Chapter 4: Two Versions of Anti-Imperialism

Right at the beginning of his studies in Bonn in the winter semester of 1926/27, Kirchheimer attended Schmitt's seminars and lectures on international law. From the outset, he learned about Schmitt's deliberations on international law in great depth—the subject was also part of his oral state examination in law, which Schmitt administered. In his doctoral dissertation entitled *The Socialist and Bolshevik Theory of the State*, Kirchheimer took up this thread from his legal training once again by approaching Schmitt's hypotheses on international law in a positive, if somewhat unconventional, way. Yet this positive perspective was soon to change. As with his work on topics of domestic and constitutional policies of the Weimar Republic, Kirchheimer clearly distanced himself from the influence of Schmitt's theories on international law from 1930 on. He finally came down on the side of the position Schmitt had previously attacked so vigorously.

1. Schmitt's early writings on international law

Schmitt's legal interest in international law can be dated precisely to 1923, the year of crisis in the Weimar Republic. Biographical scholarship on Schmitt considers the political events of this year to be the catalyst mobilizing his nationalism and his hatred of the French (see Mehring 2014a, 137). From then on, not only did he intensify his attacks on the Weimar Constitution but also felt compelled to take up the struggle against "Versailles" and "Geneva" at the level of foreign policy, too. Here, Versailles was code for the peace treaty conditions imposed on Germany and Geneva for the League of Nations, which had been established in 1920 and was headquartered there.

What had happened in 1923, the year of crisis in the republic, to cause Schmitt to react so strongly? On 11 January 1923, French and Belgian troops occupied the Ruhr (see Winkler 2001, 434–438). The reason given for this invasion was a pretense. In line with the decisions taken by the Allied Reparations Commission, the German Reich was accused of a culpable breach of its obligations to supply coal and other goods. Although the accusation of Germany being in breach of contract was factually correct, the reason

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why the German government had failed to fulfill its obligation was economic hardship. Nonetheless, this breach of contract was at least negligent inasmuch as the French government had apparently only been waiting for an occasion to occupy the Ruhr ever since the German Reich had signed the Treaty of Rapallo with the Soviet Union in April 1922. This was partly motivated by France's own security concerns as well as by the drive to underpin the French claim to supremacy in continental Europe. In Germany, the response to the occupation of the Ruhr was the "policy of passive resistance," which was supported by a broad political coalition from the right-wing parties to the Social Democrats. Here, passive resistance meant not following the occupying forces' orders.

This strategy put an enormous financial burden on the Reich until the government officially abandoned it in the autumn of 1923. In response to a series of violent acts of resistance, the occupying forces increased their repressive measures and even sentenced some of those involved in serious acts of sabotage to death. At the same time, the French government supported local efforts in the Ruhr to leave the German Reich. From the perspective of his university in Bonn, in the Rhineland, Schmitt believed that this region was in danger of no longer belonging to the German Reich, as were Alsace and Lorraine.

Schmitt began his struggle against Versailles and Geneva, which he fought with academic prowess, in late 1924 with a brief essay entitled "Die Kernfrage des Völkerbundes" [The core question of the League of Nations], which he turned into a book two years later.[1] He gave a number of talks on questions of international law over the following months. International law became one of Schmitt's key research topics. As of 1925, he was also responsible for the introductory lecture in international law at the University of Bonn as a substitute for a colleague. Kirchheimer attended this lecture of Schmitt's in the winter semester of 1926/27 and again, to prepare for his state examination, in the winter semester of 1927/28. When he began his tenure at the Handelshochschule in Berlin in 1928, Schmitt continued to lecture—albeit irregularly—on fundamentals of international law until 1933. It was not until he took on his new position in the legal hierarchy of the Third Reich in the spring of 1933 that he stopped teaching international law; from then on, he rarely published in the field. Until the setback in his career in 1936, he focused entirely on providing legal support to the Nazi regime as it established itself domestically.

During the Weimar Republic, Schmitt's work on international law focused consistently on three major issues: first, the status of the Rhineland under international law;[2] second, the Geneva League of Nations;[3] and third, the legitimacy of US foreign policy under international law (see Schmitt 1932b). All three subject areas were inextricably linked, particularly after Germany had joined the League of Nations in September 1926 under Foreign Minister Gustav Stresemann. From a domestic policy perspective, this step was the result of negotiations to form a coalition for a new Reich government in 1923. The SPD had been able to negotiate with the bourgeois parties that not only would Germany undertake additional foreign policy activities to solve the question of onerous reparations but it would also apply for membership in the League of Nations. As various German governments had persistently demanded, the Reich immediately became a permanent

1 See Schmitt (1924a) and (1926a).

2 See Schmitt (1925a), (1928a), and (1930a).

3 See Schmitt (1924a), (1925b), (1926a), (1930b), and (1931a).

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member of the Council of the League of Nations, its most important organ. While opinion pieces in the right-wing party press furiously opposed Germany's membership of the League of Nations, the Social Democrats celebrated it as a shining hour of international law. Earlier and more systematically than all the other parties, the SPD had called on Germany to join the League of Nations, and its leading politicians also believed it would open up diplomatic opportunities to revise the Treaty of Versailles.

In other words, Schmitt produced his writings on international law in a context of very dynamic events and developments; this also applied to his work on domestic policy. Nevertheless, Schmitt's fundamental position on international law, which he expressed continuously in these various works, can be discerned clearly. This fundamental position resulted from his rejection of theories that, in response to the devastating World War I, promoted an international movement to establish a peaceful world order no longer centered around the sovereignty of the individual nation-state. Members of this movement in Germany included pacifist writers such as Walther Schücking and Hans Wehberg as well as Hans Kelsen's Vienna School of International Law. In his book *Das Problem der Souveränität und die Theorie des Völkerrechts* [The problem of sovereignty and the theory of international law] (see Kelsen 1928), published first in 1920 and in a revised edition in 1928, Kelsen had formulated the position of monism according to which international law and national law were parts of a uniform legal order. The two parts formed a contradiction-free system that could be traced back to a common "basic norm." Unlike the pacifists, Kelsen did not place war outside the realm of the law but considered war to be a reaction, necessary under certain circumstances, of the community of states to grave international injustice (see Olechowski 2020, 513–519). Among Kelsen's best-known students in the 1920s and 1930s were international law scholars Alfred Verdroß and Josef Laurenz Kunz, who also influenced the works of Kirchheimer and Schmitt after 1933.

In his works on international law, Schmitt took a position decisively countering pacifism under international law and Kelsen's monism as well as the relativization of state sovereignty these both entailed. His position developed rigorously from his understanding of the concept of the political and his determination of the state as the status of a nation's political unity. In May 1927, Schmitt had presented the fundamental ideas of his later renowned *The Concept of the Political* as a lecture in Berlin at the Deutsche Hochschule für Politik (see Schmitt 1927a). Schmitt explained some years afterwards that the hypotheses of the lecture had arisen from lively discussions with the students in his advanced seminar in Bonn (Schmitt 1940, 313)—and Kirchheimer had already belonged to that circle for about a year at the time. In the first version of 1927, Schmitt still applied the concept of the political exclusively to relations between states, not to relations within them (see Walter 2018, 286–289).

The prerequisite for politics, Schmitt wrote, was a state's internal unity. Politics developed out of the existential friend-enemy relationship between political entities fighting each other. He believed the political was the most intense and extreme antagonism. Enmity meant the existential negation of the other's existence. The other was the stranger seeking to eliminate one's existence. The struggle between enemies was a struggle for life and death. War was a manifestation of enmity. Schmitt defended the right to war and the willingness to die and to kill for reasons of a political unit's existential self-assertion, thus arguing nationalistically in the German struggle against the Treaty of Versailles and the

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League of Nations. He did not say what constituted the characteristics of existence that could mobilize enmity and war. Anything and everything could inflame political mobilization. Although a world without politics was possible in principle, it would be boring without the excitement of existential struggles and would merely be "entertainment," "culture," "art," or "economics" (Schmitt 1932a, 53). Schmitt's political ethics focused on the self-assertion of a collective existence through battle. In this context, political existence did not mean mere survival but, rather, the struggle for one's own collective identity and dignity.

Schmitt's understanding of the concept of the political had four serious consequences for his theory of international relations. First, directed specifically against Kelsen, as long as the political existed, there would also be a pluralism of fully sovereign states in the world. Second, directed against the pacifists, the *ius ad bellum* belonged to the state as an essential political entity. Every state, Schmitt argued, had to have the real possibility of deciding in a specific situation who the enemy was and whether it would start fighting a war with that enemy about whatever issue. Third, only states capable of defining themselves via friend-enemy relationships in their foreign relations retained their right to exist. And, fourth and finally, nations that could not keep up with military technology or feared the effort involved in and the risk of political existence had given up their independence and sought protection under the domination of stronger nations. These consequences for international politics remained unchanged in terms of their substance in all four editions of *The Concept of the Political* from 1927, 1932, 1933, and 1963. In the 1932 edition, Schmitt added a "secondary concept of the political" (see Schmitt 1932a, 30–32) in response to the criticism that he had limited his discussion to foreign policy. In the 1933 edition, he adapted his text linguistically to the Nazi regime's vocabulary, adding antisemitic wording in various places,[4] all of which was gone in the 1963 edition.

Shortly after publication of the 1927 edition, Hermann Heller[5] and others promptly challenged Schmitt about basing his concept of the political on foreign policy and the state-centered perspective. The alterations to the text in subsequent editions were Schmitt's response to this criticism. The secondary literature provides only a few informative references to the intellectual history of the sources of Schmitt's friend-enemy definition in his concept of the political. In his editorial comments on the 1927 version of Schmitt's work, Günter Maschke mentioned reflections on foreign policy in the ancient *Persian Book of Kings* and seventeenth-century Spanish texts as two of Schmitt's sources and inspirations (see Maschke 2005, 221–223). That may well be the case. Kirchheimer's colleague Ernst Fraenkel later alluded to different genealogical clues in his 1941 book *The Dual State*: Joseph A. Schumpeter's famous article on the sociology of imperialism from 1919 and an article by Rudolf Smend, the other professor with whom Kirchheimer had been close during the Weimar Republic, about the aimless quest for power as the central

4 Herbert Marcuse was among the first to call attention to Schmitt's linguistic adaptations (see Marcuse 1934, 103). For a detailed comparison of all four editions, see Walter (2018).

5 See Heller (1928, 425) and (1933, 646).

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element in imperialist expansionism (Fraenkel 1941, 101–103).[6] Fraenkel suggested that Schmitt had simply given a more abstract theoretical expression to Schumpeter's conception of imperialism. Kirchheimer might have shared details from the discussions in the Bonn seminars with Fraenkel that are not to be found in written sources. Be that as it may, both sources again highlight the close connection between foreign policy and the concept of the political in Schmitt's thinking.

The position laid out in his understanding of the concept of the political was Schmitt's starting point from which he derived his rigorous rejection of all developments aiming to supplant the state from its traditional central position in international law and instead seek the juridification and institutionalization of a global legal order, which was the goal pursued by Kelsen, Schücking, and Wehberg. A global state of any kind had lost all its political character as it no longer had any enemies; universal humanity was not a political category as it did not permit any internal differentiation between friend and enemy. This also included the unconditional right of states to wage war.

Schmitt did not accept the argument that some wars were waged on behalf of humanity and were therefore legitimized by international law. This type of war, he believed, was in reality not a war of humanity but remained a war waged by one or more states against another one. Invoking humanity was nothing but a propaganda slogan. Formulating the essence of his hypotheses in his *Concept of the Political*, Schmitt repeated the jarring aphorism by Pierre-Joseph Proudhon: "whoever invokes humanity wants to cheat." (Schmitt 1932a, 54) Invoking humanity was even dangerous inasmuch as those who were thus declared enemies of humanity were, in the final analysis, denied the quality of being human. Which was why, Schmitt added, such a war was conducted using particularly inhuman means.

Roughly one-sixth of Schmitt's publications during the Weimar Republic were about international law. These works include his "Die Kernfrage des Völkerbundes", which Kirchheimer quoted multiple times in his dissertation. Discussing the occupied Rhineland and the collapse of the "policy of passive resistance," Schmitt accepted the initial situation that a defeated country had become an object of international politics. Yet the issue he declared to be the "core question" was whether the currently existing postwar order could develop and be stabilized in the future as an order of peace and law. The article was written at a time when the German Reich had applied for membership in the League of Nations but was not yet a member. The condition for peaceful development was a functional League of Nations, which Schmitt considered to be one that gave Germany the opportunity to be liberated of the restrictions imposed by the Treaty of Versailles. Agreement upon this matter was a precondition for it truly being a league of nations.

This hypothesis was based on Schmitt's political intention in positing the term since he wanted to develop the legal basis for the League of Nations—*Völkerbund* in

6 See also Schumpeter (1919, 13) and Smend (1923, 81). Schumpeter was Schmitt's colleague in Bonn from 1925 to 1928. According to William Scheuerman, archival materials suggest that in 1926, Schumpeter had encouraged Schmitt to complete what later became the famous *Concept of the Political*. The original essay of 1927 was published first in Schumpeter's journal *Archiv für Sozialwissenschaft und Sozialpolitik* (see Scheuerman 2020, 230).

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German—from a particular understanding of the term *Bund*. His historical example was the Holy Alliance from 1815 on. A *Bund* was designed to be more than an international office to coordinate intergovernmental matters such as the Universal Postal Union. The legitimacy of a true *Bund* was in a certain shared understanding of its members and a minimum of guarantee (see Schmitt 1926a, 115). The mutual guarantee between the members of a *Bund* arose from the cohesion within the *Bund*, that is, guaranteeing a jointly recognized constitutional standard in solidarity, which Schmitt called homogeneity. He used the example of the Soviet Union to illustrate that such fundamental commonalities were, in his view, the prerequisite for joining a *Bund* (see Schmitt 1926a, 125–126). Prior to Germany joining the League of Nations, he did not take a clear position on whether Germany should do so—this question was still open until 1926—but simply argued vehemently against admitting the Soviet Union because it did not fulfill the requirement of a shared understanding with the capitalist members of the international organization.

Schmitt's deliberations on this requirement of homogeneity at the international level remain remarkably contradictory. He did not clarify whether it referred to each member state's citizens having the same personal characteristics (for example, ethnicity) or the same opinion, or whether it referred to all states in the *Bund* sharing a jointly recognized constitutional standard, in other words, homogeneity of each state's citizens or homogeneity of the various states themselves. He mentioned both understandings but failed to differentiate them properly (see Neumann 2015, 437–439). As the result of his deliberations, Schmitt stated that the League of Nations had not given an answer to the question regarding the characteristics of a *Bund*, at least, no clear answer. Instead, it was showing the states a Janus face. To the victorious Western powers, it appeared to be a construct for a particular purpose and ready for service—to Germany, in contrast, it seemed like a system of harsh and strict rules.

A complex body of treaties was signed in London in late 1925 following the Locarno Conference in October, including various individual treaties between the major European powers as well as ones with Germany. The goal of the body of treaties, negotiated largely between Stresemann and French Foreign Minister Aristide Briand, was to establish a collective security system for Central Europe within the framework of the League of Nations under equal participation of the German Reich. Key to the body of treaties was that France committed to ending its occupation of the Rhineland ahead of schedule and Germany abandoned its claim to a revision of the Western border with Belgium and France. The Locarno Treaties entered into force on 1 September 1926 as Germany joined the League of Nations. In Germany's domestic politics, the treaties sparked fierce controversies and turbulences, prompting the right-wing DNVP ministers to resign from the Reich's government. Schmitt, too, joined those opposing both the Locarno Treaties and Germany's membership in the League of Nations.

A notable feature of Schmitt's writing on international law is his resolute and consistent criticism of the US's capitalist imperialism. Even in his first two articles, "Die Kernfrage des Völkerbundes" and "Die Rheinlande als Objekt internationaler Politik" [The Rhinelands as an object of international politics], he referred to a new "age of imperialism" (Schmitt 1925a, 28) in which economically powerful countries exercised their domination over formally independent states in various indirect ways.

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The prime example Schmitt gave was the US, which, he asserted, invoked the old Monroe Doctrine of 1823 to "protect private property" (Schmitt 1924a, 19) and expand its claim to economic domination of all of North and South America. He claimed the Treaty of Versailles and the League of Nations had both been created in the unilateral interests of the US, and he considered the fact that this country had neither signed the Treaty nor joined the League of Nations to be a particularly perfidious form of exercising domination in an indirect imperialist way. As far as Europe was concerned, the US was officially not involved but effectively came on the scene whenever it was in its interests as a "controlling suzerain" (Schmitt 1927b, 243). It corresponds to this view that Schmitt had nothing but scorn and contempt for the Kellogg-Briand Pact, which was signed in Paris in August 1928; its signatories denounced war as a means of solving international disputes and declared renunciation of war to be a means of national politics. Schmitt ridiculed the fact that the Pact was concluded as a permanent treaty from which parties could not withdraw: "A people which exists in the sphere of the political cannot in case of need renounce the right to determine by itself the friend-and-enemy distinction" (Schmitt 1932a, 50). In his writing, he notoriously called the treaty the "Kellogg Pact" after the US Secretary of State in order to express his opinion that it served the economic imperialist interests of the US unilaterally.

Toward the end of the Weimar Republic, the tone in which Schmitt wrote about the US became even harsher. He discussed the Monroe Doctrine once again in a lecture titled "USA und die völkerrechtlichen Formen des modernen Imperialismus" (The US and forms of modern imperialism in international law) which he gave in Königsberg in February 1932. This time, however, he concluded that it "had done its duty" (Schmitt 1932b, 355). The US had gone from being a debtor state to a creditor state and was using the instrument of lending to dictate to other countries. Thus, the US was, at the time, the country of the "most modern" form of imperialism, namely "economic imperialism" (Schmitt 1932b, 349). In Germany's current situation, what mattered most was to see through the "veil of words and concepts" (Schmitt 1932b, 365) of the universalist vocabulary of international law and to defend its own identity using combative means. By the end of the Weimar Republic, Schmitt had become an ardent critic of US capitalist capitalism in the name of German nationalism.

2. Kirchheimer's early writings on international law

Kirchheimer did not attend Schmitt's seminars and lectures on international law entirely unprepared. He had already studied with Heinrich Triepel, an expert in constitutional and international law in Berlin, in 1925 and 1926.[7] It was practically inevitable that his interest in questions of international law would intensify while studying with Schmitt. In foreign (as in domestic) policy, Schmitt and his young leftist student did not agree on anything concerning the political issues of the day. Although Kirchheimer's party, the

7 Otto Kirchheimer, Curriculum Vitae. Archiv der Juristischen Fakultät der Universität Bonn, Promotionen 1927/28. Prüfungsakte Nummer 521–528, Otto Kirchheimer.

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SPD, was also among the critics of the Treaty of Versailles, regarding Germany's accession to the League of Nations and the conclusion of international peace treaties, the SPD was one of the most ardent supporters of a policy aiming for reconciliation and endorsed the policies of national liberal Foreign Minister Gustav Stresemann. The party leadership hoped that accession to the League of Nations would mark the beginning of the institutional establishment of a world peace order. The SPD's leading foreign policy experts also hoped that involvement in the League of Nations would finally bring about a revision of the Treaty of Versailles, specifically as far as Germany was concerned, on the basis of a Europe coming together in peace in the medium term. The leftist wing of the party agreed with the party leadership on this matter; its views coincided with those of the communists, if at all, in their criticism of capitalist imperialism.

Kirchheimer's earliest surviving statements on questions of international law are to be found in his dissertation with Schmitt, *The Socialist and Bolshevik Theory of the State.*[8] Kirchheimer described Soviet law as by no means intended to last for eternity. It was meant to be "temporary law to the highest degree" (18). The *clausula rebus sic stantibus* in contract law, i.e., the right to alter contracts if decisive circumstances have changed, would not have to be added to Soviet law ex post. On the contrary, Soviet law was itself nothing but *clausula rebus sic stantibus*. In Kirchheimer's view, Soviet thinking on international law was a particularly clear expression of the Soviet Union's view of the law being conditioned on goals and situations. According to the Soviet theory of the state, it was only the irreconcilability of class antagonisms that had made the Soviet state at all necessary and thus established it. It was this state alone that the legal system was to serve, and the Bolsheviks hoped to launch a successful world revolution in the foreseeable future with the aid of the Soviet state.

Viewed from the perspective of world revolution, traditional international law was, in the eyes of the Soviet state, the most dubious of all bourgeois legal constructions. The Soviet Union recognized nothing more than purely technical common interests among states, as in the international postal system, for example. For this reason, it did not respond to any endeavor to support peace propaganda or to create a closer international legal community such as the Geneva League of Nations. "It considers international law as the rules of truce, not of peace" (18). The Soviet Union saw the international organizations of the day, such as the League of Nations, as an attempt to stabilize the legislation and traditions of a dying age. For the transitional period until the global victory of communism, it would have to find makeshift solutions through precisely worded individual agreements with the various powers.

At this point in his deliberations, Kirchheimer went back to the postulate of homogeneity referring to the League of Nations from Schmitt's *Kernfrage des Völkerbundes*. However, he did not use Schmitt's term *Gleichartigkeit* but the term *Homogenität* instead. In the "absence of any homogeneity of interests and views, however tenuous, that could become the prerequisite of a decision in a legal sense" (18), the Soviet Union was forced to reject any internationally recognized court as well as the majority principle in international practice. When Kirchheimer spoke of a lack of homogeneity, he was referring to a lack of shared interests and views of the members of the League of Nations, not a lack of

8 See Kirchheimer (1928a). The following page numbers refer to this text.

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homogeneity of their substantial characteristics. The Soviet Union had become hostile toward the Geneva League of Nations "as a matter of principle" (19) and not only occasionally, as Germany had. Because of its self-understanding as protector and advocate of formal democratic principles, the League of Nations took a stance of equally sharp hostility toward the Soviet state.

While the British referred to the Covenant of the League of Nations to legitimize its intervention in the Polish-Soviet war in 1921, the Soviet government referred to the incompatibility of such an argument with the sovereignty of the Russian working people. To Kirchheimer, this brought about a seemingly paradoxical constellation. Whereas "Europe de-emphasizes the concept of sovereignty, practically and theoretically, Bolshevism strangely engages in ushering in new victories, de facto, for the very concept of sovereignty from which, theoretically, it withholds recognition" (29). As evidence of this hypothesis, Kirchheimer referred to an article published in French by Soviet international law expert Evgeny A. Korovin in the previous year, according to which it was the "*intérêts réels*" (20) of the socialist republic when dealing with the capitalist powers that had made it reasonable to use the concept of sovereignty for tactical reasons.

Kirchheimer believed that international law was further evidence of the extent to which the traditional nation-state was already "on the wane" (20) in Europe. This could be seen, for instance, in the changing justifications for the colonial annexations carried out after the Versailles Peace Treaty had been concluded. Colonial rule was no longer morally defended by the traditional arguments related to the national unity of peoples. Instead, in order to legitimize the desired result, states had to take recourse to legal alternatives such as the construct of the League of Nations as a trustee. These changes in international law highlighted the practical weakness of the concept of nation-state sovereignty for states with formally democratic structures. Formally democratic states were confronted with a theoretical impasse. They aimed at a social equilibrium and did not find a satisfactory answer to the question of who wielded sovereignty, i.e., "who makes the actual decision in a conflict situation" (20). Conversely, Kirchheimer called the Soviet locus of sovereignty "sensational clarity" as opposed to the "present-day tendencies of masking and concealment" (20) in the bourgeois nation-states.

It should be noted that Kirchheimer did not consider the actual purpose of the Soviets insisting on the concept of sovereignty in international law to be an attempt to restore traditional international law, but rather something entirely new: "the intentional separation—performed for the first time—of the concepts of state and sovereignty" (20). The sovereignty of the state that saw itself as the first state of the imminent proletarian world revolution was not bound to traditional state borders. Its sovereignty was potentially universal since the claim of the working class to domination potentially extended to the entire globe. Any member of the working class in any country of the world could occasion the intervention of the Soviet state, either in order to gain its protection or to use it to influence the fate of other countries. A country that claimed or practiced an unlimited right of intervention would forgo the specific characteristic of a state, namely self-limitation at some geographical line. In Kirchheimer's view, this did not mean that the Soviet Union was less than a state. On the contrary, it had restored state integration to a new level. By making use of this power and of the myth of the world revolution, the Soviets had regrouped the international political forces. They had been able to tear open the gap

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at the very place where the traditional state had stood until the nineteenth century. What still existed in the West was the mere shell of a state.

It is not difficult to see how strongly these early statements of Kirchheimer's on questions of international law intersected with areas of domestic policy. He was concerned with the broader question of state sovereignty in Western capitalist democracies. His brief excursion into the field of international law, contrasting it with Bolshevik doctrine, was primarily to provide evidence for the large extent to which sovereignty was subject to masking and concealment in Western capitalist democracies, although that had not made it disappear entirely. The proximity of 23-year-old Kirchheimer's deliberations to Carl Schmitt's theory is palpable, as is his profound fascination with Bolshevism's strong assertion of sovereignty. Kirchheimer's view of the League of Nations also demonstrates how close his thinking was to Schmitt's. Following Schmitt's postulate, Kirchheimer considered homogeneity of interests and views to be prerequisites for legal decision-making in the realm of international law. Moreover, he believed it logical and plausible that the revolutionary Soviet Union would position itself outside the League of Nations.

What was completely absent in this work of Kirchheimer's and also in all his other early essays was Schmitt's notorious lament about the injustices that Germany allegedly had to suffer in terms of international law under the Treaty of Versailles since it had been concluded. Not a trace of nationalism or yearning for strengthening of the traditional nation-state was to be found in Kirchheimer's work. His early interest in international law was motivated exclusively by the question to what extent developments in international law could provide information about state sovereignty.

3. Kirchheimer's critique of capitalist imperialism

Two years after leaving Bonn, Kirchheimer began to take an interest in other questions of international law and to clearly distance himself from Schmitt's hypotheses on constitutional and international law. This can be seen in his review of Korovin's 1924 book *Das Völkerrecht der Übergangszeit* [International law of the transition period], which was published in German translation in 1929 (see Korovin 1929). As mentioned above, Kirchheimer had taken up a 1925 essay of Korovin's in French in his dissertation. Both of Korovin's works[9] fall within the transition period from the "heroic epoch" of permanent world revolution and "war communism" to the more national reformist and revisionist diplomacy of isolation and the "New Economic Policy" and "socialism in one country." Korovin's theory was not officially replaced in the Soviet Union until 1935, by, among others, Evgeny Pashukanis's *Essays on International Law*, in which he argued that the Soviet Union's accession to the League of Nations in 1934 made sense.

In his book, Korovin had rejected the notion of universally valid international law. On the contrary, he argued that the Soviet Union and the capitalist world as a whole lacked the minimum "Gemeinschaft und Einheit" (community and unity)[10] necessary for

9 On the major importance of this book of Korovin's for the debate of the day on international law, see Flechtheim (1936, 56–78).

10 See Korovin (1929, 24).

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any community of international law. In other words, Korovin used a similar argument to Schmitt to counter the possibility of a League of Nations. That argument can also be found in Kirchheimer's article quoted above in which he translated Korovin's term "Gemeinschaft und Einheit" as "Homogenität." Kirchheimer presented Korovin's deliberations in his review,[11] referring to them as a "voluntaristic concept of international law" (324). And he did not hold back his criticism. Kirchheimer believed that Korovin was seriously wrong in two respects. First, he had a completely mistaken idea of the alleged homogeneity of the world of capitalist states. In light of the leading industrialized states' imperialism and their competition with one another, it was absurd to claim that the entire capitalist world was homogeneous in terms of its values and interests. The traditional system of international law was certainly "no such coherent political circle" (326) in stark contrast to Korovin's assumption. The reality of imperialism and international competition was, in fact, evidence of the complete opposite. Second, Korovin had an entirely misguided concept of homogeneity in Kirchheimer's view:

> In reality, the homogeneity of the community of international law does not rest on considerations of principle. [...] Instead, it rests on a vast number of constantly growing necessary technical and economic agreements, and it is these agreements which have the effect of forming a community. (325)

Drawing on Max Huber's classical work *Die soziologischen Grundlagen des Völkerrechts* [The sociological foundations of international law], published in 1910, Kirchheimer opposed Korovin in positing that modern international law had successively "grown beyond [...] states' intensive interest in consistent rules" to the situation at the time, which had "shifted from the quantitative to the qualitative" (325). With this fundamental objection to Korovin's notion of homogeneity, Kirchheimer simultaneously attacked Schmitt's position, which he himself had advanced two years earlier without criticism. Both Korovin and Schmitt assumed a certain degree of homogeneity, which constituted a firm basis, a precondition for finding rules under international law. These few sentences in Kirchheimer's review show that he, conversely, defended a dynamic concept of homogeneity at the international level reminiscent of Rudolf Smend's theory of integration, which addressed domestic policy. The formation of an international community was in itself only the result of experiences of positive international cooperation. The same applied to international law. It developed successively, usually beginning with a web of technical treaties, followed by precedents and mutual recognition of agreed rules. According to Kirchheimer's logic, Schmitt's polemic comment about the Universal Postal Union was practically turned on its head: it was only such positive experiences of cooperation that prepared the ground for more far-reaching international agreements.

Kirchheimer called the voluntarism of Bolshevik theory just as naive and erroneous as the "traditional optimism" (325) found in international law at the time. Yet he also discovered positive elements in Korovin's book. Compared with the thinking along the traditional lines of the existing system of international law, in his opinion, it had the virtue of viewing international law more realistically. Kirchheimer considered two of Korovin's

11 See Kirchheimer (1930a). The following page numbers refer to this text.

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suggestions to be important in this context. The first concerned the traditional doctrine of the right of intervention. In light of the ban on interventions demanded by many Latin American states, he considered the contemporary law on interventions to be "one of the sharpest fault lines of international relations" (326). Here, Kirchheimer was referring to US imperialism. Instead of continuing to obscure US intervention policy behind legal terms, international law required objective analysis of the occurrences in Latin America in his view. The second suggestion from Korovin's book had methodological implications. Korovin was one of the first theoreticians of international law to comprehensively establish to what extent a number of additional factors and actors besides states had emerged that de facto had a strong influence on international law. These included international financial markets as well as internationally operating businesses and interest groups. Although they did not always act as recognized subjects of international law, the "economic agreements between interest groups in two states [could] be just as consequential" (326) as traditional diplomatic contacts between states. The roles of these factors and actors had to be "assessed differently in international law in the future, both actively and reactively" (326). Such an expansion of the area covered by international law was necessary in order to expose the "class structure in today's world of states" (326) with sufficient clarity.

Compared with the remarks he had published two years earlier on the Bolshevik doctrine of international law, Kirchheimer's review reads like a complete reversal. Korovin's book contained the same fundamental statements as his 1925 article in French which Kirchheimer had referred to in his dissertation. It was Kirchheimer who had reversed his position. He argued in favor of a "doctrine of international law that seeks to be truly realistic" (327), striving to be universally valid specifically for this reason. To him, the source of this type of international law was not shared values but the interest present in all states—and thus also expected in the Soviet Union in the future—in joint economic and technical agreements.

By 1930, there was no longer any mention in Kirchheimer's work of his fascination for the Bolshevik doctrine's strong claims to sovereignty. His understanding of requirements of homogeneity as a condition for the existence of international law had also changed fundamentally in favor of a dynamic concept of homogeneity. Finally, at least implicitly, he adopted a pluralistic concept of homogeneity for the level of international cooperation by calling attention to the differences in values between competing interests among the capitalist states. Even if Kirchheimer did not formulate it explicitly, his revisions, overall, amount to a plea for an expansion of international law and the League of Nations which even made it imaginable to admit the Soviet Union to the League of Nations. The critical sting of the "doctrine of international law that seeks to be truly realistic" that he called for was aimed not only at the US interventions in Latin America that had been virtually unsanctioned through international law to date, but more generally at the imperialism practiced by capitalist states.

The sociological foundation of Kirchheimer's approach to international law can also be seen in a review of Adolf Grabowsky's book *Politik* [Politics] which Kirchheimer wrote in late 1932 for the social democratic theory journal *Die Gesellschaft* [Society] (see Grabowsky 1932). Grabowsky belonged to the political milieu of young conservatives close to Schmitt and taught foreign policy at the Deutsche Hochschule für Politik (German Academy for Politics). Most of his book is devoted to foreign policy. Kirchheimer

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sharply criticized Grabowsky's analysis of global politics. Focusing exclusively on states as actors was just as misguided as the assertion it entailed about foreign policy unity in a state. Grabowsky's approach suffered from a crude "overestimation of all intellectual factors" (Kirchheimer 1933a, 513) in foreign policy. This was particularly true of his attempt to interpret modern imperialism. He had limited his analysis "to a purely subjective interpretation of the meaning of the historical events" (Kirchheimer 1933a, 513) and had entirely disregarded economic explanatory factors.

With this criticism, Kirchheimer simultaneously took a position in a debate that the young historian Eckart Kehr had sparked among his fellow historians in 1928 when he presented the findings of his sociohistorical study on German fleet policy directed against England around the turn of the century. In his book *Englandhaß und Weltpolitik* [Hatred of England and world politics], Kehr had reconstructed the armaments and foreign policy decisions of the German Empire as the result of the interest and power relations within society. He spoke incisively of a "primacy of domestic policy" (see Kehr 1928, 500) rather than foreign policy allegedly following its own laws. As one of the editors of the journal which had published Kehr's article, Grabowsky had followed it with a response of his own titled "Der Primat der Außenpolitik" [The primacy of foreign policy] (see Grabowsky 1928). In the methodological debate between those studying social historiography on the one hand and those tracing foreign policy constellations that were forever following their own laws on the other hand, Kirchheimer was a clear advocate of the first group.

He reviewed another book on international law for *Die Gesellschaft* in 1932. This time, it was by an author from his own political camp. Georg Schwarzenberger was a student of the two Social Democrats Carlo Schmid and Gustav Radbruch and belonged to a generation of young Social Democrat jurists specializing in questions of international law (see Steinle 2004). His book *Die Kreuger-Anleihen* [The Kreuger Bonds] (see Schwarzenberger 1932) discussed a topic hotly debated domestically in the early 1930s. Since the mid-1920s, Ivar Kreuger's private Swedish corporation had given loans to several governments in Europe that were under financial pressure. These loans were of particular importance to Germany, enabling it to pay the reparations agreed in the Versailles Peace Treaty. In return, Kreuger's corporation had insisted on a match monopoly, which meant that only matches produced by Kreuger could be sold in Germany. In the course of the Great Depression, the German Reich had become so unstable financially that the government saw no other option but to accept Kreuger's offer of a loan. In January 1930, the Reichstag, with the support of the Grand Coalition, voted to guarantee the monopoly through 1983.[12] Once Kreuger's corporation had received the monopoly, it immediately raised the prices for matches in Germany. Public resentment of the monopoly and the price increases was aired constantly during the Weimar Republic.

Kirchheimer took Schwarzenberger's detailed description and analysis of the contract with Kreuger's corporation as an opportunity to lay out his own fundamental reflections founded in international law on state sovereignty and the questions of whether

12 The Federal Republic of Germany took on this obligation, which meant that up until 1983, no matches made by other companies could be sold in the country.

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and how states were bound by contracts at all.[13] After all, Kirchheimer stated—intentionally using Schmitt's wording—that this problem was a "core problem of international law" (375). He criticized the fact that German scholars in international law had largely neglected the legal analysis of relationships between states and foreign corporations. The main question raised by the Kreuger bonds was whether they were contracts valid under international law or contracts subject solely to the law of a single country. Basing his argument on Schwarzenberger's, Kirchheimer maintained that these contracts were in the realm of a single country's law, not international law—a hypothesis with important consequences for fiscal policy.

The polemic thrust of Kirchheimer's interpretation was directed against property claims across different countries. This was evident from his opposition to the "propagandists of an allegedly general principle of international law concerning the unconditional protection of acquired rights of foreigners" (374) vis-à-vis national legislators. He accused the International Law Association (ILA), headquartered in the US at the time, of going even one step further. The goal of its activities was to stipulate "an international standard of law and justice, a kind of capitalist civilizational minimum" (374) as a ticket for membership in the community of international law, thus protecting foreign companies' property claims from being seized by nation-states in the name of an allegedly universal international law.

Although Kirchheimer shared Schwarzenberger's opposition to these ambitions, he arrived at the same position using a different line of argument. Schwarzenberger—"presumably following Korovin" (374)—established a doctrine of two fundamentally different doctrines of international law: one bourgeois and founded on the idea of the rule of law, the other socialist and founded on the idea of international cooperation and social justice. On the basis of this premise, a future socialist government of Germany would not be obligated to continue to recognize Kreuger's claim to a monopoly. Kirchheimer came to the same conclusion, but he did not follow Schwarzenberger in dividing existing international law into two different worlds existing side by side and isolated from each other. Rather, Kirchheimer thought it was not least a pragmatic argument concerning the application of the law that countered Schwarzenberger's premise. Following Schwarzenberger, every government would have to switch back and forth between the two postulated worlds of international law, depending on its political orientation. Kirchheimer believed this could not be implemented in practice. It was much "more reasonable to take international law applying to everyone as a starting point" (375). Employing such a strategy, however, it was all the more important to place precise limits on the domain of international law. "Only those [principles of international law] that all potentially suitable states in the world are able to recognize without endangering their social status" should be considered to be such principles because "it is wise for every jurisprudence, especially international law, to define its own limits" (375). Kirchheimer was convinced that the unlimited right to private property was unequivocally not included in such a catalog of minimum requirements of international law.

Kirchheimer's brief review gave further clarity to the anti-capitalist and anti-imperialist thrust of his thinking on international law. In the process, he simultaneously took

13 See Kirchheimer (1932b). The following page numbers refer to this text.

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up the suggestion from Korovin's book to focus international legal analysis on the non-state factors and actors on the international stage and applied it to the specific material of an issue that was hotly debated by the general public. Kirchheimer strongly advocated for uniform international law. Yet its rules and regulations were to be limited to questions that would not encroach on the social order of the individual countries. The implication this statement about international law had for Germany in early 1932 was unmistakable: should there be a socialist-led government in the future, it was to be at liberty to terminate the contracts with Kreuger's corporation. As Kirchheimer saw it, the ensuing legal conflicts would no longer fall in the domain of international law but would lie solely within the Reich's domestic civil law jurisdiction.

4. Conclusion: Left-wing versus right-wing anti-imperialism

The anti-imperialist thrusts of both Schmitt's and Kirchheimer's works are evident. Equally evident are their differences. In the name of militant German nationalism, Schmitt argued against a specific enemy, Anglo-American imperialism, which, he asserted, acted indirectly. He believed he had unmasked universalist international law and the prospect of an institutionally secured world peace order as perfidious claims to power by the Anglo-American enemies. He was of the opinion that the right of every state to start a war at any time, for whatever reason, must never be restricted. Schmitt maintained this basic position after 1933 and even after 1945.

Kirchheimer's advocacy for a juridification of international politics did not emerge during World War II but had its origins in his Weimar writings and his detachment from Schmitt's patterns of argumentation. In his dissertation, Kirchheimer was still under the spell of Schmitt's theses on the one hand and Korovin's Soviet doctrine on the other. Shortly afterwards, however, he opened up to the perspective of international law that aims at long-term cooperation and peace among states. France did not appear in his writings as an "archenemy" but as a friendly country with a great democratic and revolutionary tradition. There was no trace of revanchist thoughts in his work. Nor were there negative comments about the Treaty of Versailles or the Geneva League of Nations. On the contrary. Kirchheimer wanted capitalist imperialism to be fought within the framework and with the means of improved and intelligently restricted international law. He countered the concepts of mutually exclusive legal systems represented by Schmitt and Korovin with a dynamic concept of homogeneity based on positive experiences of cooperation. In doing so, he transposed Rudolf Smend's theory of integration to the international level.

A direct path leads from this basic position to his later criticism of Schmitt's theory of the *Großraum*[14] and on to his involvement in the preparations for the Nuremberg war crimes trials.[15] The diametrically opposed positions taken by Kirchheimer and Schmitt after 1945 concerning the appropriate legal and political handling of German war crimes are contained *in nuce* in their Weimar differences on international law.

14 On Schmitt's theory of the *Großraum*, see Chapters 11 and 12.

15 On the preparations for the Nuremberg Trials, see Chapter 13.

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