Chapter 11:
Preparing Germany for New Wars (1936–1939)

Schmitt's removal from a position of power to influence the domestic policy of the German Reich relieved him from time-consuming commitments, and he took the opportunity to focus on specific questions of shaping the supranational order instead. He managed to enter the political stage again, through the "back door of international law" (Koenen 1995, 783), so to speak, and became a star once more, this time with some international recognition, too.

1937 was the year in which political sentiment in Hitler's Germany reflected disillusionment. President of the Reichsbank Hjalmar Schacht had resigned from his position as Minister of Economics (later he was Minister without Portfolio), and the public's nationalist enthusiasm was on the wane. Hitler overcame his personal crisis during these events with a new wave of activities. He reacted to the economic problems that were becoming apparent and the looming change in political mood by installing a foreign policy aimed at aggressive expansion (see Fest 1973, 738–741). From the second half of 1937 on, the Reich was reorganized more systematically than ever before to support the regime's violent intentions. This included accelerating the buildup of armed SS units and increasing the number of concentration camps. The Red Cross was instructed to prepare for mobilization. At the same time, the *Hitlerjugend* (Hitler Youth) was directed to cover the staffing gaps in the armaments industry that had been quantified. In early November 1937, the press received directives not to report publicly about the preparations for "total war" initiated in all the Nazi party units. These preparations culminated in the secret conference in Berlin on 5 November 1937 where Hitler laid out his plans for a violent expansion of the Reich in eastern Europe to the military top brass in a talk lasting no less than four hours.

The year 1937 was initially a year of personal crisis for Schmitt, too. After his inglorious demotion in the hierarchy of the Nazi regime, he had a mental breakdown in the summer of 1937 (see Mehring 2014a, 358). He felt hindered in his urge to be constantly active, and he suffered from having to watch how the Nazi *Führer* state's discriminatory logic for winning the favor of the Nazi leadership now benefited his rivals, including Otto Koellreutter, Werner Best, and Reinhard Höhn. Just like his *Führer* Hitler, Schmitt de-

cided to go on the offense and push his way out of the crisis. The opportunity soon arose: he was asked at short notice to substitute for Koellreutter, who had a scheduling conflict, and give a lecture on the conventions of war in international law at the Akademie für Deutsches Recht (Academy for German Law) in the autumn of 1937. He immediately accepted the opportunity to fill the gap and turn the tide in his favor. As early as late September, he successfully returned to the stage of academic prominence in the Nazi state, this time in the role of theorist of international law, not with a subject related to domestic policy. The organizers who approached Schmitt knew that he had already studied questions of international law on various occasions in the past, so it was by no means unreasonable to ask him to speak. At the same time, it indicated that Schmitt had not become a pariah of the system. The carefully prepared lecture he gave on 29 October 1937 at the 4th Annual Conference of the Akademie für Deutsches Recht in the Arbeitsgruppe Völkerrecht (Working Group on International Law) was entitled "Die Wendung zum diskriminierenden Kriegsbegriff," later published in English as *The Turn to the Discriminating Concept of War*."

1. Schmitt's "specifically National Socialist insights"

Pinpointing Carl Schmitt's role in the context of Nazi Germany's thinking on international law requires a brief outline of the general development of this thinking between 1933 and 1945.[1] After the handover of power to Hitler's government, people were somewhat unsure initially how international law would retain its political and academic function under the new regime. At first, Germany's de facto withdrawal from the League of Nations on 14 October 1933, which was highlighted propagandistically by broad agreement in the referendum on 12 November 1933, and the gradual relief from the obligations of the Treaty of Versailles paved the way for international law along traditional lines. At least as long as Hitler's government was rebelling against the Treaty of Versailles with legal arguments from a defensive position, it was politically inopportune to negate international law in general. The strategy was to insist on nation-states' equal right to self-determination, and from this basic position, to raise territorial demands as well as the end of all limitations under the Treaty of Versailles in the name of restoring state sovereignty. With this strategic reasoning, Nazi international law thus continued to be in line with universalist internationalism.

In the second half of the 1930s, international law scholars holding Nazi views began to develop their own concept of international law, which was potentially more aggressive. The argumentative core of the new offensive concept consisted in replacing the state with the *Volk* and later the *Reich* as the legal entity of international law to provide the background for denying the validity of a universal internationalist basis of international law. "International law" in terms of "law of the states" became the "law of the *Völker*." The more that the concept of "*Rasse*" was emphasized in the further development of Nazi international law, the more the scope of rules and regulations under international law was lim-

1 On the development of Nazi international law, see Fischer (1974), and Koskenniemi (2001, 179–265), and for an incisive overview Stolleis (1999, 381–400).

ited; they were to apply only to "*Völker* related by *Rasse*." In Nazi thinking on international law, these steps opened up the way for a new ordering of the world along *Rasse*-based perspectives. Only in 1944 and 1945, when Germany's military defeat was foreseeable and merely a question of a few months, were there initial attempts to guide the arguments back to the traditional lines. In preparation for the victorious powers establishing a post-war order, Nazi authors described Germany as a victim of aggressive Anglo-American world imperialism, whereby the Allies, behind the mask of spreading peace throughout the world, were attempting to brand Germany as the aggressor and to rob it of the right to a state of its own. Carl Schmitt went along with all these steps until the early 1940s, albeit to a varying extent. He had even powered ahead of his colleagues at some stages of formulating Nazi international law doctrines and their aggressive turn. However, he also emphasized points of his own, thereby departing from the Nazi doctrine's crude *völkisch* (of the *Volk*, chauvinistic-nationalistic, antisemitic; see Glossary) racism.

It was also Schmitt who, in the summer of 1934, presented a combination of arguments along traditional lines and an initial programmatic formulation of an international law unique to Nazism in a much-noted lecture that was later published as a standalone brochure titled *Nationalsozialismus und Völkerrecht* [Nazism and international law].[2] He claimed that the situation of Germany and Europe under international law "first had to be brought to a state one could call normal" (391). Such normalcy required an end to the German Reich's "defenselessness and deprivation of rights" (391) under the alleged dictate of the Treaty of Versailles. Schmitt used natural rights to justify his position: there were "fundamental rights of *Völker* and of states" (393). These inalienable and enduring fundamental rights included the basic "right to one's own existence" (393) and the rights to self-determination, self-defense, and the means for self-defense derived from this. The German *Volk* would have to have this right immediately and without further limitations, he asserted, because it had "put itself in order internally and under consideration of its own nature" (393) under the Nazi government.

By insisting on "normalcy," Schmitt was in line with a type of universalist and natural law thinking that constituted the conservative and defensive side of this piece. At the same time, there are statements just above according to which there were "as many types of fundamental rights as there are types of human community" (392), which thus contradicted his proclaimed natural law universalism. The hypothesis formulated at the beginning of the brochure that it was a "specifically National Socialist insight" (391) not to derive the law of intergovernmental relations from universal and abstract thinking that followed rules but solely from "a concrete order of states and *Völker* of a certain *Art* and recognized in their concrete *Eigenart* (nature, or: their own *Art*, the state of being characterized by *Blut* and *Rasse*, see Glossary)" (391) fits with this statement. In using such formulations, Schmitt expanded the "thinking in legal orders newly awakened by the National Socialist movement" (392) he had already postulated previously for domestic affairs to the realm of international law, thus simultaneously opening the door to basically unlimited latitude of interpretation of what could or must be considered appropriate in a specific case for a state's foreign policy. He justified Germany's withdrawal from the

2 See Schmitt (1934a). The following page numbers refer to this text.

League of Nations six months earlier as a logical step to regain German honor. Nonetheless, he continued to polemicize not only against the international treaties on which the League of Nations was founded, but also against its internal characteristics, asserting that the League of Nations was nothing but a perfidious system to institutionally safeguard the liberal democracies under Anglo-American supremacy. Both Germany's and Japan's withdrawal was therefore only logical. The Soviet Union's accession to the League of Nations in September 1934 exposed once and for all, Schmitt stated, that the League of Nations was not a league and not a real community; all that remained was an "old-style opportunistic alliance" (405) of the former victorious powers of the war against Germany.

In this context, Schmitt drew on Moscow jurist Evgeny A. Korovin's book *International Law of the Transition Period*, which Otto Kirchheimer had critically reviewed four years previously for the journal *Die Gesellschaft*. Kirchheimer's criticism had been sparked by Korovin's hypothesis that there was an independent Bolshevik legal sphere besides the international legal sphere of the capitalist countries. Kirchheimer countered that Korovin had erroneously underestimated both the differences between capitalist states and the opportunities for the two allegedly unconnected legal spheres to come to an understanding. Kirchheimer's criticism ended in a plea to expand international law and to strengthen the League of Nations, including the Soviet Union.[3] Immediately after the Soviet Union had joined the League of Nations in 1934, international legal theory in the Soviet Union was revised to reflect the position that had been linked with Korovin's name up until this point. From 1934 on, the Soviet legal theorist Evgeny Pashukanis set the tone as the new Soviet doctrine of peaceful coexistence with the capitalist powers in the interest of collective security and preventing war was advanced, and Korovin soon felt compelled to toe the line (see Flechtheim 1936).

Schmitt's comments on Korovin's *International Law of the Transition Period* followed a line diametrically opposed to Kirchheimer's criticism. Not surprisingly, he did not mention Kirchheimer's review at all, although he had read it. Although Schmitt pointed out that changes might be made to the Soviet Union's position on international law after its accession to the League of Nations, he was convinced that the outdated position advanced by Korovin was the authentically Soviet one. There was "no community of international law at all" (399) between the liberal capitalist and the Bolshevik world. There could be no peace between them, at best a temporary ceasefire. Whereas Kirchheimer had critically examined Korovin's theory and had then concluded that a universal system of international law was needed even more at the time, Schmitt's reception strategy consisted of stating that Korovin's hypotheses were further evidence of unbridgeable pluralism in international law, thus using them to justify the foreign policy of the Nazi regime's early years.

2. Challenging the discriminating concept of war

The science of international law in Germany, which was loyal to the regime, soon had to reorient itself once again in parallel to the Nuremberg Laws of 1935 and the Reich's

3 See Chapter 4.

military buildup. When the regime successively began to expand, by committing acts of violence and threatening to do so, Nazi doctrines now foregrounded questions of the international law of war, minority rights, and resettlement policy in place of seemingly defensive demands for a revision of the Treaty of Versailles. Up until 1938, Schmitt published eight longer works on international law in which he defended the German Reich's expansive foreign policy and simultaneously criticized the League of Nations, the US, the UK, and the Soviet Union. In all these articles, he presented Germany as a country surrounded by begrudging enemies.

Schmitt's above-mentioned lecture, "The Turn to the Discriminating Concept of War," which he gave in Berlin on 29 October 1937 at the 4th Annual Conference of the Akademie für Deutsches Recht, must be understood in the context of a tacit reorientation of Nazi science of international law. In this lecture, Schmitt succeeded in making his colleagues forget his temporary demotion and placing himself right back in the vanguard of the Nazi legal community with his clear and distinct words. His lecture was met with his colleagues' great acclaim and approval. It marked the beginning of a new stage in Schmitt's career after he had fallen out of favor with the regime for some time. Such a career boost would doubtless have been impossible without the intensified expansive foreign policy dynamics of the Third Reich. Within a year, Schmitt advanced to become one of the leading Nazi international law scholars, outshining the established proponents of international law in Germany with his pointed hypotheses and formulations and enjoying recognition for his work in the highest government circles.

In the weeks and months following his brilliant presentation, Schmitt revised it and rounded it out and, in late April 1938, it was circulated as a standalone brochure in the academy's publication series. Reich Minister Hans Frank had asked Werner Weber, the publisher of the series, to urge the publishing house to bring the brochure to press faster.[4] At the time of publication, the expansive dynamics of the German Reich had reached a new level of intensity. In a speech at the Reichstag on 20 February 1938, Hitler had vowed to protect German minorities outside the territory of the Reich. Shortly thereafter, on 12 March 1938, Germany invaded Austria. Subsequently, the Reich turned its attention toward Czechoslovakia and further expansion. This direct connection is not obvious at first glance in Schmitt's text. Of all his publications on international law, this brochure is the most technical in its legal reasoning. He selected four contemporary and prominent international contributions to the debate on the theory of international law and aligned his argument closely to theirs. At the same time, he also took up all the topics and concepts of international law he was to address in the coming years until, during, and following World War II. In this text, Schmitt developed the key hypotheses—for the first time within a larger context of argumentation—that constituted the substance of his late work *The Nomos of the Earth*, published in 1950.

Schmitt's *Turn to the Discriminating Concept of War*[5] was a critical review of four international authors' works on international law. At the very beginning, he made two things clear. First, that to him, the history of international law was and had always been a history of the concept of war and that the development of the entirety of international law

4 On the circumstances of publication, see Koenen (1995, 784–786).

5 See Schmitt (1937b). The following page numbers refer to this text.

was reflected in the concept of war. And, secondly, that the global political landscape was one in which "old orders are unraveling just as no new ones come to replace them" (31), in other words, that new armed conflicts were imminent. This was a reference to the current global political context, and among the examples Schmitt mentioned in his lecture were Italy's invasion of Ethiopia two years earlier, the Spanish Civil War, which had begun in 1936, and Japan's invasion of China in the summer of 1937. To Schmitt, these events marked a crisis of international law, which was entering a new phase. The core of Schmitt's argument relating to the theory of international law lay in stressing that two diametrically opposed concepts of international law were on a collision course: a universal world legal order increasingly secured through institutions on one side and a renationalization of the theory of international law on the other—in his shorthand, the opposition between a "universalistic" and a "politically pluralistic worldview" (67, note 168). This dichotomy was "not about new norms," but rather "about new orders—orders whose concrete character" very concrete powers "struggle with" (34).

Against this background, Schmitt did not tire of emphasizing the "practical meaning" (37) of his deliberations. He first analyzed the works of Georges Scelle, professor of international law at the Faculté de Droit de l'Université de Paris, and Hersch Lauterpacht, who taught international law at the London School of Economics. Schmitt presented the two authors as prototypes of new French and Anglo-Saxon thinking on international law, respectively, and the latter as a "native of the Polish region of Galicia" (39)—code for him being Jewish. With this opening, he immediately attempted to undermine their claims of being systematic and universalist by assigning them to independent and fixed national legal cultures. The second half of the article was devoted to works by the two US international lawyers, John Fischer Williams and Arnold D. McNair, on special problems of intervention and neutrality in international law.

Schmitt noted positively that Scelle's two-volume *Précis de droits des gens* from 1932 and 1934 advanced the universalist and individualist positions within international law to their logical conclusions. Individualism, Schmitt claimed, appeared in naming the individual as a legal entity in international law; universalism was expressed in the global military right to intervention. To Scelle, the state consisted solely of individual people, and relations between states were no different from relations between people. In this regard, Schmitt's statement that this approach radically dethroned the state and elevated the individual to the only direct subject of international law was entirely true. Scelle concluded from this that the Geneva League of Nations would have had to intervene against the treatment of Jews in Germany in 1933, which Schmitt mentioned as a particular example of how absurd and far-fetched Scelle's deliberations were (see 44). Scelle followed his assertion of a right to resistance against domestic activities in contravention of international law with a call for an international instance to which individuals could appeal in the event of such violations. Schmitt alleged that this made war into an "intervention" in the interest of protecting individual rights and transformed the classic war between states into a civil war. To Schmitt, this type of system of international law was a mirror image of liberal constitutionalism magnified to universal internationality and the attempt to transform the entire planet into a global state under a single rule of law. Schmitt concluded approvingly that Scelle's linking of the polar opposites of liberal individualism on the one hand and universalism under international law on the other led "to

a new systematics of international law with logical consistency" (46) which fed into the hope for an upcoming "trans-state, universal, ecumenical order" (43)—only to add sarcastically that Scelle's lovely view was "obscured today through dictatorships and states that are not liberal democracies" (48).

Lauterpacht came to similar conclusions as Scelle concerning the binding nature of international law and its enforcement, Schmitt stated. He discovered the same tendency in Williams's commentary on Article 16 of the Covenant of the League of Nations on dealing with members of the League of Nations that violated this Covenant. The final article that Schmitt commented on, by McNair on collective security, written in 1936, was linked most closely to the title and subject of Schmitt's brochure. McNair explained that the experiences from the gruesome World War from 1914 to 1918 had brought about a fundamental change in how wars were evaluated from the perspective of international law. The firm belief now prevailed that armed conflicts between states could no longer be justified under any circumstances. This conviction was reflected in the Covenant of the League of Nations and in international treaties such as the Kellogg-Briand Pact, which Germany, too, had ratified. Schmitt considered this position to be a ploy to expand international law. He explicitly agreed with McNair's view that the distinction between just and unjust wars, attributed to seventeenth century Dutch legal theorist Hugo Grotius, had disappeared from international law over the course of the nineteenth century. The concept of war that had emerged from this, and which Schmitt considered nondiscriminating, had had its "justice, honor, and worth" (71) in the fact that the enemy was "neither a pirate nor a gangster" (71) but rather a state and a "subject of international law." International law had placed limitations only on *ius in bello*, the conduct of war, but not on *ius ad bellum*, the right to go to war. Schmitt asserted that President Wilson's declaration for the US to join the war against Germany and the Covenant of the League of Nations had ushered in the beginning of the end of this civilizing concept of war.

Several months before his lecture, Schmitt had published a brief article entitled "Totaler Feind, totaler Krieg, totaler Staat" [Total enemy, total war, total state]. Total war, he explained, derived its meaning from the total enemy. Schmitt associated total war with English naval warfare, which, he asserted, was the only form of war that was completely ruthless towards noncombatants, and that this distinguished it from traditional land warfare on the continent (see Schmitt 1937a, 484). Schmitt took up this distinction in *The Turn to the Discriminating Concept of War*, differentiating between two concepts of war: first, "justified war with a compensation for the loss of life as its goal" and, second, a "war of annihilation fueled by a universalist ideology and led against a 'total enemy'" (67, note 168). The clincher at the end of Schmitt's lecture was that he closely linked total war with the doctrine of just war. The doctrine of just war made war a kind of executive measure or purge on the just side. The unjust side was declared to be illegal and immoral resistance led by "vermin, troublemakers, pirates, and gangsters" (67, note 168), and the government of the unjust side was ruled to be war criminals. The discriminating concept of war would lead to an "intensification of war and enmity" and to a policy of preventive military buildup to "fortify for the case of war" (72).

Schmitt's line of argument did not state clearly why military action conducted in the name of protecting human rights automatically has to become a kind of war of annihilation. There is no convincing theoretical explanation in Schmitt's work why universalist

theories of international law bring about the dissolution of any and all boundaries of warfare and goals of war. On the contrary, sanctions against those declared to be lawbreakers explicitly do not aim to annihilate them. Using strict logic following legal doctrine, one can derive from all universalist approaches that—and where—the boundaries of warfare lie in the interest of protecting the individual rights of the other side's combatants. Moreover, Schmitt did not explain conclusively why the enemy in the traditional conflict between states should be excluded from appearing to be a criminal monster worthy of being annihilated. Be that as it may, this is not the place to discuss the persuasiveness of Schmitt's hypotheses more extensively.[6]

Schmitt did not tire of specifically emphasizing the most elementary practical significance with respect to a "possible coming war" (63). This applies in particular to the question of neutrality in such a case. Great Britain, France, and the United States, he claimed, had direct interests of their own in a discriminating concept of war and thus for taking a stand against an aggressive country at the international level. What mattered to Schmitt politically in his brochure was the hypothesis that at the time, international law was in a situation in which two competing concepts of war and international law coexisted: on one side, the concept of war in the Covenant of the League of Nations and, on the other, the traditional, nondiscriminating concept of war which Schmitt claimed for Germany and other nations seeking to be considered independent. The political core of his deliberations, which he formulated in decidedly academic language, consisted of reversing the distinction between a war of aggression prohibited under the Kellogg-Briand Pact of 1928 and a justified war in self-defense. Schmitt was convinced that this distinction was nothing but a perfidious means used by the Western powers to curtail Germany's options for action. Ultimately, this was how the *völkisch* foundation of international law developed its aggressive firepower: after all, following this logic, to a *Volk* claiming to fight resolutely for its national interests, a war of aggression was a legitimate war, too.

Schmitt sent his brochure to the highest government circles of the Nazi regime and the military top brass as he had done many times before in the preceding years. Reich Minister of Foreign Affairs Joachim von Ribbentrop wrote Schmitt a personal letter thanking him for the brochure.[7] When he was the German ambassador in London, Ribbentrop had called on Churchill to grant the German Reich the right to expand eastward to Ukraine and Byelorussia; an unconditional acolyte of Hitler's, he had become minister only in February 1938. Schmitt had succeeded once more in gaining the ear of those holding political responsibility in the regime.

3. Echoes in Geneva and New York

At least a brief echo to Schmitt's sensation in the field of international law was to be heard from Otto Kirchheimer in his exile in New York. It was in an omnibus review in Volume 3 of the *Zeitschrift für Sozialforschung* published by Horkheimer's institute (see Kirchheimer

6 For a critical discussion of Schmitt's arguments, see Habermas (2001, 165–203), Cohen (2004), Teschke (2011b), Benhabib (2012), Neumann (2015, 449–451), Teschke (2016), and Blasius (2021).

7 See editor's note (Günter Maschke) in Schmitt (2005, 592).

1938b). Starting with the arrangement of the texts reviewed, Kirchheimer's review was designed to contrast Schmitt's works on international law with two fundamental contemporary alternatives. Kirchheimer presented *Die Völkerrechtslehre des Nationalsozialismus* [National Socialism's doctrine of international law] by Eduard Bristler, which had been published in Switzerland, as a first alternative (see Bristler 1938).

Bristler was the pseudonym of John H. Herz, who had fled Nazi Germany in 1935. Herz had obtained his doctorate under Hans Kelsen in Cologne in 1931 with a dissertation on the identity of the state. After he had been dismissed from the *Referendariat* (a mandatory post-graduate legal training period) in 1933 because he was Jewish, he worked in a law firm for two years. In 1935, he emigrated to Geneva, where Kelsen had arranged for him to prepare his study of the Nazi doctrines on international law at the Institut des hautes études internationales (IUHEI). Herz's study was the first of its kind. It was published by the Swiss publishing house Europa-Verlag in 1938 and was banned immediately in Germany and Austria.[8] Georges Scelle, whom Schmitt had attacked, contributed a brief foreword in which he emphasized the fundamental difference Herz had identified between a universalist and a biologistic-racist concept of international law, thereby indirectly alluding to Schmitt, too (see Scelle 1938). During his exile in Paris, Kirchheimer had occasionally attended Scelle's lectures at the Faculté de Droit de l'Université de Paris but they did not know each other well. When Kirchheimer wrote the review, he and Herz had not yet met; they did so only later at the Office of Strategic Services (OSS), the forerunner of the CIA, where they became close personal friends. Unlike Kirchheimer, Herz's background was the liberal political milieu of the Weimar Republic. His book became an important additional source of information for Kirchheimer in his understanding of Schmitt's work on international law.

The very first quotation in Herz's book (see Bristler 1938)[9] was from Carl Schmitt's programmatic text *Nationalsozialismus und Völkerrecht*. No less than six works by Schmitt were quoted in the book. Herz considered his analysis to be an intrinsic critique of Nazi theories of international law. For this reason, he had sought less to construe them as being a monolithic, fully developed racist theory of international law but had instead hammered out their internal contradictions. He saw a "basic contradiction" running through them in all their "vagueness" and "obtuse ambiguity" (171). One the one hand, they still propagated the idea of a supranational order worthy of recognition; on the other, they went to great lengths to claim the superiority of a single *Rasse*.

In contrast to the German conservative author Adolf Grabowsky, for example, whom Kirchheimer criticized in 1932 for this reason,[10] Herz did not base his analysis on the notion of the primacy of foreign policy; instead, he explained that perverting rational international law into racist international law could only be seen as a function of striving to become a global power due to domestic policy concerns. His analysis ended with works from late 1937 and, of course, he could not be familiar with Schmitt's later career in international law. So the nothing less than prophetic succinctness with which he addressed a problem that Schmitt was to solve just one year later by including the buzzword

8 See Herz (1984, 111–113) and Puglierin (2011, 79).

9 The following page numbers refer to this book by John H. Herz.

10 See Chapter 6, p. 187.

Großraum in his theory of international law, again proving himself to be a legal pioneer, is all the more remarkable. Herz predicted that the German Reich's imperialist tendency toward expansion would sooner or later be brought in line with the ideologically motivated struggle against allegedly Jewish Bolshevism. The "goal of Germany expanding its power in the east and perhaps the southeast of Europe will be considered identical to the formerly proclaimed goal of the Aryan dominating the inferior races and peoples" (192).

In his review, Kirchheimer praised Herz's book as a comprehensive overview as complete as it was outstanding. He agreed with and highlighted how Herz had hammered out the political functionality present in the development of the Nazi doctrines on international law. Nazi international law was international situational law. What could directly serve the regime's foreign policy interests of the day, and nothing more, was to be recognized as international law. In the early phase of the Nazi regime, the lines of argument in international law had come from natural law, as Herz had stated, also with regard to Schmitt (see 83–85). This phase was followed by *völkisch* and racist doctrines that were to give the regime's current foreign policy goals a better legal foundation. Herz had quoted works by Schmitt as evidence of this phase, too (see 110–114). In this second phase, Schmitt no longer had a leading role in the field, but his earlier concepts such as "homogeneity" and the "friend-enemy distinction" provided important terms supporting and easing the transition to a decidedly racist doctrine of international law (see 118–120). In Herz's view, Schmitt was "hesitant to make his theory of race the criterion of his concept of homogeneity" (118) and the basis of "*Gleichartigkeit*" (see Glossary), which Schmitt considered essential, remained "unclear" (204) to the reader.

Kirchheimer in his review[11] followed Herz's strategy of immanent critique, agreeing that the line of argument in Nazi international law was contradictory. On the one hand, its protagonists were attempting to avoid completely negating international law and recognized an international community of laws, albeit a limited one. On the other hand, the *Rasse*-based theory of international law considered itself forced, for political reasons, to state that international law on the basis of bilateral contracts was the only appropriate form of international law at the time, which as a consequence would lead to a "dissolution" (200) of any international law. We can only speculate why Kirchheimer did not praise other aspects of Herz's book that he must have also appreciated. These would include the "legal-sociological" (Bristler 1938, 194) perspective, which Herz took programmatically, and the rejection of the doctrine of the primacy of foreign policy, which was inspired by power politics. Kirchheimer did not go into the parallels between Nazi and Bolshevik theories of international law, which Herz had elaborated at the end of the book, either; parallels to his own thinking are to be found here, too. Nor did Kirchheimer discuss Herz's detailed analysis of Schmitt in his book.

The second book Kirchheimer reviewed was the latest edition of *Völkerrecht* (International Law) by Alfred Verdroß, which was published in 1937. The author was the founder of the Vienna School of International Law, which was characterized by a Catholic and natural rights-based approach, and his works were already received widely in Germany during the Weimar Republic. Verdroß had often been the target of Carl Schmitt's attacks; Schmitt criticized his approach but above all his alleged willingness to give ground

11 See Kirchheimer (1938b). The following page numbers refer to this text.

to the victorious powers of 1918. In his book, Herz had classified Verdroß within the camp of Nazi literature because he had borrowed from "semi-*völkisch*-racist" (Bristler 1938, 136) works, notwithstanding his proximity to Kelsen's international law monism. Kirchheimer acknowledged in his brief comments on Verdroß's book that he considered his fundamental approach based on a monistic doctrine of international law to be a "decisive societal advance" (201) despite all the difficulties in its structure. Kirchheimer was apparently familiar with older works by Verdroß, for he accused him of not having decided whether to take the side of the Christian corporative state or of Nazism when he was working on the book—in other words, prior to the German Reich's invasion of Austria, which was celebrated as the "*Anschluss*."[12] This was the only way to explain that the "emphatically submitted avowal of natural law oscillated between *völkisch* and Christian traits" (201). Otherwise, he did not consider the book to be particularly original or forward-looking.

Finally, Kirchheimer reviewed Schmitt's book on the turn to the discriminating concept of war. This section is also the most polemical part of his review, ending with derisive comments about Schmitt's lack of knowledge. Kirchheimer correctly and concisely recounted the basic thrust of Schmitt's "position"[13] countering those of Scelle and Lauterpacht. Kirchheimer presumably knew the latter personally from his brief time working with Harold Laski at the London School of Economics in 1933/4. Next came a staccato of critical comments on and objections to Schmitt's work. "Following the pattern of all his other writings," Kirchheimer claimed, Schmitt began by showing "the political relevance of the writings he rejected," only to "give the political interests of the Nazis the dignity of a scientific theory using his usual apparatus of specious phrases based on conceptual realism" as the next step. Kirchheimer noted the "obvious contradiction" in Schmitt's latest attempt between the *völkisch* ideological position Schmitt championed and the need of the regime to maintain a consistent legal position. Since he had to "take the position of total and just war" because of his *völkisch* basic ideological assumptions, the position he espoused in his new work concerning international law demanded precisely the opposite, namely containment of a universal right to wage a war of execution against attacking states (thereby raising a war of execution, an intervention against a single state led by the central government to enforce imperial law in German empires, to the international level).

Kirchheimer had nothing but sarcasm for Schmitt's justification of "old-style" limited wars between states. "As we have heard," such a war would allegedly be contained practically automatically. Kirchheimer quoted Schmitt's statement in the brochure about limited wars between states according to which "its right, its honor, and its dignity" lay in the fact "that the enemy is not a pirate or a gangster, but a 'state' and a 'subject of international law.'" Kirchheimer's intention in quoting this passage was obvious to his readers at the time: the German Reich had just wiped the Republic of Austria off the map, a former "subject of international law," and annexed parts of the state of Czechoslovakia in

12 *Anschluß* was the Nazi German term for the incorporation of the Republic of Austria into the German Reich.

13 This and subsequent quotations are from Kirchheimer (1938b, 201–202).

the name of a higher-ranking *völkisch* international law. He concluded his review by ridiculing Schmitt: even an average French legal expert could only be astounded by Schmitt's statement that the French state was a mirror image of the legislative state. He also scoffed at Schmitt considering Harold Laski to be a philosopher of the Second International. Thus, in Kirchheimer's eyes, Schmitt had become a theorist who had made a dangerous fool of himself.

4. Conclusion: Germany attacking Poland

Schmitt's lecture in October 1937 marked the beginning of his aggressive and successful efforts to prevail as one of the leading international law theorists in the German Reich. From the mid-1930s on, when Hitler's rule had stabilized, international law provided excellent opportunities for building a career inasmuch as it enabled legal experts working in the field to do two things. First, it permitted them to avoid the risks of national constitutional law, which had increasingly become both devoid of substance and politically dangerous. Second, they could specifically prove how useful they were to the regime by doing legal work to legitimize the expansive goals of Nazism that were gradually coming to the fore. International law increasingly gained practical relevance to support the interests of the Nazi regime. Schmitt was not the only legal theorist in the Third Reich to shift the focus of his interests like this. The rise of international law compensated for the decreasing relevance of national constitutional law. Once again, Schmitt proved to be resolute and remarkably original when it came to his role as a forward thinker on the law of Nazi expansion policy up until the early war years. Viewed in the context of his oeuvre, not all of what he presented in his lecture of autumn 1937 was really new. His positions were not a strategic maneuver to avoid further attention from the SS, but a "logical extension" (Koskenniemi 2016, 594) of positions he had already taken during the Weimar Republic and in his earlier works on international law after 1933.

Due to the political circumstances, the issues of *Zeitschrift für Sozialforschung*, which was still printed in Paris, appeared almost a year after its official publication date. The readers perusing the 1938 issue of the journal which included Kirchheimer's review a year after its official publication date will have been struck by the contrast between Schmitt's claim that wartime enemies would not be treated like pirates and gangsters on the one hand and the brutal actions and atrocities of the German troops and authorities after the attack on Poland on 1 September 1939 on the other. Kirchheimer had accused Schmitt of conceptual realism as early as 1932/33 in the essay he had authored with Nathan Leites;[14] with respect to international law, he may have felt confirmed in this objection by a similar comment about Schmitt's "obsession with being original" (Bristler 1938, 78) and his method in Herz's book. Herz's accusation that some of Schmitt's work showed that he was completely unaware of the facts of the matter was not new, either.[15] What was new

14 See Chapter 6, p. 151–157.

15 "It arises from the peculiar way of thinking practiced by this theoretician, who is surely very sharp-witted in many ways, who is always striving to think 'concretely,' to derive his concepts from the 'realities,' but who simultaneously thinks constructively and immediately makes approaching what is

in Kirchheimer's review was his clear political prognosis that Germany would start a war in Europe very soon and that Schmitt's role in it was to produce the appropriate legitimation in international law. As Kirchheimer's review makes clear, he had stopped considering Schmitt's oeuvre to be a source of intelligent hypotheses or stimulation for developing further ideas on international law. He now read Schmitt as a legal theorist who was aligning his work entirely with the Nazi regime's situational political needs in foreign policy and at the price of accepting theoretical contradictions. Kirchheimer followed Herz in the strategy of immanent critique and he expanded it with the critique of ideology.

'concrete' the basis of constructions which, once they are generalized, must again lead away from the concrete." (Bristler 1938, 120).