alternatives, he was ultimately at the institute's disposal for a comparatively low salary, without a binding employment contract, and with no real prospects—Horkheimer's occasional assurances of his appreciation for him notwithstanding.

This precarious professional situation was compounded by the fact that it endangered Kirchheimer's residency in the US, which was still dependent on employment.[37] He had lost his German citizenship on 6 December 1938. The Gestapo had taken the initiative to revoke his German citizenship in early 1938 during "rectification" of German citizenship. An initial investigative report about him by the Gestapo dated 1 February 1938 stated[38] that his "current residency [was] unknown" and that he was "presumably [living] in Paris." Hence, Kirchheimer's "behavior had thoroughly violated his duty as a citizen." The report on the police investigations concluded by recommending that the Gestapo initiate the process of withdrawing Kirchheimer's citizenship. This was followed on 16 July 1938 by the Gestapo's "recommendation for revocation of citizenship"[39] to Himmler, the *Reichsführer* of the SS, "to revoke the German citizenship of *der Jude* Otto Kirchheimer" (see Glossary: "*der Jude*") and to expand this legal act to include his wife Hilde and their daughter Hanna. On 2 August, the *Reichsführer* of the SS agreed. Following consultation with the German embassy in Paris in early November, the request was granted on 17 November 1938.[40] The result was that Otto Kirchheimer and his daughter Hanna were stateless. Shortly after he lost his German citizenship, the University of Bonn revoked his doctoral

dated 13 February 1941. Emergency Committee in Aid of Displaced German/Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

35 Letter from Friedrich Pollock to the EC dated 5 March 1941. Emergency Committee in Aid of Displaced German/Foreign Scholars, New York Public Library, New York. I, A Grantees, 1933–46, Box 18, Folder 13 (Kirchheimer, Otto). — A handwritten note from a conversation with Kirchheimer at the EC in February 1941 characterized him as a man of "awkward manner," as "keen," "good humored," and "a brilliant mind."

36 Overall, the *Report* of the EC from 1941 listed the names of 235 scholars supported in the US (see Report 1941, Kirchheimer is mentioned on page 11).

37 Hanna Kirchheimer-Grossman in a conversation with the author on 25 April 2023.

38 Letter from the Geheime Staatspolizei, Staatspolizeileitstelle Berlin, to Geheime Staatspolizeiamt in Berlin dated 1 February 1938. Bundesarchiv, Akten des Auswärtigen Amtes. Politisches Archiv, RZ 214, R 99744 (69. Ausbürgerungsliste, Ausbürgerungsakte betreffend Otto Kirchheimer).

39 Letter from the Geheime Staatspolizei to the *Reichsführer*-SS dated 16 July 1938. Bundesarchiv, Akten des Auswärtigen Amtes. Politisches Archiv, RZ 214, R 99744 (69. Ausbürgerungsliste, Ausbürgerungsakte betreffend Otto Kirchheimer).

40 File Memorandum of the Reichsministeriums des Innern, dated 17 November 1938. Bundesarchiv, Akten des Auswärtigen Amtes. Politisches Archiv, RZ 214, R 99744 (69. Ausbürgerungsliste, Ausbürgerungsakte betreffend Otto Kirchheimer).

degree of 1928; the university did not give it back until November 2023 after a newspaper reported about his case, including interviews with the author of this book.[41]

US Department of Justice files show that Kirchheimer's residency status in the US became precarious when the war began in Europe. In the summer of 1940, a mail carrier from Canaan, Vermont, considered him suspicious and reported him to the FBI "owing to the Fifth Column activities" because he had a German first name and rarely spent time at the vacation house he had rented. The FBI special agent in charge started an investigation in New York; evidently, nothing incriminating was found and so the investigation was closed.[42]

In the meantime, Kirchheimer had found a new partner, Anne Rosenthal.[43] In mid-May 1941, he was divorced from Hilde Kirchheimer-Rosenfeld, who lived in Mexico in the communist community of exiles, among them writers Anna Seghers and Alexander Abusch. Two months later, Kirchheimer married Anne in Chicago, and they moved to Queens, New York. He selected this location intentionally because he did not want to live too close to the Manhattan intellectual circles.[44] After Germany and Italy had declared war on the US on 11 December 1941, Kirchheimer had the status of an "enemy alien." This entailed certain requirements, one of them being that he had to apply for official permission to travel within the US. These requirements were lifted only when he obtained US citizenship on 16 November 1943. Kirchheimer desperately searched for new employment opportunities. He had unsuccessfully applied to a college in Tennessee in September 1939, and Horkheimer had written a glowing letter of recommendation.[45] A year later, he applied to a college in Chicago, also without success.[46]

By this time, Horkheimer, who had moved to the West Coast in the meantime, had very little confidence left in the critics of his theory of state capitalism who had remained at the institute in New York[47] and enhanced the visibility of the ISR in Los Angeles as an institution with workshops and small conferences. He was in contact with Kirchheimer mainly by letter while the latter sought new ways to secure his financing through the

41 Hermann Horstkotte, "Zu Landesverrätern erklärt," *Bonner Generalanzeiger*, 31 July 2023, p. 8 and Hermann Horstkotte, "Universität Bonn will Otto Kirchheimer rehabilitieren," *Bonner Generalanzeiger*, 6 November 2023, p. 8.

42 U.S. Department of Justice, Federal Bureau of Investigation, files on Subject Otto Kirchheimer, (unnumbered).

43 Anne Rosenthal was born in Würzburg in 1915. She had studied modern dance in Berlin before fleeing Germany. She succeeded in entering the US in September 1937. After marrying Otto Kirchheimer, she found work as a physiotherapist.

44 Hanna Kirchheimer-Grossman in a conversation with the author on 25 April 2023.

45 Letter of recommendation from Max Horkheimer for Otto Kirchheimer dated 23 September 1939. Max Horkheimer Papers, Letters VI, 11, page 361.

46 Letter of recommendation from Max Horkheimer for Otto Kirchheimer dated 7 October 1940. Max Horkheimer Papers, Letters VI, 11, page 353.

47 Horkheimer wrote Leo Löwenthal in late November 1941, when work on the lecture series at Columbia University was still in full swing: "However, if we continue working with Neumann, Grossmann, Kirchheimer, Gurland, then neither your presence nor even that of Marcuse or of Teddy [Adorno] will have any effect on the rapid disintegration." Letter from Max Horkheimer to Leo Löwenthal dated 29 November 1941 (Horkheimer 1996, 225).

ISR.[48] Kirchheimer received a research stipend from the New School for Social Research in New York from March to July 1942. The Graduate Faculty (GF) of the New School had been established in 1933 for academic refugees from Europe.[49] The core group of the GF was mostly veterans of practical politics from previously democratic European countries, and their research had less of a theoretical focus. Besides the monetary aspect, the stipend at the New School was a particularly great distinction for Kirchheimer, seeing as the New School received about 5,000 requests of this kind per year, but could only grant less than fifty of them (see Später 2017, 384). His project with the vague title "Contemporary Legal Trends" was formally placed with Max Ascoli, Dean of the Graduate Faculty. Ascoli was a liberal political philosopher who had fled to the US after being released from detention in fascist Italy in 1931. However, Kirchheimer and Ascoli did not get along well personally and never really collaborated at the New School.[50] In a letter to Horkheimer, Kirchheimer believed that he could still be happy "that you have not given up the idea of seeing me in Los Angeles."[51] He missed the old debates at the institute and would be happy to move to the West Coast, but in order to do so, he would need a steady income higher than the 125 dollars he was receiving from the institute at the time. Horkheimer's response was noncommittal. He did not make a specific offer but said he would continue to support Kirchheimer's applications to other institutions.[52]

8. On the verge of Germany's liberation

With the support of Franz L. Neumann, Kirchheimer finally succeeded in securing official financing through the institute for 1942. The Carnegie Foundation enabled him to collaborate with Neumann and Gurland at the ISR on a report for the US Senate in 1942/43. The book *The Fate of Small Business in Nazi Germany* resulted from this project (see Gurland, Kirchheimer, and Neumann 1943). This commission to prepare the report was part of US efforts to gain a better understanding of the current situation in the German Reich. Claude Pepper, Member of the Special Committee to Study Problems of American Small Business in the Senate and a leading voice of the left wing of the Democratic Party, underlined the connection to the war effort in the first sentence of his preface: "One of the

48 Letter from Otto Kirchheimer to Max Horkheimer dated 24 June 1942. Max Horkheimer Papers, Letters VI, 11, page 348.

49 On the history of the Graduate Faculty of the New School for Social Research, see Friedlander (2019); on the tense relationship between Horkheimer's institute and the New School, see Krohn (1987, 213–226).

50 As Ascoli, too, stated when queried by an FBI special agent tasked with investigating Kirchheimer's loyalty to the US, he had nothing to do with the substance of Kirchheimer's project; in fact, Kirchheimer worked on his projects entirely independently. Report: Results of Investigation of 26 May 1950 (page 10). U.S. Department of Justice, Federal Bureau of Investigation, files on Subject Otto Kirchheimer, (unnumbered). Kirchheimer's friend Franz L. Neumann described Max Ascoli in a private letter as a "puffed-up idiot of unmatched vanity" (quoted in Friedlander 2019, 146).

51 Letter from Otto Kirchheimer to Max Horkheimer dated 16 July 1941. Max Horkheimer Papers, Letters VI, 11, page 324.

52 Letter from Max Horkheimer to Otto Kirchheimer dated 16 August 1942. Max Horkheimer Papers, Letters VI, 11, page 323.

secrets of fighting an effective war is knowing the enemy, how he operates, and what are his aims."[53] In the study, the methodological toolkits of economic statistics, evaluation of press materials from the German Reich, and legal analysis were applied to document the transformation experienced by the social class of small businesses in Germany over the past twenty years.

Kirchheimer's contributions to the 150-page study consisted of analyses of the position of small businesses in terms of business law during the Weimar Republic, Nazi propaganda for small businesses before taking over the government in 1933, and the Nazi regime's economic policy goals and measures taken in relation to the war effort. The economic sections of the study provided an abundance of figures from various sectors describing the decline of small businesses. In particular, the reorientation of economic policy in Germany from 1936 on to support preparations for war increasingly relied on industrial mass production and rationalized large-scale technologies. This process of decline was accelerated by the fact that the state refrained from directly interfering in the economy and handed responsibility for the politically mandated economic measures to the major trade associations, which were organized as cartels. The period of economic policy studied by Kirchheimer ended just after the devastating defeat of the 6th Army in Stalingrad in February 1943 and included some measures with which the German business community intended to intensify its war efforts and thus also its support for the monopolies. The study concluded with the—in Kirchheimer's view, positive—statement that "in the winter of 1942–43, Nazi Germany underwent her severest domestic crisis since 1939" (Gurland, Kirchheimer, and Neumann 1943, 395).

Kirchheimer was again employed temporarily by the institute in the summer of 1943. Working with Neumann and Gurland, he had succeeded in obtaining funding from the American Jewish Committee for multiple studies on antisemitism in Europe.[54] As part of the project, Kirchheimer prepared two texts on the policy of the Catholic Church toward the Jews. He determined that because of Nazi Germany's military expansion, "after 1939 antisemitic policies rapidly spread all over Europe" and that the Catholic Church had made every effort "to refute the charge of being a tool of 'International Jewry'" (Kirchheimer 1943, 515). Focusing primarily on intellectual history, the texts contained no further statements on international policy or on the war against Germany. While he was working on this antisemitism project in early 1943, Kirchheimer still held fast to the vague idea of moving to the West Coast in the foreseeable future, to Horkheimer and the others. Neumann had asked him whether he was interested in working at the Office of Strategic Services (OSS), which was in the process of being established, in Washington. Kirchheimer immediately agreed to this but was not all too optimistic in his correspondence with Horkheimer.[55] In his response, Horkheimer repeated once again that he regretted

53 Pepper in Gurland, Kirchheimer, and Neumann (1943, 333).

54 See Chapter 10.

55 "As my child is going to stay with her mother in Mexico from next summer on for a whole year, my wife and I are considering different projects and one of them is still to move to Los Angeles […]. Neumann just now is trying to fix me up in Washington, but I am somewhat less optimistic than he." Letter from Otto Kirchheimer to Max Horkheimer dated 22 January 1943. Max Horkheimer Papers, Letters VI, 11, page 318.

that in his function at the institute, he could do nothing for him.[56] Kirchheimer urgently needed a new way to support himself and his family in his exile in the US.

In early 1943, Kirchheimer applied to become a US citizen. He had succeeded in obtaining a position as Visiting Lecturer at Wellesley College in Massachusetts for the spring term (January through May) in 1943. He taught courses on social change and social theory for the program in sociology.[57] He was still seeking other employment opportunities at universities. His difficulties in gaining a toehold in the US university system were likely largely due to the fact that he was not as well integrated into the academic network as some other German émigrés.[58] In retrospect, one of his American colleagues also saw the difficulties in finding a position at a university as the result of certain problems of acculturation and what he observed as a "psychological failure to adapt to his American surroundings."[59] Kirchheimer's written English remained "teutonic," and he spoke with a strong German accent. But then, to his great surprise and thanks to Neumann's backing, he was commissioned by the Office of Strategic Services (OSS) of the US Government in the summer of 1943 to prepare a paper on German criminal and constitutional law, a project that lasted a few months.[60] When he finally obtained US citizenship in November 1943, at least his residency in the US was no longer precarious, although he still had no job security.

At the same time, Kirchheimer grappled once more with Schmitt's theory of sovereignty in his essay "In Quest of Sovereignty." The back story of the essay began in 1942. It, too, reflected Kirchheimer's complicated relationship to the ISR.[61] Parallel to his deliberations on the theory of state capitalism, Horkheimer had begun in 1939 to seek a concept to encompass the analyses of society at the ISR that took an even more general approach. His idea, which Adorno supported vehemently, was that a theory of "rackets" could accomplish this task (see Horkheimer 1939b).[62] Horkheimer had borrowed the term "racket" from 1930s American sociology, where it was used to characterize Mafia-like trade union structures and corrupt business relationships. In the summer of 1942, Horkheimer invited Kirchheimer to contribute to this project by writing about rackets in the labor movement; an offer Kirchheimer could not turn down. He sent his manuscript to Horkheimer in January 1943, who commented on it three weeks later, praising it, but proposing changes he linked to Carl Schmitt in particular:

56 "As things are, I can only hope that somehow you will arrive here anyway—if in the meantime you have not been appointed chief of some section of the State Department, or in some other powerful agency." Letter from Max Horkheimer to Otto Kirchheimer dated 8 February 1943. Max Horkheimer Papers, Letters VI, 11, page 317.

57 Otto Kirchheimer, Curriculum Vitae (1952), Otto Kirchheimer Papers, Series 2. Box 1, Folder 1.

58 Hanna Kirchheimer-Grossman in a conversation with the author on 1 April 2016.

59 This was the view of H. Stuart Hughes, his colleague at the OSS (as cited in Müller 2010, 389).

60 Letter from Max Horkheimer to Otto Kirchheimer dated 16 July 1943. Max Horkheimer Papers, Letters VI, 11, page 310. For more about Kirchheimer's work at the OSS, see the next chapter.

61 On the details of the complex backstory of this essay, see Buchstein (2020a, 95–100).

62 On Horkheimer's unsuccessful attempts to construct a "theory of rackets," see Fuchshuber (2019, 223–304).

> Should not, in a study bearing the title 'In Quest of Sovereignty,' the concept of sovereignty be more principally discussed? Of course, you touch it in various points, among others when you speak of Schmitt's decisionism. Your own concept, however, is so realistic (fortunately) that it differs strongly from the formalistic conceptions usually harbored under that title. A very short confrontation of both could add to the weight of your theory.[63]

However, the racket project never saw the light of day, buried by Horkheimer without a word. The theory that Horkheimer had begun to develop with so much ambition remained an unfinished torso of critical theory. Kirchheimer subsequently published a revised version of his article in the American *Journal of Politics*.

In his article "In Quest of Sovereignty,"[64] Kirchheimer observed a "peculiar mixture of shrewd analysis and ethical utopias" (161) in the modern theory of pluralism. As for the frequently posed question "what about sovereignty?", he reflected on what would happen if the group conflicts within a society had become so massive that they could no longer be settled. Referring to Schmitt's books *Dictatorship* (1921) and *Political Theology* (1922), he attacked his deliberations on sovereignty theory from the days of the Weimar Republic. "[A]s early as 1922, [Schmitt had] given up the hope of finding a permanent subject of sovereignty" (191) balancing the interests and volitions of different groups and factions. Schmitt attributing sovereignty to the individuals or groups that proved capable of exercising political domination under extraordinary circumstances was not convincing. For even in Schmitt's own words, this idea was too strongly "structurally akin to the theological concept of miracle" (196).

Kirchheimer argued in a strictly logical way to refute Schmitt's theory of sovereignty. It was true both of emergencies and of miracles that they had to be recognized as such, and that recognition required criteria. Emergencies and miracles were exceptions from rules that applied under normal circumstances. Their contours were determined by these rules of normalcy, which they confirmed by being exceptions. The lack of binding rules for recognizing an "emergency in permanence" (190) became the genuine symbol for the lack of a reasonable system of coordination which had historically and traditionally been accorded the attribute of sovereignty. All theories of emergency such as Schmitt's attested to the fact that society had reached a stage where the balance between the various forces within society had become unstable. In such a situation, "the most powerful groups [… were] compelled to resort to building a machine of violence" (191) with which they would eliminate their enemies politically, as fascism was doing in Germany. In this article, Kirchheimer used the term "rackets" to describe the close ties between the ruling fascist elites.

Despite its focus on domestic politics, the article concludes with an outlook on the international dimensions of Nazi domination. Since there was fierce competition in the field of international relations, the first country to complete a policy to coordinate the interests of the major trade associations would receive a "differential rent" (192). By using

63 Letter from Max Horkheimer to Otto Kirchheimer dated 8 February 1943. Max Horkheimer Papers, Letters VI, 11, page 316.

64 See Kirchheimer (1944e). The following page numbers refer to this text.

the term "differential rent," Kirchheimer took up a category from contemporary Marxist economic theory on ground rent, which meant a productivity advantage that made a positive difference to the average profit because of natural production conditions (for example, soil quality). Nazi Germany had gained this type of advantage on the European continent. Its trade policy of imperialist coordination made the Nazi government a "silent partner" (192) to private international business agreements. The Germans had even succeeded in inserting clauses into private contracts that seriously weakened the war potential of the country to which the other party to the contract belonged. Kirchheimer considered the contracts between the German conglomerate IG Farben and the American corporation Sterling Products, which had been concluded in 1937, to be a prime example of this. At this point, he alluded to a brief essay by Schmitt "Über die zwei großen ‚Dualismen' des heutigen Rechtssystems" [On the two great "dualisms" of contemporary legal systems] from 1939. Schmitt had explained that the two traditional dualisms in the law—public and private law as well as international and domestic law—had to be abandoned in legal thinking because they were now historically obsolete. The historical "development toward ever more tightly organized statehood" (Schmitt 1939b, 262) put strong states in the position of prevailing with their interests internationally in the area of private law, too. Schmitt used the term "*Gemeinrecht*" for this fusion in legal thinking (Schmitt 1939b, 263). Besides international trade agreements, he considered the responsibility of German courts for marriages between foreigners as well as the entire field of "*Rasse* law" to be legitimate objects of German "*Gemeinrecht*" (see Schmitt 1939b, 268–269).

Kirchheimer in his article "In Quest of Sovereignty" saw in the foreseeable German defeat in the war "the differential rent which ruling groups in Germany were able to secure through being the firstcomers in the field as bound to disappear" (193). For this reason, the foundations of the compromise between the rivaling social power groups in the Nazi state would again become unstable. The only thing still holding the regime together was the power groups' common interest in keeping the "practitioners of violence" in power; the regime had depended on foreign expansion from the outset. In Kirchheimer's view, the Nazi system was "substantially shaken" (193).

9. Conclusion: Waiting for the end of the war

With the publication of *Land and Sea* in 1942, Schmitt finally abandoned the idea of the Reich as a power creating and maintaining the order of a *Großraum*, moving from the academic discipline of international law to the domain of literary narration and speculation on the history of mentalities. Reinhard Mehring called this change in form of presentation the "literary staging of an exit" (Mehring 2014a, 392). In the final war years, Schmitt published more historical narratives of international politics. In April 1942, his article speculating on the decline of the US was published in Goebbels's prestigious journal *Das Reich*. The text was written in the usual tone of Nazi war propaganda against the US. The war, it claimed, was far from being decided in favor of the Allies. US involvement in it had proven to be obviously "not decisive for the outcome of the war" (Schmitt 1942b, 431). The German Reich had already won the continental land war in Europe; now it was about the victory of the Axis in naval warfare. US domestic policy was splintered, and the country

had become a "magnified and coarsened reflection of old Europe" (Schmitt 1942b, 434). President Roosevelt was not an active and major force influencing policy but, rather, an "accelerator against his will" (Schmitt 1942b, 436) of the decline of the US.

Schmitt contributed another essay with the title "Die letzte globale Linie" [The final global line] in an anthology that appeared in the autumn of 1944. He again rejected the alleged aspiration of the US to assume the air of moral judge of the whole world and aim for boundless pan-interventionism. But now his criticism of the US seemed remarkably defensive; several months after the devastating defeat of the 6th Army in Stalingrad in February 1943, it lacked the cocky jargon typical of the Nazis' confidence that they would be victorious. The current world war, he asserted, was the conflict of two competing geopolitical *Raum* orders of planet Earth. On one side, the aspirations of universal planetary control and world domination. And on the other—under Germany's leadership—a "different *nomos* of the Earth whose basic idea is to divide the Earth into several *Großräume* pervaded by their historical, economic, and cultural substance." (Schmitt 1944, 447). For the period following the end of the war, he prophesied that the world would always remain too large for the US, regardless of how the war might end, and that it would be big enough for multiple *Großräume* "in which freedom-loving people [were] capable of preserving and defending their historical, economic, and spiritual substance and character" (Schmitt 1944, 448). Schmitt continued to be very productive in the last three years of the war, but he published very little; his manuscripts from 1942 to 1945 were the basis for his first books after 1949. He shifted the focus of his work to the history of international law. As he redirected his attention to new subjects, he altered his terminology again. From 1942 on, he successively abandoned the term "Reich," which he had not elevated to prominence in international law until 1939, replacing it with "*nomos*."

Schmitt's published writing on questions of international law from the final years of the war are ambivalent. Up to and including *Land and Sea* and later works through 1944, they were clearly written as works of German Nazi propaganda supporting attacks on the neighboring countries. But they were also conceived as a position distant from Hitler's geopolitics, if not a critique of certain strands of them. Even though Schmitt's writing was clearly antisemitic, he did not define his concept of *Großraum* in biologistic terms like the concept of German *Lebensraum*, but rather on the basis of its infrastructural and economic functions. In addition, he was at least implicitly critical of the German attack on the Soviet Union. In the fourth edition of his Großraum *Order of International Law*, which he dated to the end of July 1941, more than a month into Operation Barbarossa, Schmitt retained the passage in the book on the validity of the German-Russian border and the Soviet-German friendship treaty of September 1939, the successor agreement to the Molotov-Ribbentrop Pact.

Schmitt apparently thought that the invasion of the Soviet Union was a violation of international law. His view had previously been that the German invasions of Austria, Czechoslovakia, Poland, Belgium, France, and Denmark were legitimate in terms of international law, but he did not believe the same of the attack on the Soviet Union; this position was not consistent, given that the German government had also broken multi- and bilateral treaties in the previous invasions. Be that as it may. Schmitt had praised his *Führer* for his wars on numerous occasions in printed articles. But he did not do so in 1941 even as it seemed for a few months that the German army might be successful in its

blitzkrieg heading for Moscow. These new nuances notwithstanding, the overall continuity in Schmitt's writing on international law between 1923 and 1943 is remarkable. All the major subjects—rejection of the Geneva League of Nations, insistence on unrestricted *ius ad bellum*, the nationalist definition of a *Volk*, his interpretation of the Monroe Doctrine, critique of a universal international law—can already be found in his Weimar works. In developing his theories of Reich, of *Großraum*, and of *nomos*, he did not revise his old theoretical building blocks but simply added some new ones.

Schmitt aspired in his writing on international law to criticize US hegemonic foreign policy. As William Rasch has argued, "Schmitt, the nationalist, might also be Schmitt, the international multiculturalist, who offers those, who 'obstinately' wish to resist the 'West' a theoretical foothold" (Rasch 2000, 1683). Following the US military reactions to the attacks on the World Trade Center and the Pentagon, a number of authors from the left have referred to Schmitt as an inspiring source for their critique of universal international law as a perfidious strategy of domination by Western imperialists.[65] Contemporary theories of imperial rule (see Hard and Negri 2004), critics of colonialism (see Kalyvas 2018), and postcolonial critics of international law (see Blanco and Valle 2014) also refer positively to Schmitt's theory. Kirchheimer, in contrast, already opted during the Weimar Republic for an extension of the juridification of international politics. Kirchheimer's writing contradicted Schmitt's negative view about international institutions and his cynicism about international law. It also contained a normative argument against the Schmittian critique which can be found in the current debate, too: every objection raised against the one-sided or selective application of universalistic standards in international law must already presuppose these same standards. Thus, Schmitt's hermeneutics of suspicion about universalistic international law—aptly expressed with the famous aphorism by Pierre-Joseph Proudhon: "whoever invokes humanity wants to cheat" (Schmitt 1932a, 54)—smuggled moral-normative commitments into his purportedly "realist" diagnosis of international politics.[66] Other authors argue that Schmitt's *Großraum* theory must be understood as "one of the earliest and most well-founded theories of globalization" (Manow 2022, 18). Such an assertion absolutely overstates the originality (as well as the plausibility) of Schmitt's theory and ignores liberal theories of international trade relations as well as the Marxist tradition of theories of capitalist imperialism. Even though Kirchheimer was only marginally involved in the Marxist debates about imperialism, there are some elements of continuity in his work about international politics between 1939 and 1943, too.

Among the Germans who were driven out of their country into exile and who followed Schmitt's activities and writing, Kirchheimer was one of the few who paid close attention to Schmitt's latest shift to *Großraum* theory in 1939. Although he was busy with his commissioned works at the ISR, Kirchheimer continued to keep abreast of Schmitt's latest writing—provided he could put his hands on it in New York. The sections in Neumann's *Behemoth* that Kirchheimer was involved in writing pointed out the key significance of Schmitt's contribution for making use of the Monroe Doctrine in order to legitimize the

65 See Zolo (2007) and Balakrishnan (2011).

66 See Teschke (2011a) and Benhabib (2012).

political interests of the German Reich. In his interpretation of Schmitt's *Großraum* theory, Kirchheimer emphasized the economic, technical, and organizational aspects of the concept. He stated that Schmitt's theory did have a rational core inasmuch as it objectively articulated changes both in the German and in the international capitalist system. Due to the high level of cartelization, monopolization, electrification, and rationalization of German industry, the economy of the *Großraum* had become imperative for the ruling classes. The decline of the state in domestic as well as international law was not merely an ideology; Schmitt's theory was in concordance with the major trends in German society.

In his attempts to understand the causes of German imperialism, Kirchheimer focused on the interactions between domestic and foreign politics. This included an empirical analysis of class constellations in society and the particular social and economic forces supporting German imperialism. Kirchheimer based his analysis of the Third Reich on his general theory of compromises between social groups, which he had already used in his Weimar writing. With respect to the system of Nazi Germany, he argued that the existing compromise that had excluded the working class could not generate a stable equilibrium between the ruling social groups. The compromise was only provisionally stable and was based on decisions made by the *Führer* as the dictatorial head of the regime. Hitler, however, could be successful in the long run only if and only as long as he was able to sacrifice the major group interests. He had to balance their competing interests by providing benefits and additional resources. Concerning economics, fierce competition at the international level was characteristic of monopoly capitalism. The first country to complete a policy to coordinate the interests of the major trade associations would receive a productivity advantage; Kirchheimer used the Marxist term "differential rent" as a label for this advantage. According to his line of argument, Nazi Germany was thus virtually programmed for the expansive foreign policy of *Großraum*. The position of the political leadership in Germany rested on its ability to compensate every group sacrifice. These benefits, however, could ultimately be gained only through imperialist politics which ignored international law. According to Kirchheimer, Schmitt's *Großraum* theory was the most important ideological soundtrack to Nazi Germany's warring imperialism.

Kirchheimer in his own writing and Neumann, too, in *Behemoth* disregarded the differences between Schmitt's *Großraum* theory and purely *völkisch* and racist *Lebensraum* theories of Nazi authors such as Werner Best or Richard Höhn.[67] Since Schmitt had welcomed the Germans' cultural genocides of Czechs, Poles, and other Slavic minorities, approved of the deportations in the occupied territories, and agitated against Jews on issues of international law, Kirchheimer and Neumann probably overlooked the "difference between murder and deprivation of rights" (Volker Neumann) in Schmitt's writing. Schmitt's works in the final two years of the war did not cross the Atlantic during that time, so Kirchheimer was unable to read them. Therefore, he could not write about the nuanced differences between Schmitt's writing from that period and official Nazi propaganda. By that time, however, both Kirchheimer and Neumann had already been recruited by the Office of Strategic Services (OSS) and contributed their expertise to achieving victory against Nazi Germany.

67 On Best and Höhn in contrast to Schmitt, see Blasius (2021, 272–274).