Chapter 13:
On the Road to the Nuremberg Trials (1943–1945)

With the aid of Franz L. Neumann, who had been working for the Office of Strategic Services (OSS) since March 1943, Kirchheimer had obtained a part-time position as a research analyst with the OSS in July 1943.[1] His position became full-time in early 1944. He left New York and moved to Silver Spring, near Washington, DC, with his family. Kirchheimer was to work for US agencies for the next twelve years: for the OSS during the war and subsequently for the State Department after Germany surrendered in May 1945. His tasks initially included analyses of Germany as the war enemy, then planning for the period after the Allied victory, and finally studies on the political situation in Europe in the early postwar years. The Kirchheimer family lived in a small apartment in a development in Washington, DC, built specially for government employees, and his daughter Hanna from his first marriage spent some time there, too. For the first time in his life, at thirty-seven, Kirchheimer was earning enough to be able to support himself and his family and no longer depended on support from friends and the Rosenfeld family.

On the opposite coast of the Atlantic, Carl Schmitt wrote a lot but published little in the final two years of the war. The war affected him personally in August 1943 when he found out that his Berlin residence had been destroyed in his absence by an aerial mine. He rented a villa in upscale Berlin-Schlachtensee and moved to the southwest of the city. He still taught at Berlin University and continued lecturing as actively as before at various other universities in Germany and in German-occupied countries.

After the defeat of the 6th German Army in Stalingrad in the winter of 1942/43, it became clear to any dispassionate observer that the German Reich would be defeated in the war. New questions emerged such as what should happen to Germany after the defeat and how should the war crimes committed by the Germans be dealt with.

As an employee of the OSS, Kirchheimer was soon confronted with eminent practical questions about the planning for postwar Germany. Like all the other émigrés, he, too, had been thinking since the beginning of his own exile about the period after the end of Nazism. The question of how to deal with Germans who, like Carl Schmitt, had supported

1 FBI Report by Special Agent Patrick M. Rice on Otto Kirchheimer of 21 June 1950. FBI, US Department of Justice, Federal Bureau of Investigation, File on Subject Otto Kirchheimer (121–13351-5).

the Nazi reign of terror or had even committed war crimes was naturally of deep concern to him as well as to all the others who had escaped Germany.

1. Schmitt's wait-and-see stance

After Stalingrad, Schmitt stopped making public political statements. Although he continued to publish in the regime's propaganda magazines on occasion, he otherwise took a wait-and-see stance. His neighbor and longtime friend Johannes Popitz, who had brought him to the NSDAP in 1933, was involved in planning the assassination attempt on Hitler on 20 July 1944. Schmitt was not invited into these circles. Popitz was arrested and executed after the failed attempt on the *Führer*, which convinced Schmitt to continue to wait and see. Wolfgang Abendroth, a socialist Kirchheimer knew from his Weimar days, reported in his memoirs that Schmitt had cautiously implied to his students in seminars that the war was lost and that "it was necessary to cautiously reorient oneself" (Abendroth 1978, 212) for the postwar period. Schmitt was well aware of the extent of German crimes against the Jews in Europe. In a letter to Schmitt, one of his friends, right-wing author Ernst Jünger, had drawn a comparison between the current situation and the "extraordinary stubbornness of the Jews during the siege of Jerusalem"[2] during the Roman Empire. Schmitt responded with a quote by philosopher Bruno Bauer, a contemporary of Marx: "After all, God created the Jews, too. And if we beat them all to death, we will all be in their place."[3]

In the course of the Reich's cultural-policy offensive in other European countries that had begun in 1942, Schmitt traveled to speak at fourteen universities and academies during the summer of 1944, in locations as distant as the front lines permitted, including Madrid, Salamanca, Lisbon, Budapest, and Bucharest.[4] One of his lecture tours included a reception hosted by Romanian dictator Ion Antonescu, who was chiefly responsible for the murder of hundreds of thousands of Jews, Sinti, and Roma. Although Schmitt was well aware that the Nazis' reign of terror in large parts of Europe in 1943/44 was lawless, the title he selected for his lecture was none other than "Die Lage der europäischen Rechtswissenschaft" [The situation of European legal scholarship]. The lecture was published in 1950 and 1958, in two altered versions; it can no longer be determined precisely what Schmitt actually said on his lecture tours on the role of legal science and its future renaissance. In any case, when the lecture was published in 1950, he had removed any references to the notion of *Rasse* (see Schmitt 1950b).[5] Another lecture he gave on tour particularly at various universities in fascist Spain was titled "Donoso Cortés in gesamteuropäischer Interpretation" [A pan-European interpretation of Donoso Cortés]. In this, he countered the interpretation in Marxist philosophy of history with the radically anti-socialist and anti-humanist position of the religious concept of the Spanish counterrev-

2 Letter from Ernst Jünger to Carl Schmitt dated 10 February 1945 (Schmitt and Jünger 1999, 188).

3 Letter from Carl Schmitt to Ernst Jünger dated 25 February 1945 (Schmitt and Jünger 1999, 190).

4 See Tilitzki (1998) and Quaritsch (2000).

5 See Chapter 15 for more details about this lecture.

olutionary from the mid-nineteenth century. This text, too, was published in 1950, and in a revised version (see Schmitt 1950c).

Besides his lecture tours, Schmitt was primarily occupied with teaching at the university and working on a new book he intended to be about the political order after what he thought would be the last European war. His aim was to rewrite international history in geopolitical terms as an ongoing series of *Raumrevolutionen*, thereby including Hitler's conquests in a transhistorical continuum of land appropriations (see Teschke 2011a, 187). His as yet unpublished diaries mention that he began working on this in January 1943. Because more and more of Berlin, including libraries, was destroyed by the bombings, Schmitt could not finish the book. He completed and revised the manuscript and published it in 1950 under the title *The Nomos of the Earth* (see Schmitt 1950d). Most of the classes he taught in the last two years of the war addressed topics in international law, and he also lectured to soldiers in classes steeped in ideology. He held some of his seminars privately at his home. Schmitt traveled to Hamburg to give another lecture as late as January 1945 and still wrote dissertation reports in February. He continued lecturing until university teaching was stopped after the destructive bombing of Berlin on 2 February 1945. A few days later, at age 56, he was conscripted into the *Volkssturm* (a militia of poorly equipped civilian boys and men drafted by the Nazi regime in a last-ditch attempt to defend the fatherland). Schmitt was tasked to defend the Teltower Kanal, a canal in the southern part of the city, against the Red Army—a futile endeavor given the overall military situation.

In the meantime, the Allies were advancing ever faster, the Reich government's morale-boosting slogans notwithstanding. On 25 April 1945, Berlin was encircled by Soviet and Polish troops. The first Soviet soldiers appeared at Schmitt's house in Berlin-Schlachtensee. His Serbian wife spoke to them in Russian. Nothing happened to her, but some of the other women in the house were raped by Soviet soldiers. Schmitt and his family took cover in a bomb shelter for the next few days, hoping for the American army to arrive soon. On 30 April, Schmitt's *Führer* committed suicide. Coincidentally, on the same day, Schmitt was arrested and interrogated by Soviet soldiers. He took this occasion to offer the Soviet authorities his support as an advisor, but—to his surprise, as he later said—they did not take him up on this (see Wieland 1987, 101). He was let go after a few hours of questioning. He later reported that communist poet Johannes R. Becher had arranged for his release (see van Laak 1993, 31).

Two days later, Berlin capitulated, and the German Reich signed the unconditional surrender on 8 May. Besides the problems of everyday survival faced by those released from the concentration camps as well as the German population whose homes had been bombed, two political questions were of paramount importance once the war had ended: How to deal with past German crimes and how to organize the future administration of the territory of the former German Reich. Not surprisingly, Kirchheimer and Schmitt gave diametrically opposed answers to these questions.

2. Bringing German war criminals to justice

In the pamphlet camouflaged as an issue of a series edited by Schmitt, Otto Kirchheimer had written from his Paris exile in 1935: "The jurists of the Third Reich—theoreticians and practitioners alike—will have to take responsibility someday" (Kirchheimer 1935a, 147).[6] Once the Allies had prevailed over Nazi Germany, he had the opportunity at the OSS to play an active part in seeking out and punishing Nazi criminals.

Two years before beginning to work for the OSS, Kirchheimer had expressed his views on the question of dealing with war crimes and war criminals in a book review of *War and Crime* by criminologist Herman Mannheim. The author had a teaching position in London after fleeing Germany in 1935. He had previously taught criminology as an *Außerordentlicher Professor* at Berlin University from 1924 to 1933. After emigrating to England, he had become one of the internationally leading criminologists. Kirchheimer knew Mannheim from his time in Berlin but did not make allowances for such old acquaintances in his criticism of this author's criminological approach. At the end of his review,[7] Kirchheimer briefly addressed the subject of war crimes. He essentially agreed with Mannheim's plea to treat states like companies in the future and to hold them responsible in a similar way: "That states like corporations should be made responsible for their actions is an excellent program for the future" (428). He also agreed with Mannheim's demand "that an individual citizen who resists the army of an aggressor state should enjoy the protection of international law" (428). But he pointed out that it was one thing to make justified demands, like this one, and another to put them into practice. The current situation was characterized by the "non-existence of an international order" (428). And then he added an objection that sounded more fundamental:

> It is, moreover, a methodologically questionable procedure, and, as past experiences have shown, a politically unprofitable enterprise to establish, on the basis of the dual fiction, (a) of the existence of an international order and (b) of the identification of the people with the ruling group, that a "legal" war guilt attaches to the people of just one warring country. Even the establishment of an enlightened treatment tribunal cannot reconcile us to such procedure (428).

Although Kirchheimer advocated an international order regulated by international law, in 1941 he did not support the establishment of an international court dealing with war criminals. On the normative level, he agreed with Mannheim that war criminals should be prosecuted; on the practical level, however, he was skeptical. His skepticism was based on a view that was similar to Schmitt's analysis of the international order as an anarchic system that lacked any fundamental consensus necessary for success on the international stage. Two years later, Kirchheimer overcame his practical concerns and became part of the legal team that prepared the Nuremberg Trials. The reasons for this change in opinion are not documented. It is possible that Kirchheimer only became aware of the full extent

6 My revised translation, see p. 207 (note 9).

7 See Kirchheimer (1941c). The following page numbers refer to this text.

of German war crimes two years later; however, he may also have considered the chances that such a court would succeed in gaining international legitimacy to be better.

The Office of Strategic Services (OSS) was the first independent US agency established exclusively for the purpose of collecting and processing information. Its founding by the appointment of a Coordinator of Information (COI) in June 1941 and its institutional establishment through Presidential Executive Order 9182 of 13 June 1942 were part of the US war machinery.[8] Considered a supporting agency, the OSS was placed under the direct command of the Joint Chiefs of Staff (JCS) and the Combined Chiefs of Staff (CCS). The directive JCS 155/4/D of 23 December 1942 defined the two central functions of the OSS as follows: "the planning, development, coordination and execution of the military program for psychological warfare" and "the compilation of such political, psychological, sociological, and economic information as may be required for military operations."[9]

Kirchheimer was assigned to the Research & Analysis (R&A) Branch tasked with coordinating the various sources of information and preparing individual studies on strategic, political, geographical, and economic subjects. Its role within the OSS was that of a "final clearinghouse" (Söllner 1986a, 25). There were four more branches besides R&A, including the Secret Intelligence Branch and X-2, which was responsible for counterespionage. Kirchheimer worked in R&A's Central European Section (CES), headed by Eugene Anderson. Its 40 staff members included Neumann, Herbert Marcuse, John H. Herz, Hajo Holborn, H. Stuart Hughes, Arkadij Gurland, Felix Gilbert, Hans Meyerhoff, and Carl Schorske, among others. Within the CES, Kirchheimer was assigned to the unit responsible for Germany and Austria. Since the OSS was subject to constant internal restructuring during the war, it was difficult for R&A to obtain sufficiently informative external and internal intelligence reports for its analyses. These difficulties were exacerbated by the fact that its staff were redeployed to other positions inside and outside the OSS bureaucracy—for example, for the expansion of R&A with new units in London, Chongqing, and Cairo, or as intelligence units in the states liberated from the Axis powers. By the end of the war, the R&A staff had prepared 3,000 research reports, many of which were called memorandums, and as many geographical maps (see Smith 1973, 371).

The working conditions were the result of improvisation, as was the entire structure of the OSS. R&A had a staff of 2,000. Kirchheimer and his colleagues worked at large tables set up in tightly spaced rows at the Uline Arena (later to be renamed Washington Coliseum). Kirchheimer was seated next to John H. Herz, whose work on Schmitt's theory of international law he had reviewed positively several years earlier, and the two became close friends (see Herz 1984, 136–138). One of the difficulties of the everyday operations was the complex way in which the OSS was embedded in the US war machinery. R&A received material from all the government agencies relevant to the war as well as from other OSS units and sites through an internal agency administering information, the Central Information Division (CID). R&A had no say whether the desired information was made available; other agencies, and even other OSS units, held it back at

8 For the history of the OSS, see Smith (1973), Katz (1989), Marquardt-Bigman (1995), and Müller (2010).

9 Quoted in Troy (1981, 431–433).

times. The reports completed by the R&A staff were reviewed by the Project Committee, an oversight body internal to the branch, as to whether they met the standard of neutrality. That was the reason why the Project Committee, headed by the deputy director of the R&A Branch, consisted of members of all the divisions. Their expertise rivaled that of the analysts who had authored the reports. Some R&A reports were handed over to other research teams for revision before being delivered to the government departments and agencies that had commissioned them or offered to other agencies. The reports had to maintain "strict objectivity" (Müller 2010, 50) both in substance and in writing style and had to be easily comprehensible to outsiders. Because of the growing external demand for these reports and the multiple internal rounds of revision, the analysts were seldom able to pursue projects of their own.

By the time Kirchheimer joined the OSS, everyone there had realized that questions of military administration and occupation policy would become more important because of the foreseeable defeat of the Axis powers. Staff turnover notwithstanding, a core group in the Central Europe Section (CES) can be discerned: Anderson met weekly with Neumann, Kirchheimer, Marcuse, Gilbert, Holborn, and Harold Deutsch, the director of the Political Subdivision of the Europe-Africa Division. Regardless of the different disciplines and political orientations of those working at the CES, Neumann was considered "by far the most significant personality among its members" (Katz 1989, 34) not only because of his personality but also because of his book *Behemoth*, published in 1942. The book's structural analysis of Nazism, which had originally been inspired by Kirchheimer, was used in almost all R&A reports, at times verbatim, after Neumann joined the OSS.[10] In the summer of 1943, the Department of War gave R&A the major task of compiling the most important background information and preparing practical advice for a future military government in Germany on the basis of its competence, which was acknowledged by other OSS branches. Over the next two years, the branch prepared a number of comprehensive *Handbooks* with background information and around eighty *Civil Affairs Guides* with recommendations for the officers to be deployed on the ground (see Marquardt-Bingman 1995, 120–122).

Kirchheimer was hired in connection with the new major project for Neumann's group. He had a privileged position in that group inasmuch as he had already worked closely and well with Neumann at the Institute of Social Research. However, Neumann's dominant position within the CES could not hide the fact that there were some substantive and personal differences within R&A. In retrospect, it is remarkable that seasoned US historians from Ivy League universities, German historian Friedrich Meinecke's students Gilbert and Holborn, who had both emigrated, and the critical theorists who had come from the Institute of Social Research were able to develop such a strong esprit de corps. For example, Carl Schorske, from 1944 on Acting Chief of the Europe-Africa Political Subdivision of the Central European Section, later reflected: "The Central European Section remains its brilliant but incoherent, Teutonic, and maladministered self."[11] There was a latent conflict within R&A between the older, more established historians

10 See Erd (1985, 153–157), Marquardt-Bigman (1995, 132–136), and Kettler and Wheatland (2019, 334–347).

11 Quoted in Katz (1989, 173).

born around 1900, such as William Langer, Eugene Anderson, and Walter Dorn, and the ambitious scholars including Carl Schorske, Leonard Krieger, and H. Stuart Hughes, who were an average of fifteen years younger. Although the German émigrés at R&A, like Kirchheimer, belonged to the generation of the older group, they were not established scholars, either.

In the summer of 1943, Kirchheimer was given his first larger assignment: investigating how German war criminals might be punished. By 1942 at the latest, the Allies had agreed that those responsible for the crimes under the Nazi regime were to be brought to justice before an international tribunal, although they had different ideas of how this was to be accomplished (see Heydecker and Leeb 2020, 103–130). The Western powers had established the United Nations Commission for the Investigation of War Crimes in late 1942, but, initially, it was unclear whether the war criminals were to be court-martialed and shot—which would be the responsibility of the military on the ground—rather than prosecuted in court cases requiring considerable time and effort. On 30 October 1943, after lengthy negotiations, the Moscow Tripartite Conference of the Allies issued the "Statement of Atrocities" announcing the punishment of the main war criminals through regulated procedures on the basis of decisions made jointly by the Allies. Various questions remained: How was the circle of the main Axis war criminals to be defined? What procedures were to be applied when prosecuting crimes? From February 1944 on, the United Nations War Crimes Commission, based in London, began to answer these questions. Kirchheimer and John H. Herz presented Memorandum R&A 1482 entitled "The 'Statement of Atrocities' of the Moscow Tripartite Conference"[12] six weeks after the Moscow Declaration as a set of guidelines for the Americans involved in the London Commission for interpreting the statement and taking action.

To better understand the thrust of this report, readers should be aware that the British had been reluctant to permit the Nazi leadership to enjoy formal legal proceedings. In the early years of the war, Churchill thought they should simply be declared outlaws whom every member of the Allied forces should be permitted to shoot on the spot. It was not until 1943 that he changed his mind about this. US Finance Minister Henry Morgenthau had favored summarily shooting those responsible and rejected proceedings he considered unnecessary. Although the Soviet Union had also supported the idea of prosecuting Nazi war criminals in court, Stalin considered that to mean brief show trials followed by mass executions by firing squad as already practiced in the areas the Soviet Union had reconquered from Germany. In addition, US President Roosevelt had shown only mild interest in the problem of German war criminals (see Heydecker and Leeb 2020, 115–119).

Against this background, it is clear why Kirchheimer and Herz first laid out what had led up to the Moscow Declaration and called attention to the fact that it was "the first common announcement of intentions" (452) by all three major Allied powers. They emphasized that there was no longer any reason to fear that disagreements between the three powers after the end of the war might endanger the practical implementation of what they had agreed on jointly. "In many respects it seems to constitute a victory for

12 See Kirchheimer and Herz (1943). The following page numbers refer to this report.

those who, led by Russia, as one of the main direct victims of German atrocities, had insisted upon uncompromising prosecution and concrete procedures" (453). Kirchheimer and Herz then explained the individual provisions of the Moscow Declaration: the immediate extradition of all war criminals after the cessation of hostilities with Germany; the opportunity to prosecute other Axis powers and German satellite states; the ban on other countries granting asylum to criminals fleeing justice. The reason they gave for demanding extradition of the war criminals even in the ceasefire agreements was to prevent a repetition of what had happened in Germany after World War I: the "delay and open sabotaging of the Allied demands by Germany, together with the sham trials of Leipzig" (455).[13]

Kirchheimer and Herz then pointed out that in the Moscow Declaration, "for the first time a definite procedure is outlined for those persons whose acts are 'localized' in one of the Allied countries" (454). The perpetrators were to be handed over to the countries in which they had committed their crimes for prosecution before the courts according to those countries' laws. As Kirchheimer and Herz interpreted the declaration, those courts would operate on the basis of the laws applying there, but "it does not seem excluded that they may also apply certain rules of international law" (454). They mentioned the Hague Convention of Land Warfare in this context. Their report was the first in the OSS to prepare the argument for judging the German war criminals according to the rules of international law. The two authors considered the Moscow Declaration to be an effective "means of deterrence" (455). Announcing and broadly disseminating later punishment was "probably" the strongest effort that could be made "to deter Germany or Germans from continuing atrocities" (455). In particular, the "rather broad definition of responsibility" (455), which held all those accountable "who commit, or consent to, atrocities" (455) might induce many Germans to dissociate themselves from the demands or orders of their superiors. As morale in Germany regarding the war could be expected to worsen in light of withdrawal and defeat, the effect of the threat of punishment would increase.

As Roosevelt and Churchill were meeting in Quebec in mid-September 1944 for one of their last war conferences, the US Department of War had the CES under Neumann develop the first comprehensive strategy for punishing German war criminals. The ideas were synthesized by Neumann in the report *Problems Concerning the Treatment of War Criminals*,[14] dated 25 September. Kirchheimer was involved in writing this, and the authors circulated various drafts among their colleagues at R&A before it was finalized. From the outset, the report assumed that the prosecution and punishment of German war criminals was a matter of international law. Then it listed the offenses to be considered war crimes, including shooting hostages, abusing prisoners of war, plundering the civilian population, and atrocities against whole groups in pursuance of a general plan of "annihilation" (for example, massacres of Jews). Participation in such crimes had "directly or indirectly involved […] a large number of persons" (458). The Allies' previous declarations had not included sufficient principles according to which the responsibility of individuals was to be established. The report sought to fill this gap by presenting a proposal for the

13 This referred to the acquittals in the trials against war criminals—which were part of the Treaty of Versailles—that took place from May to July 1921 before the German *Reichsgericht*.

14 See Neumann (1944b). The following quotations refer to this text.

American position in the negotiations with the Soviets and the British about the future war crime trials.

The wording of the Moscow Declaration ("have been responsible for or have taken a consenting part in") was again interpreted as a broad concept of responsibility. This laid the foundation for being able to indict not only Hitler and his close associates. Then, the question as to how to react to potential defendants' excuses such as superior orders or ignorance was examined in depth. Since the established principles of Anglo-American jurisprudence could not be applied to the system under Nazi rule, the report turned to the legal theory of Nazi Germany for guidance. The line of argument that Neumann and Kirchheimer developed in reaction to this problem can be considered a tactical variant of Marxist immanent critique because they refer to none other than the Nazi *Führerprinzip* (see Glossary). According to this principle, on which all organizations in Nazi Germany were built, the *Führer's* authoritative decision was always correct. Every superior, in his or her role as *Unterführer* (sub-*Führer*; see Glossary) was "responsible for whatever happens within the functional and territorial sphere of his jurisdiction (without legal limitations)" (458). Thus, according to Nazi legal theory, superiors bore the criminal responsibility for all crimes committed under their leadership. The only admissible excuse, according to the report, was if it could be proven that the incriminated person had done "all in his power to prevent the act" (459). Another criterion for assigning responsibility mentioned was whether a person had joined a criminal organization such as the Nazi party or the SS voluntarily. If a person had done so, "he must be assumed to have had full knowledge of the practices and functions of the organization and can therefore not avoid to share his responsibility" (460).

As to the question of who was to conduct such proceedings, Neumann and Kirchheimer argued that Allied military courts should first pursue the most important cases according to international law. This legal opinion also, and importantly, stated that the authors believed that the large number of smaller cases were to be adjudicated by German courts after the first major proceedings had been concluded. "Punishment of Nazi crimes by German courts would go far to prove to the German people and the whole world that Germany repudiates the crimes of its former leaders" (462). Attached to the report was a provisional list of Germans to be treated as war criminals. This appendix, however, is no longer to be found in the archives today (see Laudani 2013, 457).

OSS Director General William J. Donovan immediately sent the report to John J. McCloy, Assistant Secretary of War, with the enthusiastic note "that this was the story" on the war crimes question (see Smith 1973, 58). Donovan's personal views on how best to try Nazi war criminals were strongly influenced by this legal opinion written by Neumann and Kirchheimer. Both had included their personal opinions about the strategic advantages for postwar democratic reconstruction of having the Nazi criminals convicted by German courts for violations of German law. Another reason for assigning the following cases to German courts was the problem of capacity. In a letter to Donovan, Neumann mentioned that the Allies would be able to handle at most 5,000 cases, but that there would be significantly more than that.[15] These figures were based on estimates prepared

15 Letter from Franz L. Neumann to William J. Donovan dated 4 May 1945. Quoted in Slater (2007, 317).

by Kirchheimer. Neumann and Kirchheimer's report served as guidance for the American position in the discussions with the British and the Soviets in preparing trials against war criminals.

From October 1944 on, once the report had been finalized, the CES was tasked with specifically preparing the planned trials of war criminals. Neumann and Kirchheimer's group assembled documents in a form usable by the courts and was involved through late April 1945 in compiling an *Arrest Categories Handbook* that included an authorized list of persons to be arrested immediately. The list was limited to the names of war criminals with major responsibility for operations and did not include intellectuals helping to lay the groundwork for the regime, such as Schmitt, as they seemed less important at the time. Neumann and Kirchheimer also continued to be involved with tactical aspects of the trials. OSS Director Donovan was originally envisaged to serve as the second American prosecutor besides Supreme Court Justice Robert H. Jackson. Neumann was considered to be his "right-hand man" (Müller 2010, 53) whose team at the CES was doing the lion's share of US preparations for the International Military Tribunal (IMT). Neumann coordinated all aspects of preparing the trials and had direct access to Donovan.

A few days after Hitler's suicide, Jackson was named US Chief of Counsel for the prosecution of Nazi war criminals. Donovan was merely subordinate to him, and thus also the group around Neumann and Kirchheimer. It was still in May 1945 that Neumann, as the newly appointed Chief of the War Crimes Unit of the OSS in Europe, reorganized the CES, assigning more than twenty people, with Kirchheimer among them, to an American War Crimes Unit (see Intelmann 1996, 51). In August 1945, Neumann traveled to Europe with a small group of his staff, including John H. Herz, to help prepare the proceedings on site. Kirchheimer stayed in Washington with the others and worked on compiling intelligence materials that were sent to Germany. In the meantime, Jackson had pulled off the feat of bringing the four victorious powers together and getting them to adopt a resolution about an International Military Tribunal and its staff and procedures. One problem relevant to Jackson's tactics for bringing charges was the expectation that some of the defendants would put forward the excuse that they had merely executed the *Führer*'s commands, for which reason they were innocent as charged.

Kirchheimer and Herz addressed this problem in their Memorandum R&A 3110 of 18 July 1945, titled *Leadership Principle and Criminal Responsibility.*[16] The report was produced while the victorious powers were holding a conference in London (26 June to 8 August) and was sent to Neumann, who was a member of the American delegation negotiating the preliminaries of the indictment. It went into more detail about the idea first developed by Neumann and Kirchheimer in September 1944, namely to assign responsibility on the basis of the Nazi *Führerprinzip*. Adopting that strategy, the line of argument in the report was ingenious in that it, too, "allow[ed] the Nazis to do the work for them" (Katz 1989, 52) and to use their own logic against them. First, as in *Behemoth*, it characterized the general structure of the Nazi regime as a system in which, theoretically, all power and authority were concentrated in the hands of Hitler as the *Führer* but, in practice, *Unterführer*s in various areas exercised a high degree of unfettered power. They were no tools

16 See Kirchheimer and Herz (1945). The following page numbers refer to this report. Regarding the term "leadership principle," see Translator's Preface.

of Hitler's without a will of their own, but rather people actively contributing to the Nazi system. As such, they were responsible for the policies within their areas of competence. "The more such policies involved a political aspect, the freer they were from any form of legal restraint" (464). In other words, direct orders in writing were often lacking, for which reason it would be very difficult to prosecute this level of leadership following the standard American legal doctrines.

According to Kirchheimer and Herz, the Nazi theory of *Führer* and *Führerprinzip* would prove useful for litigation at this point: "By drawing an analogy to the 'leadership' theory of responsibility[17] as developed by the Nazis themselves, a theory of incrimination in connection with war crimes might be developed which could be applied to fit the special circumstances arising under the Nazi hierarchy" (465). Another advantage of this strategy would be that it would be much more comprehensible to an incriminated member of the Nazi party. The authors then laid out important contributions of Nazi legal theory, the general principles and special features of the *Führerprinzip*, *Unterführerschaft* (the concept of the role of the *Unterführer* level), and *Führungswirtschaft* (the economic system under the *Führerprinzip*).

The second principle of the Nazi state mentioned was that the individual agencies and organizations were largely exempt from legal limitations. For that reason, a *Führer* or *Unterführer* was not dependent on direct instructions; instead, he or she formulated certain principles and guidelines for his subordinates, to whom he or she also delegated their implementation. "One of the reasons why the Nazi system has relied more on the execution of implied policies than on outspoken orders lies in the very illegality or immorality of a great many of its policies" (467). Kirchheimer and Herz mentioned the policy of exterminating Jews, including technical aspects such as the system of deportation and the erection of gas chambers, as a succinct example of this. The authors of Nazi legal theory they cited included Schmitt's political mentor Hans Frank as well as Otto Koellreutter, Werner Best, and Kirchheimer's fellow student in Bonn, Ernst Rudolf Huber, among others. They did not mention or quote Carl Schmitt himself. This may seem surprising, but only at first glance. Although Schmitt had referred to the *Führerprinzip* nothing less than emphatically and multiple times in his Nazi writing,[18] it was right not to mention him here inasmuch as he had in fact not written any elaborated text on interpreting the *Führerprinzip* in administrative law.

Kirchheimer and Herz developed "a new concept of responsibility for actions committed under the Nazi program" (470) on the basis of their analyses. Criminal responsibility for the annihilation of the Jews was to be assigned to all the *Führer*s and *Unterführer*s who, below the uppermost level of leadership, were responsible for functional and regional implementation of the Nazi's policies toward Jews. They were all aware of the general political guideline to eliminate all Jews from European life once and for all. Whether or not they knew about every detail of its practical execution in every individual case "appears immaterial" (470).

Overall, the report is a preemptive rebuttal of the most common excuses later made by the defendants in public and in the trials, namely that they were simply carrying out

17 The authors surely meant the *Führerprinzip* here; see Glossary.

18 See Schmitt (1933d, 103–105), (1933k, 63–68), and (1936f, 343–345).

superior orders and implementing the current law. First, the report explained on the basis of Nazi legal theory that the unconditional application of the *Führerprinzip* precisely did not mean that tasks were strictly delegated top-down and, second, it pointed out that it was important to avoid the pitfalls of the hyped-up hypothesis of all Germans' collective guilt; those responsible for the crimes later often used this hypothesis as an excuse, applying a false generalization.

Neumann and also Donovan took up Kirchheimer's proposal in Nuremberg (see Slater 2007, 400–402). Donovan used it to develop the idea of cross-examining the defendants, bringing them to pronounce themselves and others guilty through their own words. In contrast, Jackson, who lacked any recent experience of cross-examination in criminal trials, preferred to rely on documentary evidence. Jackson prevailed in the ensuing conflict, and Donovan withdrew from the trials. Neumann and his staff remained on Jackson's team for the time being. They now worked on the trial briefs with Telford Taylor and Benjamin Kaplan from the legal department of the Office of the Secretary of War. Kaplan regularly visited or contacted the group of OSS staff. They and Taylor, too, aimed to cast a relatively wide net and to investigate and indict as many potential defendants as possible. But they could not convince either the British or Jackson to agree to this goal.

3. Defending a German war criminal

As soon as Carl Schmitt was released from Soviet interrogation on 30 April 1945, he continued to read and write in his office at his house. He stayed home for the next weeks without even attempting to make a trip to the center of Berlin or to the university. His former university assistants visited him and delivered books while he began work again on his *Nomos of the Earth*. He also penned an exposé in English about his work for the Nazis in which he compared Hitler deceiving him personally to his first wife cheating on him (see Mehring 2014a, 408). His diary of the first days and weeks after the war is filled with antisemitic comments and his fear of "Jewish revenge."[19] In early June, the new Berlin Magistrate, installed by the occupying forces, ended all employment contracts with universities and pensions received through them. As a result, all former professors had to reapply for employment with the university. The same month, Schmitt reported back to the newly appointed rector of Berlin's university, Eduard Spranger, to take up his duties. He was incensed about the university's questionnaire in which Spranger asked for information about his activities under the Nazi regime and refused to fill it in. It was clear to him that he could not expect to return to the university for the time being.

Financially speaking, however, Schmitt did not live in desperate want, let alone go hungry, in the months following the war, which were extremely difficult for most Germans. In July 1945, Friedrich Flick, the biggest entrepreneur in the Third Reich, whose weapons factories had made extensive use of slave labor from concentration camps, had

19 I owe this information to Reinhard Mehring's knowledge about Schmitt's diary between March and September 1945, which has not yet been transcribed in full and is still unpublished. Conversation with Reinhard Mehring on 17 December 2022.

read in *Stars & Stripes*, the magazine for American troops, that leading German industrialists were to be put on trial before an international court (see Quaritsch 1994, 125–133). The description of the group of perpetrators to be tried led him to expect, justifiably, that he would be a defendant sooner or later. Facilitated by a lawyer friend, Schmitt was commissioned to prepare a legal opinion in support of Flick in advance. Flick and his lawyers could not predict the charges against him. They hired Schmitt in case these included participation in and preparation of a war of aggression.

As early as late August 1945, Schmitt delivered his extensive opinion *The International Crime of the War on Aggression and the Principle "Nullum crimen, nulla poena sine lege."*[20] The fact that he was able to complete such a comprehensive text going into the details of international law so quickly can only be explained by him doing preliminary work before the end of the war. Schmitt focused exclusively on the potential charge of participation in a war of aggression, reacting to up-to-date information available prior to the Nuremberg Trials. The statute for the International Military Tribunal of 8 August 1945 had stated that besides war crimes and crimes against humanity, the planning, preparation, initiation, or waging of a war of aggression was a crime against peace, which was to be punished.

Refusing to accept that this last crime was punishable was one of Schmitt's central goals in his legal opinion for Flick, and he explicitly excluded the other two types of war crimes: first, violations against *ius in bello* as codified in the Hague Land Warfare Convention, i.e., violations of the rules of warfare by armed forces, and, second, "atrocities in a specific sense, planned killings and inhuman atrocities whose victims were defenseless humans" (127). Such cruelties were not military actions, he claimed. And he added, "the rawness and bestiality of these crimes transcends normal human comprehension" (128). Such deeds went beyond the scope of the usual measure of international law and criminal law. They proscribed the perpetrator and made him "an outlaw" (128). It is unclear what was to be concluded from these sentences of Schmitt's. Did he mean that it should be possible to punish those committing such atrocities regardless of the existing legal situation, or that they could not be legally prosecuted at all because their atrocities went beyond the scope of the law?

Schmitt countered the hypothesis of the war of aggression contravening international law with his own hypothesis, which he had propounded from the 1920s until the end of the war, namely that according to existing international law, every sovereign state had a *ius ad bellum*; thus, a war of aggression could not be a crime. He discussed the provisions of the Treaty of Versailles, the Geneva Protocol of 1925, and the wording of the Kellogg-Briand Pact in detail. Although the pact condemned unjust war, i.e., war conducted in a manner countering the provisions of the pact, it provided for no other sanction than moral condemnation. Schmitt's interim finding was that international law as of the year 1939 did not include a punishable ban on a war of aggression; thus, Germany's attack on Poland had not been unlawful according to his argument.

If now, after the end of the war, this was viewed differently in international law, then, Schmitt believed, the next question was to what extent was invoking a new state of affairs under international law compatible with the ban on ex post facto laws under the rule of law. Schmitt's ability to transform his views on the rule-of-law principle *nulla poena*

20 See Schmitt (1945). The following page numbers refer to this text.

sine lege in this text is astounding. As a proponent of Nazi justice, he had vehemently rejected this liberal principle and replaced it with the formula *nullum crimen sine poena*, regardless of the specific legal situation. In this legal opinion, he presented himself as an eloquent defender of this principle and called it a "maxim of natural law and morality" (196). He discussed the ban on ex post facto laws in the legal traditions of continental Europe, England, and the US in a detailed and knowledgeable manner. His conclusion was that this principle was undisputed in all three legal traditions. So, even if wars of aggression were considered a crime today, the actors responsible for the German wars of aggression could not be punished for them ex post facto.

In the final part of his legal opinion, Schmitt discussed the question to what extent international law could even apply to principals of and accessories to the (alleged) crime of a war of aggression. Schmitt disputed that individual citizens or institutions of any state could be prosecuted under international law. The only subjects of international law were the individual states. Anyone who had a different view of this matter would have to be able to precisely define the circle of those responsible for a particular war. Drawing a parallel to piracy, he claimed it would be absurd to consider everyone found on board such a ship a perpetrator; that would amount to collective penal custody of the entire population of a country. Wars had to be prepared politically and militarily, for which reason it made more sense to hold the government or the parliament liable. Schmitt supplemented his argument with a structural description of the Nazi regime that was new is his writing. It was "part of the essence […] of the regime that many power groupings fight amongst one another behind the closed façade of the unconditional unity of the regime" (180). Access to the *Führer*, the sole ruler, was decisive for anyone seeking to have influence. The much-touted *Führerprinzip* had become an opaque "antechamber principle. It was here, in the proximity of the *Führer*, that the actual plot in a criminal sense and the actual conspiracy came into being" (180). Prosecution of the members of Hitler's innermost circle alone should be permissible, but not, in contrast, an "economically active ordinary businessman" (186) such as Flick.

The finding of the legal opinion was that Flick was to be absolved from the accusation of participating in a war of aggression on three counts: first, because this offense did not exist in 1939; second, because it should not be applied ex post facto; and, third, because Flick as an individual had not had the right to resist the Nazi war machinery. Incidentally, the steel magnate's concern about being indicted in Nuremberg proved to be justified. Yet it was not until two years later, in April 1947, that an American military tribunal pressed charges in the Subsequent Nuremberg Trials, Case #5. The court charged him and five of the Flick corporation's leading employees with using tens of thousands of forcibly recruited workers from the occupied territories, prisoners of war, and concentration camp inmates in the corporation's industrial facilities and mines and with taking possession of foreign industrial enterprises. During the trial, they presented themselves as victims of the Nazi system. Flick's attorneys did not present the legal opinion prepared by Carl Schmitt to the court because it pertained to a charge that had not been brought and was therefore not needed. Flick was sentenced to seven years imprisonment on 22 December 1947 for use of slave labor, deportation for labor, plunder of property in areas under German occupation, and participation in crimes committed by the SS. He was released in August 1950 and was able to devote himself to his business again.

When Schmitt wrote the legal opinion in the summer of 1945, he had hoped it would help place him at the pinnacle of the legal discussion in Germany once again (see Quaritsch 1994, 142–144). That summer, American prosecutor Robert H. Jackson had actually intended to indict Flick in the first Nuremberg Trial for participating in preparing a war of aggression. I have not found any source material confirming that Neumann and Kirchheimer were involved in this project of Jackson's. Yet it is not implausible in light of the special attention given to Flick in Neumann's *Behemoth*.[21] Jackson, however, was unable to convince the representatives of the Soviet Union, Great Britain, and France of his idea (see Taylor 1993, 77–82). If Jackson had prevailed, then it is highly probable that Schmitt's legal opinion would have been submitted on Flick's behalf; Schmitt might even have served as another defense attorney. He had sought to play a part on this stage where his two former mentors, Hermann Göring and Hans Frank, had also been prosecuted. In the words of Helmut Quaritsch, he may well have viewed arguing the case in Nuremberg against criminalizing the war of aggression in international law as the "high point of his life." (Quaritsch 1994, 144).[22] In reality, his argument remained unnoticed and was published only posthumously in 1994.[23]

Schmitt's legal opinion provokes a number of critical comments, two of which I would like to address briefly.[24] The first concernes his hypothesis that only states are subjects of international law, but not individual citizens such as ordinary businessmen. To him, it followed from this dualistic concept that individual citizens could not commit crimes under international law, either. The flip side of his dualistic position was that citizens had the duty to obey their states in all matters of foreign policy. They had no duty of disobedience or resistance, not even in the event that the government took criminal action. Citizens had the right *not* to resist their governments and could not be prosecuted for supporting their government in a war of aggression. Schmitt again adapted his position to the changed political conditions. For his argument of 1945 contradicted the line of argument in his 1925 article "Die Rheinlande als Objekt internationaler Politik" [The Rhinelands as an object of international politics]. Then, Schmitt had written about the obligation of every citizen to resist rulers who lacked "publicity" and did not rule "in full openness" (Schmitt 1925a, 38). In the political situation of the day, this was meant as a call to resist the French and British occupying forces in the Rhineland after the end of World War I. Comparing Schmitt's legal opinion with this older text, Timothy Nunan commented "that it is notable that Schmitt makes no attempt to subject Hitler's regime

21 Friedrich Flick, the owner of "the biggest German combine," an "outstanding 'finance' capitalist," and a "close friend of Göring" (Neumann 1944a, 614).

22 Another reason why it would have been unlikely for Schmitt to be able to appear as an attorney on the stage of the Nuremberg Trials is that the American military government only accredited lawyers who could prove they had kept a distance from Nazism. Three years later, Schmitt noted in his *Glossarium*: "I would have gladly died had my August 1945 exposition on the criminalization of the war of aggression been able to be published then or during the Nuremberg Trials." *Glossarium* entry of 20 June 1948 (Schmitt 2015, 126).

23 Schmitt included some systematic sections in part four of *The Nomos of the Earth*, see Schmitt (1950d).

24 For more critical questions, see Salter (1999) and Nunan (2011, 17–22).

to the same kind of analysis" (Nunan 2011, 19) as the one he had conducted twenty years earlier.

My second comment is directed at Schmitt's dichtomization of the German war against Poland and the Soviet Union, namely into a war of aggression and a war of atrocities, creating the impression that the two were separate acts. He did not write a single word about the fact that the Germans had killed Poland's political elite in order to destroy the subject of international law called the Polish state, for example. The German attacks in eastern Europe were not wars in which atrocities happened accidentally alongside warfare; rather the atrocities were, from the beginning, an integral component of the warfare conducted by the *Einsatzgruppen*.[25] It was a specific kind of war from the outset: committing atrocities had become the means of warfare and extermination its end.

4. Preparing for the trials

In June 1945, three weeks before Schmitt was commissioned by Flick with preparing the legal opinion, Herbert Marcuse and Otto Kirchheimer were tasked with summarizing the Nazis' plans for dominating Germany and Europe in two reports for the Nuremberg prosecution. The reports were completed by mid-August. In the meantime, the first estimates of the number of Jews murdered (5.7 million victims) had been presented to the prosecution in another report prepared by the group (see Müller 2010, 56). Marcuse's report described how the Nazis had taken over power and prepared for the war, while Kirchheimer dealt with the domestic crimes of the regime.

Kirchheimer's report R&A 3114.2 was titled *Domestic Crimes*.[26] The fundamental problem Kirchheimer attempted to solve in the first part of his report was the objection expected from the Nazis' defense lawyers that the crimes the defendants were accused of were in fact authorized according to the laws of the Third Reich. In the second main part of the report, Kirchheimer provided an overview of the mechanisms of the Nazi regime's organization of terrorism to the extent that they could be deduced from the files secured by the American authorities at the time. Kirchheimer proposed "the principle 'selective retroactivity'" (523) to solve the problem to be expected during the trials. According to this principle, all the laws, amnesties, and policy measures that protected Nazis from the consequences of their crimes were to be specifically rescinded. Before proposing this, he clarified the question of whether the Nazi regime was constitutional. Kirchheimer followed the hypothesis that after 1933, Schmitt, too, had repeatedly proclaimed a revolutionary break with the order of the Weimar Constitution. A similar break had occurred with the defeat of Nazi Germany.

In his deliberations on selective retroactive revision of a defunct regime's legislation, Kirchheimer referred to precedents from various countries, examining in detail how the US had dealt with the Southern states and providing more recent examples from France,

25 The *Einsatzgruppen* were special units under *Reichsführer* of the SS Heinrich Himmler that carried out mass murders during the war to implement the Nazi genocide policy in the German-occupied territories.

26 See Kirchheimer (1945). The following page numbers refer to this report.

Denmark, and Italy as well as from international law. His list of retroactive rescissions of Nazi laws included what was commonly called "racial legislation" as well as the laws to suppress political opposition. Only if these laws lost their validity retroactively would it be possible to prosecute the members of the official repressive agencies such as the *Volksgerichtshof* or the *Militärgerichte* (see List of German Courts). Viewed in retrospect, it is remarkable that Kirchheimer's proposal of selective retroactive rescission corresponded to the ideas of some members of the German resistance against Hitler, even though the two sides were not aware of each others' positions. In 1943, the Kreisauer Kreis resistance group had also called for a retroactive penal provision for "Nazi acts of desecration of the law" (see van Roon 1967, 553–559).

Kirchheimer discussed Carl Schmitt in particular at one point in his report. It was in connection with whether the murders committed by the Nazi regime between 1933 and 1945 might have been covered by the law. He explained that the Nazi government had "indeed attempted in only one instance to justify specifically a series of political murders" (528). Kirchheimer was referring to the *Gesetz über Maßnahmen der Staatsnotwehr* [Law on measures of state self-defense] issued by the *Führer* soon after the purge of July 1934 and which Schmitt had celebrated a few days later in the editorial titled "Der Führer schützt das Recht" [The *Führer* is protecting the law] (see Schmitt 1934e, 199).[27] Kirchheimer quoted Schmitt and commented that such a position was justifiable only "from the viewpoint of the National Socialist doctrine" (529). His fundamental objection was that Hitler, the perpetrator, had made himself the judge in his own case and that the law could therefore not be given any recognition. But then, his line of argument went in a different direction. The regime would never have adopted this law if the majority of the German people had been willing to accept at the time that state authorities could murder their political opponents without a trial. Issuing such a law was, in fact, to be considered as "confirmation of the thesis that the substantive rules of criminal law, including those pertaining to murder, were never revoked under the Nazi regime" (528). Kirchheimer concluded from this that all the other murders during the Nazi regime were automatically not permitted under Nazi law, either, and could consequently be prosecuted.

Whether and to what extent the recommendations put forward by Neumann's group and specifically by Kirchheimer had any effect in the following months can no longer be determined today. In any case, they had only a minor influence on how the trial against the tweny-four individuals identified as major war criminals, which began on 18 October 1945 and took almost a year, was conducted (see Perels 2002). The further details of taking evidence during the 218 days of the trial with more than 5,000 evidentiary documents and films were no longer the responsibility of the OSS team but of an American prosecution team that had grown to almost 2,000 members in Nuremberg and London within a few weeks. Despite Donovan's support, Neumann was unable to convince Jackson of the idea of prosecuting more people involved in the economic aspects of Nazi aggression; this idea had mainly been developed on the basis of preparatory work done by himself, Herbert Marcuse, and Kirchheimer (see Slater 2007, 384–387). The materials Neumann had prepared for Donovan on this matter included Kirchheimer's report titled *Domestic Crimes* (see Slater 2007, 388). Jackson revoked the responsibility of Neumann's group for

27 See Chapter 7, p. 188.

the economic case and gave it to other individuals who were less critical of German big industry. From late summer on, Neumann's group was increasingly marginalized and mainly used as consultants for preparing evidence. For instance, they tracked down film evidence of the destruction of the Warsaw Ghetto later shown in the trial itself.

Jackson repeatedly stated that Neumann's group with its staff in Nuremberg and Washington had done "excellent work of laying the foundation"[28] for the case. Nonetheless, the conflicts became irreconcilable as time went on. In early December 1945, the émigrés in the OSS, including Neumann and Herz, returned to the US from Europe. Before then, conflicts between the American legal experts recruited by Jackson, who as civilians were specialists in stock company law or family law, and the small group of political émigrés from Germany, had intensified, even becoming personal. John H. Herz wrote in his memoirs: "Having young, mostly Jewish whippersnappers from Central Europe peer over their shoulders and into their papers hurt the egos of the American officers, who considered themselves superior" (Herz 1984, 140). When it came to formulating the closing arguments in the case, the group around Neumann and Kirchheimer was no longer involved. All the R&A staff members who were interviewed subsequently complained bitterly in retrospect that their *Guides* had little practical effect.[29] They were often not distributed on the ground or ended up in the occupying officers' wastebaskets. In this sense, the preparations for the Nuremberg Trials that Kirchheimer was involved in were something of an exception, at least in the initial phase.

R&A's recommendations had no impact at all when it came to denazification. Neumann's group followed the theory of domination approach in Neumann's *Behemoth* according to which the mass of the population was powerless vis-à-vis the four organizational pillars of the Nazi regime. Neumann's staff estimated the number of people whose classification as offenders was to be prioritized at about 220,000.[30] They also identified the names of 1,800 business leaders who were considered to be active Nazis and who were to be taken into custody pending further investigations. Contrary to these recommendations, the American military authorities on the ground were out for numbers. As a result, 1.5 million Germans were registered using a comprehensive questionnaire as early as mid-1946.[31]

If the OSS had prevailed with its recommendations, the American denazification measures would presumably have been more successful; their failure was widely deplored. Instead, the responsible authorities were overburdened with bureaucracy over the following years. This necessitated multiple waves of amnesties, which in turn mainly benefited those considered more serious offenders after many members of the Nazi party with much less important positions had already been sanctioned. Because he worked for the OSS/State Department, Kirchheimer was forbidden to make public

28 Letter from Robert Jackson to Franz L. Neumann dated 14 August 1945. Quoted in Slater (2007, 259).

29 See Erd (1985, 151–182), and John H. Herz in a conversion with the author on 15 November 1985.

30 See Söllner (1986a, 153–155) and Katz (1989, 45–49).

31 The questionnaire distributed in the American zone totaled 131 questions. The prominent right-wing German author and screenwriter Ernst von Salomon took this questionnaire as the point of departure for his derisive autobiography, which became one of the most widely read books in post-war Germany.

comments on these matters. After leaving the OSS, John H. Herz called denazification policy a "fiasco" (Herz 1948, 569). Kirchheimer most probably shared that view, since one of his closest friends in Germany, Richard Schmid, a Social Democrat and senior official in the justice administration in Stuttgart, also published a radical critique that was based on internal information from military government sources (see Schmid 1948). Kirchheimer, who had visited him in Stuttgart shortly before the article was written, was probably the main source for this.

5. Conclusion: Scenes of an indirect dialogue

The immediate postwar situation formed an ironic reversal of Kirchheimer and Schmitt's roles. Schmitt, who from 1933 onward had supported the Nazis' merciless criminal judiciary system and their terror against members of the opposition, now took on the role of a defense attorney and prepared himself mentally for this role in Nuremberg. Kirchheimer, who had once been incarcerated by the Nazis, now joined the team of prosecutors against German war criminals. Because of his expertise in analyzing the Nazi regime, he was able to make major contributions to the legal justification and strategy of the Nuremberg Trials.

In some parts of the lives of Kirchheimer and Schmitt, the year 1945 marked new similarities; in others, their roles had switched. Both were prepared for the defeat of the German Reich from 1943 on. Both were aware of the German crimes against the Jews in Europe, albeit not to their full extent. The differences between the two of them are also obvious. Schmitt took a personal wait-and-see stance and made no connections with German resistance groups; Kirchheimer became an active member of the group later named "The Frankfurt School goes to War." In his public appearances, Schmitt showed complete loyalty to the regime until its final day; Kirchheimer intensified his observation of German domestic politics. Schmitt turned his academic interest toward the history of political ideas; Kirchheimer wrote for the day-to-day administrative purposes of American government and military agencies. Schmitt had lost his prestigious job as a professor, Kirchheimer had a well-paid tenured position for the first time in his life. And, finally, Kirchheimer was suddenly on the side of the victors and Schmitt on the side of the defeated.

Kirchheimer could not have been aware of Schmitt's legal opinion for Flick; it was not until later that the document had circulated among Flick's lawyers during the trial in 1947 and among selected legal experts from the same Nazi milieu. It was not made known outside these almost conspiratorial circles (see Quaritsch 1994, 137–141). Kirchheimer had a very good idea how Schmitt's mind worked and so it is not at all astounding that his ideas about the best prosecution strategy, which he had previously committed to paper at the OSS, read like responses to some of the arguments in Schmitt's legal opinion. Key to his legal opinions for the OSS is his discussion of selective retroactive rescission which countered the "rediscovery" of the liberal *Rechtsstaat* in Schmitt's legal opinion for Flick. Kirchheimer's considerations of how to react to potential defendants' excuses such as superior orders or ignorance can also be read like direct responses to Schmitt. Kirchheimer's strategy was to turn to the legal theory of Nazi Germany and, in particular, to the

Führerprinzip for guidance as the basis for his purely immanent argumentation. From today's perspective, Kirchheimer anticipated what was to be the defendants' main line of defense in the Nuremberg Trials and the trial against Adolf Eichmann, one of the major organizers of the Holocaust, as well as the prosecution's weak point: invoking orders from superiors to shift responsibility away from themselves. What may be more important in the context of the relationship between Kirchheimer and Schmitt is that if one takes Kirchheimer's considerations for the evaluation of Schmitt's activities as a yardstick, then his deeds for the regime were reprehensible but Schmitt was still not a war criminal who had to be prosecuted.

Kirchheimer's personal motive for participating in preparing the Nuremberg Trial was probably the same as John H. Herz's. In his memoirs, Herz wrote that it was not about "satisfaction, a satisfying sense of revenge." What mattered to him was "that the world, and especially the Germans, should get a clear picture of what had happened" (Herz 1984, 142). Even though Kirchheimer in his US exile in August 1945 was fully aware of the war crimes and mass murders committed by the Germans, he stood by his assessment that the majority of Germans had been opposed to the Nazis. Hitler's government had not had a majority in 1933 and had only been able to establish itself in power because of its "system of terror" (Kirchheimer 1945b, 523). This view of Kirchheimer's does just as little justice to the crimes of the *Wehrmacht* as to the fact that the vast majority of Germans did indeed support the regime and its crimes.

Kirchheimer expected that with Germany's military defeat, the majority's rejection of the Nazi system had already become stronger than before. If, he thought at the time, it were possible to successfully eliminate the Nazis and the functional elites that had chosen to conspire with them, then little would stand in the way of reestablishing democracy in Germany. Kirchheimer did not mention Schmitt's name in this context. But it logically follows from Kirchheimer's considerations that Schmitt was among those who had to be categorized as someone banned from regaining a position in the functional elite of a future German democracy. In 1945, Kirchheimer had high expectations with respect to the future of German democracy. He pushed to revitalize democratic parties and organizations. Carl Schorske and H. Stuart Hughes, Kirchheimer's American R&A colleagues at the time, reported independently of each other in retrospect that Kirchheimer—like Neumann—supported democratic socialism at the time and placed their hopes in a rapid revitalization of the trade unions and social democracy as forces of reform (see Erd 1985, 185–199). Viewed from today, his optimism seems naive since it fails to take account of the high intensity of ideological indoctrination and the complicity of the majority of Germans with the Nazi crimes.

Although Kirchheimer failed in his political ambitions, his idea of a political compromise of four ruling groups, which Neumann had taken up in *Behemoth*, curiously enough has a bureaucratic legacy to this day. The Subsequent Nuremberg Trials needed to have an immense number of files compiled and sorted for the proceedings. Just over 35,000 pieces of evidence were ordered in four series. The four series correspond exactly with

the structure and the names of the ruling groups of the four-headed *Behemoth* and have served as the organizational principle of the archives for these trials ever since.[32]

32 Raul Hilberg in a conversation with the author on 2 December 2000. See also Hilberg (2002, 82) and Wildt (2023, 68).