

**RETROSPECTIVITY AT NUREMBERG:  
THE NATURE AND LIMITS OF A SCHMITTIAN ANALYSIS**

**By**

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## **CHAPTER 4**

### **THE UNRAVELLING OF THE SKEIN**

## CHAPTER 4

### THE UNRAVELLING OF THE SKEIN

‘Normativist thinking can appeal to being impersonal and objective whereas a decision is always personal and concrete orders are suprapersonal.’<sup>1</sup>

#### ‘The whither’: concrete-order thinking

This chapter addresses the development in Schmitt’s political thought after the inception of the Nazi regime and focuses on his declared disaffection with decisionism and his embrace of concrete-order thinking.<sup>2</sup> More specifically, it grapples with Schmitt’s newly-postulated conception of law as a flexible and organic entity, spontaneously emanating from institutions such as the Army, State bureaucracy and most ominously, the leadership, discipline and honour, supposedly encapsulated in the Führer.<sup>3</sup> Schmitt claims that concrete-order thinking heralds the advent of a juristic order, discrete and distinct from any previous jurisprudential tradition but is this assertion sustainable?

What is clear is that Schmitt chiefly attributes the collapse of the Weimar Republic and the consequential political tensions and unrest to the inadequacies of a legal-positivist interpretation of the textual constitution.<sup>4</sup> But does this vilification of positivism survive the transition from liberal *Rechtsstaat* to fascist totalitarianism? Is decisionism still an efficacious guarantor of civil order? If not, what replaces both or either of the two theories that principally pre-occupied Schmitt during the Weimar period? In the new reality confronting post-Republic Germany, how does he re-conceptualise the origins of law-making, the legitimacy of the legal order and the authenticity of legal interpretation and application? Is Schmitt now receptive to what he perceives a more ‘progressive’ mode of legal thought and if so, does he sacrifice his decisionist theory to this process? How does Schmitt seek to justify the reprehensible regime into which the

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<sup>1</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 49. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

<sup>2</sup> *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20: Concrete-order thinking is a system wherein ‘one is judged and held accountable not according to an abstract universal norm but according to the standards of the particular concrete order to which one belongs’.

<sup>3</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 82, 97ff.

<sup>4</sup> *Supra*: Gottfried *Carl Schmitt Politics and Theory* (New York and London: Greenwood Press, 1990), 77: ‘Was Schmitt....a conservative concerned with defending a political framework in which the concrete order of society can be preserved? Germany’s regime had been changed irreversibly by the Enabling Act 1933 and the concept that Schmitt thought came closest to describing the new government was one he had presented in 1921: ‘sovereign dictatorship’. Germany’s dictator was no longer obliged to restore the legality or constitutional order of the Weimar Republic but he was, as Schmitt conceptualised his duties compelled to maintain public tranquillity and the undisturbed operation of civil society’.

socio-political maelstrom of Nazi Germany propels him and his compatriots? And is it possible to extrapolate from the theoretical devices he employs any insights into resolution of the dilemmas that bedevil retrospective crime creation and punishment?

In traversing the portal of the Nazi era, manifest again is the inextricable link between the empirical challenges the new political order generates and the consequential evolution in Schmitt's legal and political philosophy. Does a degree of ambivalence, however, cloud the clarity of the characteristic contingency Schmitt generates between concrete reality and hypothetical resolution? Plausible as it is to interpret his support of the institutions that underpin the Nazis' specific brand of governance as a genuine - if tragically misguided - affinity with the trappings of despotism, is not the motivation for his alignment with National Socialist doctrine, or worse, intellectual justification for it, profoundly meretricious?<sup>5</sup> If the latter, it is difficult to avoid the conclusion that some, at least, of Schmitt's professed perspectives during this period are purely opportunistic. And even if Fascist Germany does perversely engender within Schmitt an intrinsically *non-fascistic* mode of thinking – one that is not necessarily tarnished by the particular backcloth against which it evolves – it is still only through its reification in the institutions of National Socialism that its situation-specific orientation emerges. In short, whilst his *formulation* of a third type of juristic thought - as explicated and explored in the mid-1930s – is capable of reconfiguration, his contemporaneous deployment of it is not so readily divorced from the perversions of Nazism.

What follows must, therefore, be interpreted against the pall of fascism. Whether Schmitt's philosophical experiment is equally ephemeral or, conversely, capable of a less tarnished and wide-ranging application remains to be seen. Has Schmitt, at last, alighted on an epistemological resolution of the abiding antinomy between law and power? Is his new mode of juristic thought able to found a 'legal order', neither on the groundless norm nor the vagaries of a sovereign decision but on a conceptualisation endowed with the prospect of stability without stagnation; evolution without revolution; harmonisation of law and power in realistic symbiosis. And does his *On the Three*

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<sup>5</sup> See Tracy B. Strong *Foreword to The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition, Berlin: Duncker & Humblot, 1932), xxiii, where she questions whether Schmitt was blinded by ambition, unaware of what the Nazis were doing or able to persuade himself that the opponents of Nazism were, in fact, enemies who posed a threat to German ideology.

*Types of Juristic Thought (1934) (On Three Types)*<sup>6</sup> herald a definite methodological shift, both in terms of his stance towards positivism and decisionism and the synthesis of what Schmitt hails a new and inspirational jurisprudential gateway to the future?<sup>7</sup> It is the response to these and related dilemmas that may yet prove crucial in surmounting the fateful dichotomy between natural law and legal positivism that infused the Nuremberg process and the taint of retrospectivity that continues to besmirch its legacy.

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<sup>6</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*.

<sup>7</sup> See, however, *supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*, 45 where Schmitt possibly presages, in very embryonic form, his later formulation and adherence to concrete order thinking: 'But it is a sociology of the concept of sovereignty when the historical-political status of an epoch is shown to correspond to the general state of consciousness that was characteristic of western Europeans at that time'.

### The decimation of legal positivism

Pivotal to his analysis is the claim that legal positivism is not '*original and distinct but a legalitarian hybrid of decisionism and normativistic legal thinking*'.<sup>8</sup> As a concept of state, positivism Schmitt argues is '*suspended between the decisionism of the dictatorial state construct of Hobbes and the normativism of later rational-law thinking; between dictatorship and the bourgeois Rechtsstaat*'.<sup>9</sup> Not satisfied with the embrace and exploitation of the political stability that the omnipotent sovereign of a decisionist framework guarantees, positivism proceeds both to absorb the sovereign within the legal order and replace the sovereign entity with an impersonal, legislative law-maker. As the subjectivity of the personalised will is sacrificed to the ostensible objectivity of the general norm, this transition signifies the irreversible degeneration of decisionism into the pallor of positivism.<sup>10</sup>

An unfortunate conflation with normativist thinking produces an '*increasingly sharper separation of norm and reality; ought and is; rule and concrete state of affairs*'.<sup>11</sup> What commences as vibrant facticity, with its emphasis on the concrete reality of everyday life, convergence with normativism transforms into an unfruitful obsession with the norm: the consignment of normativity and facticity to '*completely different planes*'.<sup>12</sup> Because the '*ought*' lies outside of the '*is*', the '*matter of factness and objectivity of pure normativism leads to an order-destroying and order-dissolving juristic absurdity*'.<sup>13</sup> The conjunction of decisionism and normativism within a positivistic mode of thought fatefully excludes every metajuristic viewpoint; each extra-legal consideration, whether '*such extralegality appears as divine, natural or rational law*'.<sup>14</sup> Irrespective of its ostensible values of firmness, inviolability, security and calculability,

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<sup>8</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 22.

<sup>9</sup> *Ibid*: 78; see *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 194: Balakrishnan observes that for Schmitt, decisionism could not be an alternative to positivism because like positivism, it holds that a legal rule is valid, not according to a substantive anterior criteria of legitimacy but in part simply because it is enacted. Positivism was subsumed under the wider category of normativisation. Positivism was a hybrid of normative and decisionist thought.

<sup>10</sup> *Ibid*: Schmitt, 65: 'The jurisprudential foundation of this legalitarian positivism has passed quickly into three phases: one had first of all to adhere to the will of the lawgiver; then, in order not to fall into subjective and psychological analyses, appear to have spoken objectively the will of the law; finally one had to declare only the law itself, as a sufficient norm, to be authoritative'.

<sup>11</sup> *Ibid*: 50.

<sup>12</sup> *Ibid*: 52.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*: 63.



what intrinsic merit does positivism possess when it cannot even define or justify its own self-professed quality of *positivity*?<sup>15</sup>

All the lessons Schmitt believes have emerged from the Weimar debacle, he employs to telling effect here. Imposition of unconditional subjugation to the norm - and nothing but the norm - serves to cripple the regime's flexibility of response. A pure normativism that necessarily seeks to deduce the positive norm from a norm superior to the positive is simply unrealistic.<sup>16</sup> To tear juristic thought free from every contextual meaning is untenable, for '*legal and jurisprudential thought expresses itself only in connection to a historical, concrete, legal order*'.<sup>17</sup> Free-floating jurisprudence characteristic of positivism produces a relativism that can only bring positivism into a sharper contrast to '*everything that is ideological, moralistic, economic or political*'.<sup>18</sup> This exposes its absurdity. Shorn of residual worth, positivism is too jejune to survive. Disintegration of this ill-fated jurisprudential tradition is fortuitously concomitant with the demise of the liberal *Rechtsstaat* that coheres with it. But if legal positivism so patently fails to provide a viable basis for the establishment and ongoing efficacy of the type of legal order Schmitt now envisages, does decisionism provide any elements he can more readily salvage?<sup>19</sup>

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<sup>15</sup> See *ibid*: 65.

<sup>16</sup> See *ibid*: 69.

<sup>17</sup> *Ibid*: 73.

<sup>18</sup> *Ibid*: 70.

<sup>19</sup> Cf. *supra*: Wolin 'Carl Schmitt, political existentialism and the total state' *Theory and Society*, Vol. 19 (1990), 389-416: 'all attempts to transcend without preserving the ethico-political legacy of liberalism invite historical regressions of the highest magnitude'.

### Disenchantment with decisionism?

*On Three Types* includes a more diagnostic recitation of the facets of decisionist theory that Schmitt has previously explicated and eulogised. With a degree of ironic acerbity decisionist thinking, Schmitt observes, is unique in the facility it affords to forge a 'positive connection to a definite factual point of time in which from a previous absence of a norm or absence of order springs forth a positive sole noteworthy positive law which is then supposed to have additional value as positive norm.'<sup>20</sup> Linkage to the concrete reality, coupled with the flexibility this denotes, claims to elevate decisionism over its erstwhile rival: legal positivism. Fundamental to a legal order founded on an originary decision is 'an act of will which, as decision, actually creates *Recht initially*',<sup>21</sup> regardless of the conformity of the decision with pre-existing norms. The sovereign decision is 'the absolute beginning and the beginning is nothing but sovereign decision'.<sup>22</sup> It is this decision that creates 'right law' out of nothing, even if it contravenes pre-existing norms.<sup>23</sup> Because the decision always takes precedence over the norm, decisionist theory precludes the otherwise inexorable conflict between norm and decision. This avoids the absurdity inherent in 'a logically consistent normativism'.<sup>24</sup> What alone ensures the validity of command is 'the authority or sovereignty with which the command is given'.<sup>25</sup> Affirming his earlier declared position, the classic and foremost exponent of the decisionist model is Hobbes, the first, for Schmitt, to conceptualise the sovereign simply as 'one who acts in a sovereign manner'.<sup>26</sup> Whether the sovereign enjoys authority of legitimate or longstanding provenance is irrelevant within a genuinely decisionist mode of thought, for 'it is the decision which first establishes the norm as well as the order'.<sup>27</sup>

Manifest is the latitude this accords whoever possesses *de facto* power to impose the force of the normatively-unsubstantiated sovereign decision on those less fortuitously

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<sup>20</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 70.

<sup>21</sup> *Ibid*: 59.

<sup>22</sup> *Ibid*: 62.

<sup>23</sup> See *supra*: Schwab *The Challenge of the Exception*, 120: Schwab elucidates the key distinction, for Schmitt, between normativism and decisionism. In normativism, laws, not men govern. The norm is isolated and made absolute. Objectivity is the key. For normativists, norms produce right. In contrast, in decisionism, Schmitt says that law, in the form of decision, arises from a normative nothing. It is this first decision which produces order, peace and right.

<sup>24</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 59.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid*.

<sup>27</sup> *Ibid*: 62.

endowed. But how does Schmitt perceive his decisionist theory to dovetail with the embryonic National Socialist regime? Though the architects of Nazism engineered ascent to power through outward compliance with the legal constitutional provisions enshrined in the Weimar Constitution, this formalistic adherence was short-lived. To shore up their regime, the Nazis swiftly resorted to situation-specific measures geared, in part, to ruthless repression of those inimical to, or even at ideological variance with them. Seemingly compatible with this new-found reliance on legal indeterminacy, does not Schmittian decisionism epitomise the ideal jurisprudential methodology to buttress the Nazis' quest for ubiquitous dominance?<sup>28</sup>

Surprisingly, Schmitt does not agree.<sup>29</sup> Indicative of a sudden and possibly disingenuous disillusionment with the perspective he has hitherto nurtured and extolled, decisionism:<sup>30</sup>

'Once established, [it] nevertheless works against the will of the one who had established it; otherwise, it could not create the necessary certainty which one has come to expect from the state.'<sup>31</sup>

What predicates this theoretical switch? With his Weimar-era glorification of decisionism as a putative stabilising influence, Schmitt appeared to entertain little compunction about its utility when the preservation of the Republic was at stake. Commendation of unbridled presidential authority, with a concomitant suspension or abrogation of legal-constitutional provisions, left no doubt as to Schmitt's perception of the relative merits of decisionist and liberal-positivist theory. But this leaves a vital question unanswered. Had the liberal *Rechtsstaat* ever been subjugated to the will of an authoritarian president to the extent Schmitt exhorted, would this have persuaded him to resile from decisionism *before* the collapse of the Republic? For would not a series of *coups d'état* against the incumbent president have equally jeopardised Schmitt's

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<sup>28</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195: 'The legal theory of the Nazi period without exception sought to provide formulae to expedite the *ad hoc* suspension or nullification of legal rules'.

<sup>29</sup> See *supra*: Scheuerman *The End of Law*, 124: 'Schmitt pulls back from wholesale decisionism. A consistent decisionism would simply exacerbate the ills of liberal legalism, making a virtue out of liberal's most telling jurisprudential vice'.

<sup>30</sup> See *ibid*: 125: Scheuerman claims that Schmitt's attempt to criticise decisionism should be read with a grain of salt.

<sup>31</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 69.

agenda? And would not civil order have been as fragile in the hands of successive quasi-dictators, as with any other mode of governance, liberal or otherwise?

Feasible though it may be to attribute Schmitt's *On Three Types* methodological shift to a *genuine* desire to moderate his late-Weimar authoritarianism,<sup>32</sup> is it not perhaps equally plausible to presume that he appreciates the dangers latent within decisionist theory to the post-inaugural stability of a new political order? A potent double-edged sword, decisionism comprises an invaluable device to justify the legitimacy of whatever regime is *currently* in place. Yet, it is ambivalent enough to authenticate any *substitute* regime – even one diametrically contrary to the former – with possession of the political premium of power. What is required is simply the sovereign decision of any entity with sufficient brute force to enforce a new mode of governance. Whoever wields authority to optimal effect prevails. This is an outcome that decisionist theory not only supports but renders inevitable. A philosophical model that professes to ascribe paramount significance to the power of decision ultimately founders on its own indecision, with the consequential imperilment to the integrity of the legal order this entails. This outcome Schmitt could perhaps have overlooked against the backdrop of any regime less virulent than National Socialism. But lest the Nazis elect to exact revenge against its author, he dare not promulgate a theory with the capacity to facilitate the overthrow of such lethal overlords:

'Perhaps Schmitt resiles from decisionism because an authentic decisionist model of interpretation would leave legal actors free to act against National Socialist principles as well as in favour of them. This would not have sat well with the Nazi agenda.'<sup>33</sup>

Whatever Schmitt's rationale for the renunciation of decisionism, no longer does he deem it a viable alternative to the legal positivism he has long since discarded.<sup>34</sup> Neither the sovereign decision – whether or not imbued with, or authenticated by, the will of the

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<sup>32</sup> For a sympathetic interpretation of Schmitt's possible motivation, see *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 14: 'Schmitt had to see the limits of decisionism when confronted by Hitler, a leader of a dynamic revolutionary movement unrestrained by the values, traditions and institutions that conservatives like Schmitt cherished'.

<sup>33</sup> *Supra*: Scheuerman *The End of Law*, 126.

<sup>34</sup> Curiously, perhaps, it was not only decisionism from which Schmitt resiled during the Nazi era. His visualisation of the exception, Schmitt likewise modified, to an extent, that his *The Plight of European Jurisprudence* (1943) suggested that the exception should be read not in terms of existential facticity, but 'as a purely juristic category'. Ten years too late, this tentative concession that concrete circumstances could not, of themselves, vindicate an otherwise ungrounded decision to suspend a normatively imbued legal regime, far less support an entire legal order. On this point see Carl Schmitt 'The Plight of European Jurisprudence' *TELOS* No. 83, (Spring 1990), 35-70.

people - as a transcendent foundational moment of a decisionist mode of thought nor the hypothetical hierarchically highest norm of normativist theory possesses the substantive anterior criteria of legitimacy he now considers crucial. In this appears a tacit realisation on Schmitt's part that - from the specific perspective of the postulated origins of the legal order - positivist and decisionist thinking are more closely affiliated than he has ever previously been disposed to concede. Because both lack a legitimate foundation, neither can guarantee the durability of the legal order. This is what impels Schmitt to seek a third alternative;<sup>35</sup> one that he contends derives its authenticity neither '*ex nihilo from the legislative power of the state* [presumably intended to encompass both the groundless sovereign decision and the equally ungrounded legal norm] *nor from a natural law valid before the establishment of the legislative power*'.<sup>36</sup>

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<sup>35</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 31: 'On Three Types shows the shift in Schmitt's decisionism and also offers his clearest and most elaborate critique of normativism and positivism'.

<sup>36</sup> *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195.

### The quest for a third way

Again, it is the empirical backdrop that is both catalyst and resource for the synthesis of an outcome that finds favour with Schmitt.<sup>37</sup> No longer immersed within the dualistic structure of the political unit of the liberal *Rechtsstaat*,<sup>38</sup> Schmitt recognises that what now exists is a tripartite order of state, movement and people in which '*the state no longer has a monopoly on the political*.'<sup>39</sup> Pivotal to the foundation of this innovative regime is a jurist who can '*rise above and overcome the earlier positivistic tearing apart of law and economy, law and society, law and politics*'.<sup>40</sup> Only then is the Leadership Principle integral to the Nazi regime able to flourish. If a tawdry, normativist mode of thinking would have reduced the Fuhrer of the new order to '*a duly authorised state organ*',<sup>41</sup> with the concomitant diminution of authority and autonomy this connotes, how is Schmitt to address this quandary?

The solution lies in the concept of concrete orders. Intent for once on pursuing a reconstructive rather than deconstructive agenda, what attributes does Schmitt detect within concrete order thinking that he insists both normativism and decisionism lack? And to what extent does his, arguably, enforced 'affiliation' with the tenets of National Socialism influence the empirical deployment of his new mode of thought and thereby inhibit or distort the potentiality embedded within it? Central to an understanding of this formulation is his assertion that:

'Every jurisprudential thought works with rules, as well as decisions and with orders and formations. But only one can be the ultimate jurisprudentially formed notion from which all the others are always juristically derived: either norm (in the sense of rule and statute), or decision, or concrete order.'<sup>42</sup>

Distillation of these three types of juristic thought into rule and statute, decision and concrete order invokes inquiry into the rank to be conferred upon each. It is this that

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<sup>37</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195 where Balakrishnan comments that Schmitt's 1933 criticism of the statist conception of law is inexplicable merely as a concession to the political climate of the time.

<sup>38</sup> See Gary Ulmen 'Between the Weimar Republic and the Third Reich: Continuity in Schmitt's Thought' *TELOS* No. 119, (Spring 2001), 18: 'What had happened was that the dual structure of the state promoted by 19<sup>th</sup> century liberalism, based on the antithesis of the state and the individual, state power and individual freedom, state and society had been replaced by a tripartite structure. Political unity and public life were now organised into three distinct orders: the state which constituted the "political-static" part; the movement (the Nazi Party), which constituted the "political dynamic" part; and the people, which constituted the "unpolitical" part'.

<sup>39</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 97.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid*: 55.

<sup>42</sup> *Ibid*: 43.

determines the order of succession ‘into which one is deduced from the other or traced back to the other’.<sup>43</sup> Tracing the provenance of concrete order thinking to the Germanic ethos of the Middle Ages bolsters Schmitt’s inclination to elevate this mode of thought over reliance on either norm or decision. Jurisprudential practice depends on persistent, unavoidable and concrete suppositions developing ‘directly out of the concrete assumptions of a presumed natural condition’.<sup>44</sup> Because concrete orders are, in their essence, not immutable but in a state of constant permutation moulded by such influences as from time to time prevail, the suppositions that respectively derive from each concrete order must also necessarily vary according to the era and nation that spawn them.<sup>45</sup> As such, it is implicit that *universalistic* application of the *same* concrete order thinking may not be apposite. Accountability before the ‘law’ is governed not by a universal legal norm but ‘according to the standards of the particular concrete order to which one belongs’.<sup>46</sup> What matters above all is *nomos*, which ‘like law does not mean statute, rule or norm, but rather *Recht*, which is norm, as well as decision and above all order’.<sup>47</sup>

Components rather than initiators of the legal order, norm and decision operate as regulative devices only within the parameters prescribed by the regime that accommodates them. Whether active in tandem or isolation, neither norm nor decision suffices to create an authentic legal order. Concrete order and formation thinking is now the only viable option over otiose modes of thought, whether decisionist, normativist or the legal positivism that is the amalgamation of both:

‘The mere restoration of a concept of institution of institutions overcomes both the previous normativism as well as decisionism and with it the positivism composed of both. For the institutional mode of thought, the state itself is no longer a norm or system of norms nor a pure sovereign decision but the institution of institutions in whose order numerous others, in themselves autonomous institutions find their protection and order.’<sup>48</sup>

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<sup>43</sup> *Ibid*: 44.

<sup>44</sup> *Ibid*: 46.

<sup>45</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20: ‘Legal norms, rules, regulations and decisions must grow out of the intrinsic way of life within each concrete order and speak to its values and needs. For concrete order thinking, law must always be conceived of institutionally but also flexibly so that law reflects the existing but evolving social reality’.

<sup>46</sup> *Ibid*.

<sup>47</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 49.

<sup>48</sup> *Ibid*: 88.

Beyond doubt, therefore, is the vital role Schmitt allocates to concrete orders but how does he define or clarify their composition. Arguably the '*least detailed and developed part of his work*',<sup>49</sup> what is clear is his disapprobation of the omnipotent Hobbesian state.<sup>50</sup> It is this leviathan that consumes the very foundation of concrete orders and institutional legal thinking by its propensity to set aside or relativise '*traditional feudal, legal and ecclesiastical communities, hierarchical stratification and inherited rights*'.<sup>51</sup> What Schmitt appears to commend is recognition of collectivities that develop organically from the concrete circumstances of the age. Preferable it is to establish and uphold a sense of belonging to these groupings - whether kin in a clan, clergy in a church, soldiers in an army, members of political movements, even nations within an established inter-state order – than to cling to an unwavering adherence to a closed system of norms or an assorted agglomerate of putative natural rights. Crucially, concrete orders of the type Schmitt conjectures '*can be reduced neither to the functionalism of predetermined laws nor to contractual regulations*'.<sup>52</sup>

Paying homage to Maurice Hauriou for his treatment of the French administrative organism as '*a unit living according to its own laws and inner discipline*',<sup>53</sup> Schmitt highlights what he considers the merits of a concrete jurisprudential consideration of an orderly state administration: jurisdictional authority; a hierarchy of offices; inner autonomy; internal counterbalances of opposing forces and tendencies and foremost of these, honour and discipline.<sup>54</sup> With particular emphasis on the judiciary; the criminal law system; the practice of government administration and the Prussian Army, Schmitt

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<sup>49</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 30.

<sup>50</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195: 'Schmitt produced no answer save for his vague reference to concrete orders as the only way to understand immanent principles of legitimacy within a legal system'

<sup>51</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20.

<sup>52</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 54. The relevance of concrete-order thinking, in the context of the state of international relations prevailing in Europe until the end of the 19<sup>th</sup> century, is explored *infra*: Chapter 5 in conjunction with Schmitt's stance towards international law.

<sup>53</sup> *Ibid*: 87. The great codifications of Continental doctrine and practice Schmitt contrasts with the English case-law system (*Fallrechts*) which he describes as autochthonous and insular: see *ibid*: 85-86: the English system would only become compatible with concrete order thinking 'if judges were to be bound neither by the norm underlying the decision of a previous judgement nor by a previous judgment but to the case as such.' It is the case itself as a concrete decision which is to be taken as binding and not the rules/norms applied in the case. How workable this would be in practice is questionable for it appears a recipe for indeterminacy and arbitrary decision making; see also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195: 'Schmitt said that he admired French institutionalism – a language in which law could be understood non-normatively as the transparent expression of the dynamic representatives of political institutions or 'concrete-orders' which precede and form the necessary presupposition of legal reasoning'.

<sup>54</sup> *Ibid*: Schmitt, 88.



seeks to restore such institutions to a place of honour.<sup>55</sup> Though all support the National Socialist juggernaut, it is the last two that Schmitt specifically identifies as '*too firm to allow their intrinsic right to be degenerated by normativistic or positivistic legal thinking*'.<sup>56</sup>

Common to every concrete order unit is the leadership concept with its immanent connection to discipline and honour. This, in itself, is antithetical to a normativistic-constitutional thought that requires every jurisdiction to be stringently bound to the norm and is, in consequence, divorced from the notion of leadership.<sup>57</sup> Obsolescent is the concept of a legal system '*created by or founded upon rules and regulations governing the relationship between individuals in society*'.<sup>58</sup> Unlike '*the liberal constitutional, power-separating, normativistic way of thinking of a bygone individualism*'<sup>59</sup> it is the new sense of commonality and communal life within concrete-order thinking that evokes true allegiance to the leader. The value of this to a nascent regime, its acolytes and conscripts collectively deferential to the *leadership principle* – the one by choice, the other by force – is too glaring to ignore. What are paramount now are such rules and regulations that are derived from the already existing social order.<sup>60</sup>

Nowhere, however, does Schmitt clarify what degree of longevity qualifies the social order as a 'concrete order' capable of generating its own particular legal requirements. If even the novel National Socialist Social Honour Court, without detailed rules and norms, possesses '*the essential elements of a new community and its concrete order and formation of life*',<sup>61</sup> then does concrete order thinking offer any higher guarantee of

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<sup>55</sup> See *infra*: this Chapter, for a discussion of Schmitt's conceptualisation of the judiciary as a concrete order.

<sup>56</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 81.

<sup>57</sup> *Ibid*: 82.

<sup>58</sup> *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20.

<sup>59</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 82.

<sup>60</sup> See *supra*: Scheuerman *The End of Law*, 123: '...the concrete order theory as developed by Schmitt between 1933 and 1936 is revealing for two main reasons. First, it represents the perfect theoretical expression of Schmitt's hostility to liberal conceptions of codified general law. Its underlying insight is that society needs to be conceived as a series of variegated communities or "orders" having highly specific needs resistant to codification by general legal norms or concepts. For Schmitt, it is inappropriate to apply a liberal model of a legal system, in which law is supposedly modelled on a set of calculable traffic regulations, to complex, situation-specific institutions such as the family or workplace...Second, the theory of concrete orders points the way towards Schmitt's quest to articulate a post-liberal conception of legal determinacy, while building on his analysis of the irrepressible indeterminacy of liberal general law'.

<sup>61</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 95.

certainty or security than the decisionism it purports to supersede? How does it impact on the judicial interpretation and application of legal norms? And to what extent does the interrelationship between the three types of juristic thought identified by Schmitt in 1934 (normativism, decisionism and concrete orders) and his perception of *judicial discretion* shed light on his *metamorphosis* from tentative Neo-Kantian to concrete order advocate? Or in contrast, illuminate a *seamless* thread that connects his pre-Republic experimentation with an embryonic brand of decisionism to his Nazi-era exposition of an institutional mode of thought?

## Judicial discretion within the three types of juristic thought

### (i) Through the lens of a normativist mode of thought

Flirtation with the first, normativism was brief indeed as Schmitt found ample grounds on which to reject the model of judicial interpretation it championed. Nowhere in his conceptualisation of an authentic legal system did Schmitt reserve any place for the positivistic insistence on judicial subsumption to the norm. Judges were instead encouraged to exercise an element of indifference to the content of the norm; '*a dimension of adjudication that transcends the previously established norm.*'<sup>62</sup> As mentioned earlier, the legal norm had utility only insofar as it provided guidance as to the stance likely to be adopted by a hypothetical arbiter, categorised as the empirical type of a modern legally trained jurist.<sup>63</sup> Given this concession that an agglomeration of non-homogenous judges could not be expected all to speak with one voice, '*the normativistic liberal focus on the relation between norm and judge had to be jettisoned for an emphasis on the relation between legal decision makers.*'<sup>64</sup>

This was the best alternative that Schmitt could conjure to secure the legal determinacy which he claimed that positivism had arrogantly – and with rank self-delusion – appropriated for itself. In this, like so many other facets of the purportedly gapless formalism it promulgated, legal positivism was found wanting. A legitimate outcome to an individual case was not achievable where the judge was expected to apply the relevant legal norm in a sterile vacuum with all external influences expediently – and, in Schmitt, view, unrealistically – bracketed out.<sup>65</sup> Rather, attainment of authentic adjudication was feasible only when it was consistent with the concrete decision of another judge dealing with similar facts. This signified what Schmitt saw as a

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<sup>62</sup> *Supra*: Wolin 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror', 424.

<sup>63</sup> See the discussion of Schmitt's pre-WWI work *supra*: Chapter 3.

<sup>64</sup> *Supra*: Scheuerman *The End of Law*, 21. Schmitt seemed to believe that this relationship would constrain any potential consequential indeterminacy within the application of law.

<sup>65</sup> It is important to recognise the distinction between Schmitt's assessment of what he deems the positivist perception of the judicial role and the actual role which he claims that the judiciary must exercise even within a legal-positivist framework. Positivists may deny the existence of discretion but in their repudiation of discretion, they are, in Schmitt's view not only misguided in wishing to oust it but hypocritical in seeking to claim that judges are able to fulfil their function without reliance upon it. On this point see Michael Salter and Susan Twist, 'The Micro-Sovereignty of Discretion in Legal Decision-Making: Carl Schmitt's Critique of Liberal Principles of Legality', *Web Journal of Current Legal Issues* Vol. 3, (2007).

momentous shift from the positivist emphasis upon the objective abstractness of law as a legal-scientific entity, to the vibrancy of its real life dynamism characterised by assimilation, within the judicial purview, of every germane concrete factor.

## (ii) From a decisionist standpoint

With the gradual synthesis of his fully-fledged decisionist theory during the early 1920s, this trend towards the indispensability of judicial discretion proportionately escalated. This developed to a point where Schmitt endowed the personality of the judge in each individual case, with an almost transcendent power to effect a mystical transformation from abstract norm to concrete application. Only then could the process of interpretation and application of legal norms embrace the host of political, societal, economic and moral factors that had initially generated the concrete facts of the case under adjudication. To disqualify discretion from the judicial function was an act of emasculation that would denude the juridical system of any prospect of genuine legitimacy:

‘When a judge, as a concrete personality, decides on a norm’s relationship to an individual case, Schmitt declares, as if describing a Catholic priest presiding over the act of transubstantiation, “a transformation takes place every time” (PT p. 31).<sup>66</sup> This transformation stands as far as logically possible from processes of mechanistic repetition and reproduction. The fact that norms do not apply themselves automatically to cases affirms the personality of the judge.’<sup>67</sup>

Just as Schmitt deemed the judicial processes of a supposedly ‘*mechanistic repetition and reproduction*’<sup>68</sup> intrinsic to the tenets of legal positivism, discretion was to become the indelible hallmark of his decisionist thinking. Though no significant incursions into this position emerged during the early and mid-Weimar period, his *Constitutional Theory* (1928) (CT)<sup>69</sup> contained some uncharacteristic reticence at the prospect of limitless and ubiquitous judicial discretion. This was, however, less to do with any inherent retraction of the fundamentally decisionist position to which Schmitt still subscribed and more from a desire to concentrate the capacity ‘to decide’ in the executive. The existential discretion to make decisions and call them ‘law’ was as momentous as ever it had been but Schmitt was rather more cautious to whom he gave this prerogative.

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<sup>66</sup> Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge, Massachusetts: MIT Press, 1985) trans. George Schwab from *Politische Theologie*, 1922 (Berlin: Duncker & Humblot, 1934).

<sup>67</sup> John P. McCormick ‘Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt’ *Annual Review of Political Science* Vol. 10, (2007), 185.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Supra*: Schmitt *Constitutional Theory*.

Non-formalistic interpretation and application of legal norms entitled, and indeed required, the judge in the individual case to exercise considerable latitude in the adjudication process. To the decisionist Schmitt, this should have evoked no concern. But what newly perturbed him was any potential over-politicisation of the judiciary that exercise of their discretion might precipitate. Because the state alone was to enjoy the monopoly on the political, it was implicit in Schmitt's position that nothing should encroach on the authority of the executive. Whatever the source of incursion, checks and balances upon presidential discretion were unwarranted. As such, judge-made law - the probable by-product of the exercise of judicial discretion - was laden with danger. This tendency Schmitt believed more readily emerged in conditions of volatility and flux, when the homogeneity of the people was less easy to sustain. Where 'the people' comprised a politically homogenous unitary entity - an outcome entirely feasible in times of stability - unlimited authority to interpret statutory norms was not likely to politicise the judiciary. This was because the judiciary was deemed at one with the will of the people. But whenever forces within, or external to the state splintered the homogeneity of the people, a contrary outcome invariably ensued.

Bestowal of latitude to interpret indeterminate statutory norms in accordance with the merely *conjectured will* of a heterogeneous, pluralistic agglomerate of citizens would tend to politicise the judiciary and this, Schmitt was unprepared to countenance. Judicial licence to exercise discretion, both in its admissibility and remit was always, for Schmitt, conditional upon the challenges that each set of concrete circumstances posed.<sup>70</sup>

'During the interpretation of statutes in particular, the application of indeterminate statutory concepts, the judge should conform to the fundamental legal views of his time and people. In normal times and with a people that is homogenous, culturally, socially and in terms of religious doctrine that is not a difficult task. If this homogeneity diminishes, then reliance on the fundamental legal views of the people is not a solution. In any case, it would be an error to refer the highly political task to the judiciary. Political decision is a matter for the legislature and for political leadership.'<sup>71</sup>

As the political and economic turbulence within Germany intensified, the attitude Schmitt adopted towards the role of the judiciary became increasingly reminiscent of

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<sup>70</sup> *Ibid*: 299: 'Aspirations about 'justice' depend to a great extent on the political situation and mood as well as on political values of the judges at the time - not on substantive connections of a constitutional type'.

<sup>71</sup> *Ibid*: 301.

the formalism that he had so deplored within the positivistic conceptualisation of a closed system of norms. Against the backdrop of the seemingly inexorable collapse of the Weimar Republic it was Schmitt's position that a Supreme Court was incapable of guarding the constitution.<sup>72</sup> In '*Das Reichsgericht als Der Hüter der Verfassung*', (1929) (HV),<sup>73</sup> Schmitt sought to confine judicial function to situations where 'subsumption' was possible. This was feasible only where the legal norm was neither doubtful nor controversial; the court could therefore only permissibly arbitrate on questions of *fact* and this meant that the very concept of a constitutional court, entrusted with determination of issues of *law*, was misplaced. What was similarly startling within the model that Schmitt newly formulated for the curtailment of judicial discretion was the requirement of 'derivation'. Enmeshed within the special role the *Rechtsstaat* accorded the judiciary, the judge was bound '*to decide on the basis of a statute and derive his decision, in its content, from another decision, namely one already contained in the statute*'.<sup>74</sup> Suddenly, for Schmitt, the role of the judge simply involved the mere unveiling of the decision - as if a miraculously ready-made formulation - within the statute itself. Derivation from the statute, by the act of logic this entailed, exhausted the scope of judicial authority.

This represented an astonishing *volte-face* on Schmitt's part. What emerged in HV as a desire to confine judicial discretion to a form of 'slot machine' decision-making<sup>75</sup> became suddenly indistinguishable from the scathing treatment earlier accorded to the so-called positivistic credentials for judicial office. Positivism, in Schmitt's view, demanded nothing more from members of the judiciary than an ability to demonstrate the mere '*technical schooling of a good switchman*'.<sup>76</sup> But was not the position Schmitt espoused in HV, with its insistence on subsumption and derivation, uncomfortably close to the normativism he claimed to despise? And why this untypical fidelity to a legal formalism more associated with the positivist tradition? What seemingly accounted for this anomalous shift was the late-Weimar imperative Schmitt discerned for privileging

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<sup>72</sup> See *supra*: Chapter 3 for a preliminary discussion of the stance Schmitt adopted towards the institution best suited to guard the constitution.

<sup>73</sup> Carl Schmitt *Der Hüter der Verfassung (Guardian of the Constitution)* (Tubingen: J.C.B. Mohr Paul Siebeck, 1931), 7-9.

<sup>74</sup> *Supra*: Paulson 'The Theory of Public law in Germany 1914 -1945', 525.

<sup>75</sup> See *supra*: Paulson 'The Theory of Public law in Germany 1914 -1945', 525; this was the rejoinder of Hans Kelsen to Schmitt's HV theory of subsumption and derivation.

<sup>76</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 67.

presidential authority over the prospect of judicial review. Once more, Schmitt appeared willing to sacrifice the niceties of theoretical consistency to the exigencies of mounting an appropriate response to each concrete emergency:

‘He is keen on defending the Reich President as the guardian of the constitution. And if he can cast this defence in the language of legal science by showing that the alternative to the Reich president, a Constitutional Court is not possible legally speaking, then he will have made his case in non-political terms. Or so he would have us believe.’<sup>77</sup>

Preservation of the constitution required the entity entrusted to act as its ‘guardian’ to be a repository of political authority. In *CT*, the fear was that judges would become overly politicised. On the contrary, in *HV*, the judiciary was, for Schmitt, ill-befitted to undertake the task that the concrete emergency invoked because ‘*politically speaking, it was always too late*’.<sup>78</sup> Put simply, the judiciary was not political enough to deal with the state of exception that was threatening to bubble to the surface of the Weimar whirlpool:

‘For Schmitt, a court operating in accordance with the standards of ordinary jurisdiction cannot serve as the guardian of the constitution. A court, as developed in the history of European constitutionalism is – in its tasks, function and the self-understanding of its actors - detached from the gravitational field of politics. It works only on request (no judge without plaintiff; it is bound by claims brought forward; and it operates in obedience to norms which are not to be created by the judge but are, as a rule, given in legally defined statutes). The court has to apply law without being required or permitted to pursue more general political goals or purposes. The guardian of the constitution, by contrast must act as a political organ.’<sup>79</sup>

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<sup>77</sup> *Supra*: Paulson ‘The Theory of Public law in Germany 1914 -1945’, 525.

<sup>78</sup> Carl Schmitt ‘*Das Reichsgericht als Hüter der Verfassung*’ (1929); see *supra*: Schwab *The Challenge of the Exception*, 81: Schwab explains that Schmitt rejects the possibility of a Supreme Court as Guardian of the Constitution because the judiciary always presupposed the existence of norms and thus a state of normalcy which was not present in the Weimar Republic of 1929.

<sup>79</sup> Ernst Wolfgang Bockenforde ‘A Key to Understanding Carl Schmitt’s Constitutional Theory’ in *Law as Politics* ed. David Dyzenhaus (Durham and London: Duke University Press, 1998), 45-49, 46.



### (iii) 1933 - the permeation of concrete order thinking

With the 1933 onset of the National Socialist regime and the advent of his concrete order thinking, one year later, Schmitt again modifies his approach. What Schmitt evidently now seeks is a philosophy that encapsulates the fledgling regime's '*volkisch, economic and ideological condition and the new form of community*'.<sup>80</sup> Pertinent to the judiciary as to every other concrete order, an intense communitarianism ethos becomes crucial in achieving legitimacy in both the interpretation and application of legal norms. Not for Schmitt the Hobbesian rejection of interpretative discretion founded on the premise that '*if the judge presumes and claims the power to interpret laws, then everything becomes complete incalculable discretion. With this manner of proceeding, there is no security*'.<sup>81</sup> No longer is judicial discretion to be feared because of any inherent propensity to undermine sovereign authority. Eschewing a normative solution that designates the judge as '*a pure organ of the pure norm*',<sup>82</sup> inextricably shackled to the norm and subject to it, Schmitt now conceptualises the judge as an order concept. Members of the judiciary derive their office, '*not from rules and norms but from a concrete judicial organisation and concrete personal appointments*'.<sup>83</sup> Innocuous though this formulation may, perhaps, appear what does it augur for the preservation of those qualities traditionally deemed quintessential to legal determinacy?

Pivotal, here, is the significance Schmitt attaches to '*the disintegration of positivistic rules and statute thinking*' within German jurisprudence.<sup>84</sup> This trend, he conjoins with a further instrumentalisation of the concept of homogeneity that he has so frequently deployed and which, on this occasion, complements the ethos of the new regime to perfection. Paramount first is the need for law not only to be conceived of institutionally but '*also flexibly so that law reflects the existing but evolving social reality*'.<sup>85</sup> Crucial here is the burgeoning of '*so-called general clauses*' that '*surge forwards in a way that*

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<sup>80</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 97.

<sup>81</sup> *Ibid*: 67. Contrary to what Schmitt asserts here, Hobbes did leave a residual role for equity where the positive law was silent though as indicated *supra* Chapter 3 section 5, Hobbes simultaneously undermined the scope of judicial discretion by compelling judges to conform to the will of the sovereign.

<sup>82</sup> *Ibid*: 50.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*: 94.

<sup>85</sup> *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20; also *supra*: Schmitt, *On the Three Types of Juristic Thought*, 93: 'Unlike the legal positivism combined of rules and decision thinking and normativistically disengaged from the reality of life, such concepts directly relate to the concrete reality of a life relationship and lead necessarily to a new type of thinking that takes into account the existing and newly maturing orders of life'.

*wipe out every positivistic certainty*'.<sup>86</sup> These, Schmitt observes, include indeterminate concepts of all kinds; references to extra-legal criteria and notions such as common decency and good faith. All '*embody a renunciation of the foundation of positivism, that is, of a detached lawgiving decision embodied in the norming*'.<sup>87</sup> Though such clauses evoke juristic concern from traditional positivists through their tendency to disrupt, even shatter, the '*in itself complete, gapless law*'<sup>88</sup> to which positivism aspires as the bedrock of certainty, Schmitt applauds this development.

Particularly evident in the sphere of criminal and tax law, general clauses bring about a new juristic way of thinking; '*not a mere corrective of the earlier positivism but as the specific method of the new type of jurisprudential thinking*'.<sup>89</sup> No more is it tenable to detach general concepts such as guilt, abetting, or attempt from concrete crime of treason, arson or theft. Inchoate acts of preparation, as a prelude to what would formerly have been regarded as the principal offence, are now no less serious than the substantive offence and, as such, are inseparable from it. Only if each becomes an integral and equivalent component of potential culpability will a proper concept of justice be restored. This surmounts what has hitherto been '*an artificial and nonsensical tearing apart of the natural and actually existing relations of life*'.<sup>90</sup>

No longer is it feasible for ingenious criminals to flout the juridical system or to exploit the unrealistic formalism of a self-vaunted gapless positivism. Nor is it possible for '*bold and imaginatively endowed*'<sup>91</sup> transgressors to reduce the criminal law to a laughing stock '*with the help of the phrase nulla poena sine lege*'.<sup>92</sup> Retrospectively implemented criminal norms are now fully warranted. Certainty and predictability in the formulation and implementation of legal norms yields to the concrete demand to punish those who infringe the '*interests of the whole nation*'.<sup>93</sup> Not only does concrete order thinking facilitate this capacity to frame the proper content of an offence against the nation and enable punishment to be wrought but salvages the very concept of a crime.

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<sup>86</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 90.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*: 92.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*: 93.

<sup>92</sup> *Ibid.* The further implications of this from the specific standpoint of retrospectivity are explored *infra*: Chapter 5.

<sup>93</sup> *Ibid.*: 91.

With normativism, ‘*the disorder of the concrete situation does not interest the normativist who is only interested in the norm*’.<sup>94</sup> In contrast, concrete order thinking connotes a realisation that ‘*only the concrete peace or a concrete order can be broken*’.<sup>95</sup> It is this that impresses the import of a crime, in its real sense, upon all those involved in the criminal justice system, not least on both the perpetrator of the alleged offence and the judges entrusted with the disposition of that defendant.

What is manifest within *On Three Types* and other works of the same period is a revival of Schmitt’s intention to heighten judicial discretion.<sup>96</sup> But is the position he espouses as transparent as, at first glance, appears? Or does he conflate an ostensible valorisation of the judiciary with a simultaneous strategy to control the decision-making latitude he unleashes? An incongruent conundrum now confronts Schmitt. Not only do judges of 1934 and beyond need to interpret general clauses of the type that invite - if not demand - some degree of latitude on the part of the interpretative agent. They are also charged with the application of *pre-Nazi* statutes in a manner commensurate with the unparalleled challenges imposed by the new order. The alternatives here are twofold. Either the judiciary must formalistically bind itself to those legal norms enshrined in pre-1933 statutory provisions, as if wholly immunised from the influences of the Nazi regime. Or the new order can simply exonerate the judiciary from any obligation to enforce any laws the Nazis have not enacted. The first postulated solution enables laws to be applied in opposition to the National Socialist ethos and carries the attendant hazards of non-compliance with it. The second connotes manifest legal indeterminacy and the possibility of alarm to those previously devoted to a positivistic interpretation and application of legal norms. What is needed is an interpretative model capable of fulfilling each potentially conflicting role:

- (i) Pragmatic application of the ‘general clauses’ that the new regime has engendered;
- (ii) Enforcement of pre-Nazi statutes in a manner that manages to cohere with the requirements of the new regime whilst still creating the appearance of some basis in law

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<sup>94</sup> *Ibid.*: 52.

<sup>95</sup> *Ibid.*

<sup>96</sup> These include Carl Schmitt ‘Aufgabe und Notwendigkeit des deutschen Rechtsstandes,’ *Deutsches Recht* Vol. 6 (1936), 185 and Carl Schmitt, ‘Die geschichtliche Lage der deutschen Rechtswissenschaft’, *Deutsche Juristen-Zeitung* Vol. 41, no.1 (1936), 16.

What is clear, to Schmitt, is that though legal texts alone cannot provide guidance to decision-makers, neither should judges sit *ex nihilo*. Once again, it is the notion of homogeneity that proves pivotal. Already crucial to various aspects of his hypotheses is the indispensable contribution this concept lends to:

- (i) constraint of the political within manageable parameters;
- (ii) repression of the individual and rejection of social pluralism;
- (iii) promotion of substantive rather than purely formal equality;
- (iv) creation of the unitary will of the people to bolster his re-conceptualisation of democracy; and
- (v) repudiation of the principle of 'equal chance'.

Newly vital, at this stage, is '*an ethnically homogeneous caste of judicial experts dedicated to an equally homogeneous worldview*'.<sup>97</sup> The ease with which the Nazis are able to accomplish this, they augment by their destruction of intellectual pluralism and academic freedom. Further complemented by an educational system that is '*able to keep judges and lawyers free from the taint of ethnically alien intellectual influences*',<sup>98</sup> homogeneity is, to Schmitt, an almost chilling, if ameliorative resolution to the problems of legal indeterminacy that would otherwise threaten to undermine the regime. Quite aside from the desirability and feasibility of a homogenous populace – an empirical objective that Schmitt deems worthy of attainment – homogeneity of the judiciary is vital if juristic *fora* are to produce outcomes that cohere with the spirit of the regime. What Schmitt must, therefore promulgate and the Nazis facilitate is a system where every measure they introduce educes just one judicial interpretation. It is homogeneity that guarantees the subsumption, within the unified judicial caste, of subjective preferences and extinguishes any tendency for individual judges to interpret or apply the 'law' in a non-uniform manner. How does this compare with Schmitt's conceptualisation of judicial discretion during his pre-Weimar phase?

The Schmitt of the 1910s, and beyond, groped for a solution that ensured that judicial interpretation of analogous concrete components, that is of comparable facts subjected to parallel statutory norms would secure a similar verdict. Legal determinacy, measured against the criteria that Schmitt implicitly deemed appropriate, was putatively

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<sup>97</sup> *Supra*: Scheuerman *The End of Law*, 127; see *ibid*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 36: 'In his 1934 *State Movement People*, Schmitt advocated not just homogeneity but racial homogeneity'.

<sup>98</sup> *Ibid*: Scheuerman.

guaranteed if each judge strove for fidelity to the surmised decision of another. Elusive though this objective may have been via the methodology Schmitt propounded, it was arguably not without intrinsic merit. But it is the transition to concrete order thinking explored in *On Three Types* that signifies the radicalisation of his earlier rationale. Absorption of every judge within an ethnocentric straitjacket now effectively deprives the judiciary of any substantive latitude whatsoever. Mandatory adherence to an ethnically - even racially - oriented common ethos supersedes the search for a truly authentic model of judicial discretion:

‘It is an epistemological verity that only those are capable of seeing the facts of a case the right way, listening to statements rightly, understanding words correctly and evaluating impressions of persons and events rightly, if they are participants in a racially determined type of legal community to which they existentially belong.’<sup>99</sup>

Armed with this concept of substantive homogeneity, characterised by and instrumentalised through an ideologically and ethnically uniform judiciary, Schmitt now feels free to entrust the interpretation of both pre-Nazi statutes and Nazi-enacted general clauses alike to the judge in each individual case. Confident in the belief that every judge will interpret and apply the law in a manner wholly compatible with the ethos and spirit of Nazism, Schmitt no longer fears the sceptre of judicial activism. Whatever discretion the judiciary appears to enjoy, Schmitt expediently negates. Application of the *coup de grace* is at hand.

Critical to Schmitt’s formulation is that as soon as concepts including common decency and good faith - of the type comprised within the Nazis’ innovative general clauses - are linked, not to the individualistic bourgeois, commercial society but to the interests of the whole nation, ‘*the entire Recht changes in reality without it being necessary to change a single positive law*’.<sup>100</sup> This renders ‘*every element of German law [is] potentially subordinate to Nazi policy aims without requiring potentially time consuming changes in the legal code*’.<sup>101</sup> What matters is cognisance of the demands the specific concrete reality imposes and if this necessitates wholesale disregard of the textual basis of individual statutory provisions, this is the task that befalls every member

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<sup>99</sup> *Ibid*: 121, quoting from Schmitt’s un-translated work, ‘*State, Movement, People*’.

<sup>100</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 90.

<sup>101</sup> See *supra*: Scheuerman *The End of Law*, 132.

of the judiciary as an homogeneous concrete entity.<sup>102</sup> Semantic niceties within the text of each legal provision are dispensable as are the procedural and formalistic devices traditionally embedded within judicial interpretation.<sup>103</sup> However arbitrary and boundlessly discretionary this may appear from a traditional standpoint, this juristic licence is justified as a vital bulwark of the new order.<sup>104</sup> Because of the shared relationship between Leader and judge, Volk and Leader, the regime and the legal system within it acquires an existential authenticity.<sup>105</sup> What represents the zenith of this formulation is the unqualified compliance of each member of the judiciary with the will of the Leader, however nebulously articulated this may be.<sup>106</sup> Because all considerations yield to the imperative of total conformity to the new regime and the tenets it professes to uphold, *'the judge becomes a mere administrative accessory of the national socialist leadership'*.<sup>107</sup>

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<sup>102</sup> See Bernd Ruthers 'On the Brink of Dictatorship – Hans Kelsen and Carl Schmitt in Cologne 1933' in *Hans Kelsen and Carl Schmitt A Juxtaposition* ed. D.Diner/M Stolleis (Gerlingen: Bleicher Verlag, 1999), 115, 116: 'The law is in the main formulated by the state in the concrete rules and regulations of the ethnic-racially influenced Volksgemeinschaft national community. Accordingly, the law consists of state orders, decisions, and the aforementioned rules and regulations which are of course to be interpreted in accordance with National Socialist world views and which have the power to negate conflicting principles of law. The contradiction between Schmitt's positions and Kelsen's Pure Jurisprudence is obvious'

<sup>103</sup> See *supra*: Scheuerman *The End of Law*, 129; also Carl Schmitt 'Aufgabe und Notwendigkeit des deutschen Rechtsstandes,' *Deutsches Recht* Vol. 6 (1936), 185 and Carl Schmitt 'Die geschichtliche Lage der deutschen Rechtswissenschaft' *Deutsche Juristen-Zeitung* Vol. 41, no.1 (1936), 16.

<sup>104</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 195 where Balakrishnan claims that this is an attempt to portray an explosively unstable instrumentalised legality as a concrete order of authority.

<sup>105</sup> See *supra*: Scheuerman *The End of Law*, 132.

<sup>106</sup> See *ibid*: 134: 'Schmitt claims that Nazi law was far more determinate and predictable than it ever was within liberal democracy – no judicial action incompatible with the mores and spirit of National Socialism is to be tolerated'.

<sup>107</sup> *Ibid*: 137.

### Consequences of Schmitt's turn to concrete order thinking

Concrete order thinking, in Schmitt's view, leads ultimately '*to a comprehensive total unified order superior to the positive*'.<sup>108</sup> The preservation of that order is so vital that Schmitt endows the judiciary - itself a concrete order concept - with the authority to deviate from and even disregard statutory norms whenever an existential threat is posed to it. From the perspective of judicial interpretation, this can '*justify overriding and altering legal rules whenever the existence of such concrete order is at stake*'.<sup>109</sup> But if the concrete order is paramount, what of the individual human being within it? Does not institutional thinking of the type Schmitt esteems tend to subvert individualism and the notion of equality before the law - both fiercely treasured within liberal constitutionalism?<sup>110</sup> If so, where is the protection '*against a capricious and arbitrary application of the law*'?<sup>111</sup> What safeguards exist to guarantee '*fairness and due process*'?<sup>112</sup> Is the individual ever permitted to flout the stipulations of the concrete order to which he belongs or does unquestioning compliance with superior orders and loyalty to the state - as institution - transcend every other consideration?

Conversely, however, does concrete order thinking offer unexpected solace to the beleaguered citizen? If communitarian collectivism holds sway over its constituent components - as Schmitt appears to envisage - how is the individual member of the integral order to be legitimately fixed with personal responsibility for acts perpetrated in the service of the whole? Is it the concrete order rather than the individuals within it that is to be held accountable for alleged transgressions committed in its name? If a concrete order insists upon the unqualified obedience of its individual constituents to each and every command it issues, is a perpetrator entitled to exoneration for acting in fulfilment of those requirements? And how does Schmitt's new-found fascination with concrete-order thinking shape his perspective towards the early-20th century disintegration of European inter-state relations and the formation of a new world order? To the post-

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<sup>108</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 69.

<sup>109</sup> *Supra*: Ruthers 'On the Brink of Dictatorship - Hans Kelsen and Carl Schmitt in Cologne 1933', 115, 116.

<sup>110</sup> *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 31: 'These questions have concerned current critics who fear the insidious influx of concrete order thinking and general clauses into legal and social theory as well as into law and public policy'.

<sup>111</sup> *Ibid*: 30.

<sup>112</sup> *Ibid*.

WWI Treaty of Versailles and the juridical/political subjugation of the vanquished to the vagaries of the victors' will?<sup>113</sup>

Generated by a dubious imperative to buttress the institutions of National Socialism, concrete order thinking and its interaction with the exercise of juristic discretion perhaps invokes more questions than it solves. Crucial some eleven years later to a Nuremberg process memorable, in part, for the judicial analysis and implementation of the Allies' brainchild that defined it was the availability, authenticity and scope of the selfsame juristic prerogative that Schmitt sought to explore in *On Three Types*.<sup>114</sup> How would Schmitt have envisaged the scope and operation of judicial latitude – its metier an unqualified allegiance to the ethos of the prevailing concrete environment – in a context other than Nazi Germany? And had he been able to forecast the future, would he have considered a concrete order mode of thinking apposite to the empirical and jurisprudential dilemmas that the Nuremberg proceedings invoked?

Though his general contribution on concrete orders is regarded as superficial,<sup>115</sup> what is clear is that Schmitt regards a normal stabilised solution: a '*situation etablie*' as the presupposition for all aspects of concrete order thinking to emerge and flourish.<sup>116</sup> Does this, therefore, imply that decisionism outlives its utility once the state of exception passes? Is it Schmitt's intention to reserve concrete order thinking to a condition of normalcy? From this, does he purport to equate the post-Enabling Act regime, itself reliant upon suspension of separation of powers and subsequent disregard of legal-constitutional positive provisions, to norm or exception? If so, how does Schmitt perceive the Allies' post WWII assumption of governmental authority within Germany and do the Nuremberg proceedings occur, in his view, against a backdrop of a state of normalcy or exception? Is this not a distinction that could ultimately prove crucial in determining whether decisionism or concrete order thinking should, in Schmitt's view, prevail?<sup>117</sup> Whether by accident or design, it is in the international arena that Schmitt

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<sup>113</sup> See *infra*: Chapter 5 for discussion of concrete order thinking in the context of Schmitt's perspective towards international law.

<sup>114</sup> The Nuremberg Charter, August 1945. This is discussed *supra*: Chapter 2.

<sup>115</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 30 where Bendersky comments on the correctness of the observations of Frederick Dessauer in his 'The Constitutional Decision: A German Theory of Constitutional Law and Politics', *ETHICS: An International Journal of Social, Political and Legal Philosophy* Vol. 57, No.1, (October 1946), 14-37.

<sup>116</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 88.

<sup>117</sup> These issues are further considered *infra*: Chapter 5.



finds fertile ground for the development and deployment of his particular brand of concrete order thinking and it is to this that the ensuing chapter turns.

## **CHAPTER 5**

### **RECONFIGURATION AND CONSUMMATION OF CONCRETE ORDER THINKING**

## CHAPTER 5: RECONFIGURATION AND CONSUMMATION OF CONCRETE ORDER THINKING

### A world of dilemmas

As the previous account seeks to demonstrate, the seismic political, social and economic upheavals within Europe, between 1914 and 1934, coincide with the transition Schmitt undergoes during the same period from nascent neo-Kantian to fully fledged decisionist and, in his Nazi-era manifestation, as adherent to an institutional mode of thought. In contrast to this overall fluidity within his legal and political philosophy, constant throughout his theoretical skein is the polemical treatment he reserves for the so-called deficits of liberalism. With misguided adherence to the primacy of ‘law’ over ‘power’ and oscillation between what Schmitt deems the equally flawed jurisprudential perspectives of natural law and value neutral positivism, neither liberalism nor its hypocritically vaunted ideologies possess the qualities intrinsic or conducive to an authentic and sustainable legal order. To this specific extent, his work of the Weimar period, and beyond, betrays little immanent contradiction. Similarly evident from the foregoing scrutiny is that the decisionism explored, developed and ultimately discarded by Schmitt appears no more facultative of an efficacious and enduring system than the liberalism he professes to deplore. Still tantalisingly elusive, however, is the extent to which this relentless quest for a viable legal and political order – epitomised by his post-1933 experimentation with concrete order thinking – conjoined with his previously explicated theoretical vacillations dovetails with the stance he adopts, whether explicitly or by extrapolation, towards the legitimacy of *ex post facto* criminalisation and punishment.

Fast approaching, therefore, is the moment to extract and illuminate all that has hitherto lain concealed within the elaborate skein Schmitt has so meticulously crafted. Is the *nullum crimen nulla poena sine lege* doctrine indispensable or redundant to Schmitt’s notion of legitimacy within the legal-constitutional order? If the sovereign will is vaunted as the ultimate arbiter of the enactment, content and execution of ‘law’, how is the *legality* principle to be upheld? How does the irrepressible spectre of the exception impinge upon the validity of retrospective penalisation? Does the Hobbesian approach to the doctrine of *nullum crimen* comprise a template capable of appropriation by his self-professed, intellectual adherent? What residual methodological devices inure for a

theorist of Schmitt's mindset, who has hitherto repudiated a liberal interpretation of the *rule of law*? Even where a legal-constitutional order embraces a categorical embargo on retrospective penalisation, what is to prevent its rescission either in accordance with pre-ordained procedures or worse, at the untrammelled discretion of the sovereign authority? How relevant are Schmitt's persistent abnegation of *a priori* natural rights and the denigration of the individual associated with it? And what impact does this have on the non-retrospectivity ban enshrined within Article 116 of the 1919 Reich Constitution? Does a potential reservoir lie still untapped within Schmitt's arsenal, capable of utilisation in the domestic arena and beyond? And natural law aside is it concrete order thinking that represents an authentic third way - one distinct from the supposedly polarised perspectives of decisionism and normativism - not merely beyond but facially at variance with his articulated *On Three Types* contemplation?

As seen, concrete order thinking – as sketchily elucidated in *On Three Types* - Schmitt *prima facie* conceptualises as the organic product of concrete institutions in an ever present – even volatile - state of *flux*. But is this not a contradiction? Are not concrete orders, by their very nature, best located within a long-established and habituated 'lived-in' existence? Detached from the imperative within Nazi Germany to buttress a revolution - epitomised by abrogation of a pre-existing constitutional regime (albeit one instigated in legalistic compliance with it) – is it not feasible that Schmitt would have conceived his new mode of juristic thought as a device to uphold and perpetuate the pre-Nazi *status quo*, rather than to destroy it? Does not cognisance of concrete orders and the ethos immanent within it, tend to stabilise what is synchronously reflective of embedded custom and practice? And, as Schmitt seems sporadically to recognise, is this not its primary function?

As such, the potentiality of concrete order thinking in the *domestic* context – hitherto smothered within the burgeoning institutional trappings of fascist despotism - appears unfulfilled. Is it therefore, possible to extrapolate any latent perspectives within this mode of thinking that the confines of *his* concrete environment contemporaneously both impeded in terms of detailed exposition and impelled in a deployment more corrosive than Schmitt would have otherwise promoted? If brought to fruition a mere scintilla of time earlier, how would this have impinged on the survival of the Weimar Constitution and more specifically the constitutionally non-suspensible embargo on retrospective

penalisation inscribed within it. The drafters of the Constitution presumably deemed the embargo on *ex post facto* criminal law fundamental to the *Rechtsstaat* they aspired to inaugurate within post-WWI Germany, not least because Article 48 did not specifically permit the President to suspend Article 116 in a time of emergency.

To what extent does concrete order thinking impact on the viability of sustaining the *legality* principle, not purely in the domestic domain but, more crucially from a Nuremberg perspective, in the international sphere? And does this facilitate the formulation of an analytical model that will enable Schmitt – or a theorist professing consistent adherence to the principal themes his work unveils – to justify condemnation of the strategy the Allies employed towards the *legality* principle throughout the Nuremberg process? If inconsistencies emerge between his intra and inter-state perspectives towards the indispensability of the *legality* principle, are these immanent contradictions beyond resolution? Conversely, does the differing context for their application warrant a commensurately divergent response; does his Weimar era decisionism present an insuperable obstacle for the formulation of a consistent analysis; how cogent is the critique Schmitt postulates of the Nuremberg process and is this reconcilable with the overall tenor of the theoretical positions he propagates? Does this lend insight into the validity of the Allies' post WWII disposition of the Nazis and the significance of the *legality* principle in the international arena? What role does Schmitt accord the so-called immutable concepts of natural law either to denigrate the Allies' strategy at Nuremberg or to uphold the ban on retrospective penalisation? Why, if at all, is a principled observance of the 'rule of law', in the interstate sphere (within Europe), of sudden consequence to Schmitt and does he consider the measures implemented against the defendants during the Nuremberg Trial of the Major Nazi War Criminals conducive or antithetical to it? Is an unimpeachable embargo on retrospective penalisation more or less imperilled by the liberal ideology that has traditionally championed the doctrine than the brand of Schmittian authoritarianism ostensibly deleterious to it? And is it in a reconfigured institutional mode of thought – unveiled in *On Three Types* but appropriately remodelled for deployment within the international arena that Schmitt is able to outflank his liberal-tended critics?

Above are the dilemmas but what of their resolution? To address this conundrum, what this chapter primarily seeks to elucidate is Schmitt's legal and political theory within the

context of international law<sup>1</sup> whence, following an SS campaign to discredit him in 1936, he directed his principal focus.<sup>2</sup> Though this provided a reprieve from Nazi persecution, it was an intellectual digression that was, in part, responsible for his arrest and subsequent interrogation by the Allies, as a preamble to potential indictment before the International Military Tribunal. Around the same time, Schmitt became more tangentially involved in the Nuremberg process in an advisory capacity to a number of compatriots, similarly at risk of trial.<sup>3</sup> In June 1945, Schmitt was invited to compile a legal opinion (*Gutachten*) – putatively neutral<sup>4</sup> and ultimately otiose – on behalf of several prominent German industrialists, including Friedrich Flick.<sup>5</sup> This overture and

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<sup>1</sup> A number of Schmitt's more significant international law writings have now been translated into English. These include his 'Forms of imperialism in international law', trans. Matthew G Hannah (2010) from 'Volkerrechtliche Formen des modernen Imperialismus', *Konigsberger Auslandsstudien* 8, (1933), 117-142; 'The Turn to the Discriminating Concept of War (1937)' in *Writings on War* (Cambridge: Polity Press, 2011), 30 trans. and edited by Timothy Nunan from Carl Schmitt, 'Die Wendung zum diskriminierenden Kriegsbegriff' (Berlin: Duncker & Humblot, 1988); 'The Grossraum Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law (1939-41)' in *Writings on War* (Cambridge: Polity Press, 2011), 75 trans. and edited by Timothy Nunan from Carl Schmitt, 'Volkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte: ein Beitrag zum Reichsbegriff im Völkerrecht' (Berlin: Duncker & Humblot, 1991); *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Ltd, 2003) trans and annotated by G.L. Ulmen from *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker Humblott, 1950); 'Theory of the Partisan' *TELOS* No. 127, (Spring 2004), 11-78; 'The Legal World Revolution' *TELOS* No. 72, (Summer 1987), 73-91; 'The Plight of European Jurisprudence' *TELOS* No. 83 (Spring 1990), 35-70; 'The Age of Neutralisations and Depoliticisations' *TELOS* No. 96, (Summer 1993), 130; his *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition, (Berlin: Duncker & Humblot, 1932) and his *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (Westport, Connecticut: Greenwood Press, 1996) trans. George Schwab and Erna Hilfstein from *Der Leviathan in der Staatslehre des Thomas Hobbes*, 1938 also contain important insights into the Eurocentric state-dominated legal order which Schmitt seeks to uphold. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

<sup>2</sup> In 1936, Schmitt was pilloried in the SS newspaper, *Das Schwarze Korps* and feared for his own safety. He was spared by the patronage of Goering and Frank, both Defendants before the IMT at Nuremberg

<sup>3</sup> See Gary Ulmen 'Just Wars or Just Enemies' *TELOS* No. 109 (Fall 1996), 99-113, 105: 'While incarcerated, Flick...also became aware of the so-called Jackson Report to President Truman of June 6<sup>th</sup>, 1945, mentioned in both the American and German press, which listed financial and industrial leaders – along with political and military leaders – as subject to criminal prosecution. Thus, even before his arrest, Flick could have expected that charges of this nature could be brought against him, although it is unclear whether he personally asked Schmitt to write a *Gutachten* or whether this was done by his lawyer, Walter Schmidt, or one of Flick's operatives. At any rate...Schmitt could not have begun work on it before the middle or end of June, 1945'.

<sup>4</sup> See *supra*: Ulmen 'Just Wars or Just Enemies', 106 where Ulmen points out that in view of Schmitt's treatise on the turn to a discriminatory concept of war, this already predisposed him to argue against the criminalisation of aggressive war as well as against the revival of the concept of "just war". The treatise in question was written in 1937.

<sup>5</sup> Carl Schmitt 'The International Crime of the War of Aggression and the Principle "Nullum crimen, nulla poena sine lege" (1945)', 124 in *Writings on War* (Cambridge: Polity Press, 2011) trans. and edited by Timothy Nunan from Carl Schmitt, 'Das international-rechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege"' (Berlin: Duncker & Humblot, 1994). Flick was later tried and sentenced to seven years imprisonment. Schmitt's opinion was obsolete because Flick and

the advice it produced, in September 1945, was to provide the catalyst for his commentary upon the retroactive import and legitimacy of two of the principal charges contained in the Nuremberg Charter: *crimes against peace* and, to a lesser extent, *crimes against humanity*.<sup>6</sup> Assessment of Schmitt's critique of the first of these is particularly instrumental not only in its exposition of the validity of the Nuremberg Charter *per se* but equally so in the wider context of international law, the forces that influence its evolution and the legitimacy of *ex post facto* criminalisation and punishment.

What this chapter seeks to address is the impact of the empirical and theoretical strands that Schmitt interweaves in his 1945 *Gutachten* and amplifies elsewhere, many of which contribute to his invective against the Nuremberg process and, in particular, the concept of *crimes against peace* intrinsic to it. Commencing with a brief reminder of his polemical stance towards the disintegration of the political, what follows is an account of the history of the *just war* doctrine from its original instantiation in the *res publica Christiana* of medieval Europe to its re-incarnation – or as Schmitt would allege – its fateful transformation into the *crime of aggressive war* at Nuremberg. Integral to this process but simultaneously detached from it is the *jus publicum europaeum (JPE)*, the order of classical European international law that straddled the period from the demise of the *res publica Christiana* until its gradual disintegration in the wake of WWI. Under scrutiny are those facets of the *jus publicum europaeum* that for Schmitt exemplified the most laudable characteristics of an *interstate* order in comparison with his blistering, theoretical and doctrinal critique of the conceptually nebulous norms of *international law*.<sup>7</sup> Culpability for this latter development Schmitt chooses to lay chiefly at the feet of the ubiquitous influence of the United States during the political machinations bedevilling the Treaty of Versailles 1919, the ensuing internecine turmoil and the

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his colleagues were charged with war crimes and crimes against humanity rather than waging aggressive war on which Schmitt's advice primarily focussed. Further, by the time Flick *et al* were tried between April and December 1947, the IMT had made it clear, during the earlier Trial of the 'Major Nazi War Criminals' 1945-46, that the issue of *nullum crimen* could no longer be pleaded in defence.

<sup>6</sup> See *supra*: Ulmen 'Just Wars or Just Enemies', 99-113: Schmitt compiled 'a comprehensive legal opinion, *Gutachten*, comprising the criminality of aggressive war and the possibility of indicting industrial as well as military and political leaders'. For further details of the 'offences' respectively comprised within Articles 6(a) and 6(c) of the Nuremberg Charter, see *supra*: Chapter 2.

<sup>7</sup> See Vik Kanwar 'Dark Guardian of the Political: Carl Schmitt's Ethical Critique of the Liberal International Order' available online: <http://kanwar.info/schmitt.html> accessed 18.09.2006, 'On one hand Schmitt consistently valorised de-formalised decision making procedures (discretion) in the hands of the sovereign state. On the other hand, he emphasizes the radical indeterminacy of liberal law, including international law, harshly criticising the use of open-ended discretionary standards (indeterminacy)'.

watershed represented by the Nuremberg proceedings. A process where the status of the legality principle, and its abrogation, was subject to intense scrutiny and Schmitt's condemnation of the one – the decision to convene an *ad hoc* Tribunal and its juridical aftermath - inextricably entwined with his professed repudiation of the other.

Attendant to this is an evaluation of what Schmitt perceives a strategic Allied ploy to formulate the Nuremberg Charter and manipulate the ensuing judicial process by flagrant exploitation of the chimerical norms of natural law. At the heart of this process is the status and violability of the putative ban on retrospective penalisation. If it emerges that the subversion of the *legality* principle is, to Schmitt, an inevitable casualty of the policy the Allies elected to pursue, is it possible to formulate an interpretative model through which it is, conversely, feasible to salvage the ban on retrospective penalisation. It is to these issues that the remainder of this chapter turns.



### The challenge unfolds

As explored in Chapter 2 the Allies at Nuremberg - through their American lead prosecutor, Robert Jackson, on the *crime of aggressive war* and his British counterpart, Hartley Shawcross - argued first that by stipulating the law by which the IMT was bound, the Charter, and the proceedings it governed, was unimpeachable.<sup>8</sup> Next, that regardless of the status of the Charter as a valid legislative instrument, the crimes comprised within it were already crimes within international law before the defendants acted. In essence, the claim was that the Charter merely affirmed the pre-existing state of international law such that even without it, identical indictments could have been laid against those alleged to have committed the offences specified within them. What emerges, therefore, is that if Schmitt wishes to launch a tenable critique of the Nuremberg process, he must convincingly impugn the Allies' authority to enact the Charter or refute their contention that the crimes within Article 6 were not innovatory but a blatant exercise of *ex post facto* law-making. Whether the polemic Schmitt musters against the legal legitimacy of the Charter and the strategy of the Allies that underpinned it emerges as two distinct strands or as one conflated invective is, perhaps, of peripheral significance. More crucial is the extent to which his condemnation of US-inspired tactics at Nuremberg is itself coherent? Does it reflect or contradict the overall tenor of his legal and political theory. Specifically, why is it the *crime of waging aggressive war* that evokes within Schmitt vitriol of peculiar intensity? And what does this augur for the preservation of the *nullum crimen* principle and its application within the theatre of international law and politics?

Evidence of Schmitt's incipient concern about the incremental acceptance of the concept of aggressive war – *crimes against peace* - and its alleged illegality is manifest at intervals even during the Weimar period, most unambiguously in *Concept of the Political* (1927) (CP).<sup>9</sup> Only in his later works on international law during the 1930s and the culmination of these in *The Nomos of the Earth in the International Law of the*

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<sup>8</sup> See Kenneth Gallant *The Principle of Legality in International and Comparative Law* (Cambridge: Cambridge University Press, 2009), 94: 'He [Jackson] needed to argue that the charter bound the tribunal because he did not want the tribunal to reject the crime against peace or the crime of conspiracy to wage aggressive war. He needed to argue that the charter crimes were international crimes before WWII because he wanted the tribunal to declare aggressive war and conspiracy to wage it to be individual crimes in international law, not crimes that apply just to the leaders of the European Axis'.

<sup>9</sup> Carl Schmitt *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) trans. George Schwab from *Der Begriff des Politischen*, 1932 edition (Berlin: Duncker & Humblot, 1932).

*Jus Publicum Europaeum* (1950)<sup>10</sup> (*Nomos of the Earth*) does his polemic against the notion of *just war* come to fruition on a normative level as well as in the empirical and conceptual sense previously articulated. It is the foremost of these – its interface with the pre-established norms of international law conjoined with what Schmitt perceives a strategic US project to undermine them - where his insights into the status and validity of the *nullum crimen* principle are most illuminating. Crucial also to this assessment are sporadic digressions into the resurrection of the notion of *just war* as an *empirical* reality for it is this that appears to underpin, or, at least, augment the fundamental antipathy Schmitt exhibits towards the notion that states – and the citizenry within then – are susceptible to punitive sanctions for the alleged *crime* of waging aggressive war.

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<sup>10</sup> Carl Schmitt *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Ltd, 1950). This is referred to *infra* as *Nomos*.

**Antipathy towards attempts to eradicate ‘war’ as an empirical reality and a preface to its confluence with the concepts of *just war* and *unjust enemy***

‘One must always be reminded of the fact that international law is a law of war and peace, *jus belli ac pacis*’. The time-specific, spatially concrete and specific reality of war and peace, vary though it may be through different historical epochs, as well as the just and concrete mutual relations of these two conditions, forms the core of every nature of international law and every coexistence of organised nations, divided up as they may be.’<sup>11</sup>

As earlier elucidated,<sup>12</sup> what Schmitt relentlessly emphasises in *CP* is that ‘*the entire life of a human being is struggle and every human being symbolically a combatant*’.<sup>13</sup> This predisposition to undertake battle he conceptualises in *the political*, the existential decision between friend and enemy that remains the prerogative of the politically united people whose particular concrete interests are under threat. The individual fights on behalf of the communitarian gathering to whom he owes allegiance but the discretion to engage in conflict is not his to make. It is the state that possesses the *ius belli* – the right of war - or what could be equally categorised as the *ius ad bellum* – the right to wage war and to demand from its citizens the ultimate sacrifice of life and the duty to kill those inimical to it. As groupings – or states, as the essentially political entity - amass to confront the ever-present possibility of conflict, the ensuing ‘*specifically political tension*’ is the very antithesis of a *completely pacified globe*’.<sup>14</sup> Because nothing can escape ‘*this logical conclusion of the political*’,<sup>15</sup> not even a momentum towards a pacified globe will eliminate it. Pivotal is preclusion of descent into ‘*an entire system of demilitarised and depoliticalized concepts*’<sup>16</sup> that seek to avoid or even deny the life-and-death struggle intrinsic to a meaningful existence; a regime where abstract norms obtrude into the concrete reality of the political and threaten to subvert it.<sup>17</sup>

Perceived not only as indispensable but inescapable components of viable interstate relations, what emerges, therefore, in *CP* are:

- The ever present risk of conflict, arising from the dynamic and dangerous predisposition of human beings
- The vibrancy of the friend/enemy antithesis

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<sup>11</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 75, 115.

<sup>12</sup> See Chapter 3 for an account of Schmitt’s conceptualisation and instrumentalisation of the ‘political’.

<sup>13</sup> *Supra*: Schmitt *The Concept of the Political*, 33.

<sup>14</sup> *Ibid*: 35.

<sup>15</sup> *Ibid*: 36.

<sup>16</sup> *Ibid*: 71.

<sup>17</sup> See generally on this theme, *supra*: Schmitt ‘The Age of Neutralisations and Depoliticisations’ 96, 130.

- The inextinguishable force of the political
- The monopoly of the state to make the decision on the distinction between friend and enemy (understood in a public and not a private sense)
- The unassailable and particularistic right of every sovereign state to decide when and on what basis to wage war
- The dreaded ramifications of global depoliticalisation

Axiomatic to the survival of the political is the coexistence of political entities in juxtaposition – nation states within a *pluriverse* of similar states among which the friend/enemy distinction is able to prevail.<sup>18</sup> This, to Schmitt, is pluralism in its unadulterated and correctly-placed form, for only in a world that embraces differentiation in the political realm between one state and another – a repudiation of a unified globe where conflict is consigned to the status of civil war - is the ‘political’ able to flourish.<sup>19</sup>

What Schmitt, therefore, recognises is the inevitable elevation of the Hobbesian war of all individuals against all individuals in the state of nature ‘*into a war of all states against all states in a second-order state of nature.*’<sup>20</sup> Subsequent transformation of war into an institution then mitigates the anarchy that would otherwise ensue.<sup>21</sup> This is not the intrastate sham pluralism of a multiplicity of agencies vying with the sovereign authority for the allegiance of the populace and, above all, the fundamental right to decide. Instead, it is the interstate pluralism of a truly political world, characterised by the concrete reality of nation-states as its bearers, authentic in provenance and effective in operation.<sup>22</sup> Antithetical to this is the ‘*astonishing misunderstanding*’ to promote a dissolution of ‘*these plural political entities on the basis of a universal and monistic*

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<sup>18</sup> See *supra*: Schmitt *The Concept of the Political*, 53: ‘The political entity cannot by its very nature be universal in the sense of embracing all of humanity and the entire world. If the different states, religions, classes and human groupings should be so unified that a conflict among them is impossible and even inconceivable and if civil war should forever be foreclosed in a realm which embraces the globe, then the distinction between friend and enemy would also cease’.

<sup>19</sup> What Schmitt deplores is pluralism within the state and universalism beyond it for both weaken state sovereignty.

<sup>20</sup> William Rasch ‘Lines in the Sand: Enmity as a Structuring Principle’ *The South Atlantic Quarterly* Volume 104, (Spring 2005), No. 2, 253, 257.

<sup>21</sup> Alessandro Colombo ‘The realist institutionalism of Carl Schmitt’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 21, 23

<sup>22</sup> See *supra*: Schmitt *Constitutional Theory*, 381: ‘international legal community is not a contract nor is it based on a contract. It is also not an alliance and still less a federation. It does not have a constitution in the distinctive sense. It is the reflex of the politically plural universe, which expresses itself in individual, generally recognised rules and constitutions. In other words, it is a pluralistic universe, understood as a multitude of political unities that exist along side one another’.

view and to present this as pluralism'.<sup>23</sup> This is in contrast to Hobbes who, whilst cognisant of the 'original right of nature to make war',<sup>24</sup> and the similar right of every sovereign to procure the safety of his people,<sup>25</sup> counsels against the waging of war 'out of ambition or vainglory or that makes to avenge every little injury or disgrace done by their neighbours'.<sup>26</sup> Whereas Hobbes appears to advocate peace, Schmitt valorises the predisposition to violent conflict endemic within humankind and the imperative to preserve it.<sup>27</sup> Quintessential to Schmitt's international law perspectives are, therefore, abhorrence of a unified globe and the ensuing eradication of the political this invokes.<sup>28</sup> Whatever tends to transform or destabilise the truly pluralistic world-system that Schmitt envisions as the principal guarantor of concretely feasible co-existence is likely to constitute the focus of his critique.

This is where the imperative he discerns to recognise and preserve the political dovetails with the initiation at Nuremberg of the *crime of waging aggressive war* - a fateful move that Schmitt interprets as a normative disruption with irremediable implications. Once susceptible to punitive sanction under criminal international law, war as a legal institution, that is, as the lawful exercise of politics, ceases to exist. Explored later in conjunction with the outlawry of protagonists who participate in *unjust war* - amongst them the Nazi defendants at Nuremberg indicted for *crimes against peace* - crucial at this stage is the impact this development has on the 'political'. Upon the omnipresent risk of war hinges the communitarian right of each decisionist state to make the

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<sup>23</sup> Carl Schmitt 'State Ethics and the Pluralist State' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 300, 308; *ibid*: 308: 'For the world of objective spirit is a pluralist world - pluralism of races and peoples, religions and cultures, languages and legal systems. It is not a question of denying this existing pluralism and violating it with universalism and monism but rather of correctly placing pluralism'.

<sup>24</sup> Thomas Hobbes *The Leviathan* (New York: Prometheus Books, 1988), 168, Ch. XXVIII.

<sup>25</sup> *Ibid*: 189, Ch. XXX.

<sup>26</sup> Thomas Hobbes *English Works*, Volume IV 219-20, in Gershon Weiler *From Absolutism to Totalitarianism* (Durango, Colorado: Hollowbrook Publishing, 1994), 145.

<sup>27</sup> See *supra*: Scheuerman *The End of Law*, 264 where the author alludes to what he deems an insightful essay by Hedley Bull in which Bull emphasizes the fundamentally pacific character of Hobbes' thinking on international politics and defines Hobbes as a Realist of Peace. The implication is that Schmitt is, in contrast, a Realist of War.

<sup>28</sup> On this point see Carl Schmitt 'The Legal World Revolution' *TELOS* No. 72, (Summer 1987), 73-91, cited *supra*: Kanwar in his 'Dark Guardian of the Political', 'Written in the new context of the United Nations and the Cold War, here Schmitt writes against the prospect of a world-state and picks apart the dangers of liberal-internationalism in the process. The day world politics comes to the earth, it will be transformed into a world peace state. That is a dubious progress. We come full circle to the ultimate consequences of liberal denial, neutralisation and depoliticisation....This is about the universalisation of liberalism, this creates the asymmetrical effects and insurmountable discrimination'.

determination between friend and enemy. Criminalisation of war, in contrast, denotes the death knell of the political and it is this that comprises the crux of Schmitt's lament about the transformation of the *ius ad bellum*. Integral to this concern is the consequent exclusion from consideration of those subjectively determinable factors vital to a proper assessment of whether or not war is existentially warranted. Whenever a normatively-based rationale - whether ethical or juristic - intervenes, this connotes a disastrous disregard of the empirical reasons why one state chooses to wage war against another. Eliminated for ever is the possibility of lawful conflict in its raw and unvarnished manifestation:

'There exists no rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such physical destruction is not motivated by and existential threat to one's own way of life, then it cannot be justified. Just as little can war be justified by ethical or juristic norms. If there really are enemies in the existential sense, as meant here, then it is justified, but only politically, to repel and to fight them physically.'<sup>29</sup>

Compounded by the interjection of humanitarian ideals – values which the framers of the alleged offence of *crimes against peace* arguably sought to appropriate to justify their strategic intent - this culminates in the abject debasement of the enemy and, with it, Schmitt's perception of the ultimate 'injustice'.<sup>30</sup> Impelled by '*a political motive*' where '*the will to abolish war is so strong that it no longer shuns war*', there arises '*the absolute last war of humanity*',<sup>31</sup> in which war becomes:

'unusually intense and inhuman because, by transcending the limits of the political framework, it simultaneously degrades the enemy into moral and other categories and is forced to make of him a monster that must not only be defeated but also utterly destroyed.'<sup>32</sup>

If this is the heart of Schmitt's critique – encapsulated by his polemic against his opponents' efforts to undermine the political; to elevate the normative over the existential and the sham-cosmopolitanism over the particularistic motivation for waging war,<sup>33</sup> what is now vital is to contextualise it against the backcloth of the concrete

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<sup>29</sup> *Supra*: Schmitt *The Concept of the Political*, 49.

<sup>30</sup> See *supra*: Kanwar 'Dark Guardian of the Political', 'The greatest danger of liberal universalism is that it will claim to speak in the name of universal humanity. In such a case, all those by whom one is opposed must automatically be seen as speaking against humanity and hence merit only to be exterminated'.

<sup>31</sup> *Supra*: Schmitt *The Concept of the Political*, 36; as explored *infra*, this gives rise to the asymmetric 'war to end war'.

<sup>32</sup> *Ibid.*

<sup>33</sup> See *supra*: Kanwar 'Dark Guardian of the Political': 'The greatest sin of liberalism is its universalism. For Schmitt, morality is contextual and making choices in life and death situations is the essence of politics and identity. Therefore, disregard for particularity can be devastating'.

reality against which he seeks to formulate and refine it. How does Schmitt's interpretation of historical developments from mediaeval to late-modern eras lend insight into his denunciation of what he regards as the *ex post facto* introduction at Nuremberg of *crimes against peace* and, by extension, *conspiracy* to commit this offence? To which jurisprudential mechanisms does Schmitt have recourse? Is his denigration of the techniques utilised by the Allies sustainable in light of the previously elucidated legal and political theory that he so eloquently espoused during the turmoil of the Weimar Republic and the dark years of the Nazi regime that succeeded it? Upon what basis is the natural law concept of *just war* amenable or objectionable to him and, if the latter, how does he interweave his declamation of it with his ultimate repudiation of the *crime of waging aggressive war*?

Commencing with a brief account of the *res publica Christiana*, this is a journey encompassing what - from a Schmittian perspective - might be labelled the golden age of the *JPE* and its subsequent disastrous dismantling. Heralded by the ravages of the Allied onslaught against the defeated Germans at the 1919 Treaty of Versailles and the ominous shift signified by the Kellogg-Briand Pact 1928, this was to culminate in its fatal denouement during the equally flawed Nuremberg process. Overshadowing the demise of the *JPE*, as a vulture circling its prey, was the incremental influence of the US as a global power on the world stage. From its non-interventionist Monroe Doctrine 1823 to post-1917 ambivalence between isolationism and intervention, pivotal is the role Schmitt accords the US in what he depicts as a seismic transition to the insidious imperialism evident at Versailles and consummated at Nuremberg. Parallel to the rise of the US as an empirical and normative presence was the crumbling of the *JPE*, with all this augured for the *nullum crimen* doctrine. This is an account founded in history, anchored in the present but with its acumination firmly directed to the future.

## Epochs of Europe

### (i) The *res publica Christiana*

Regardless of Schmitt's ultimate embrace or repudiation of the *res publica Christiana* (*RPC*), what clearly holds fascination for him is the 'unity of medieval Christendom with the guarantee of 'supreme power' that this denotes.<sup>34</sup> Driven by papal authority and imbued with 'potestas spiritualis', the international order of the age pledged its efforts to the defence of Christianity, chiefly against the perceived menace of Islam. At its epicentre was Christian Europe, both its concrete allegiance and historical tradition oriented to Jerusalem and to Rome. Doctrinally key to this system was a theologically-conceived natural law - the *ius gentium* or law of nations - that provided justification for the waging of 'just war' to safeguard Christianity, in face of incursion by forces heretical to it. Neither the putative guilt of the perpetrators nor validation of their conduct beyond the pivotal ambition of Christian proselytisation was relevant. Authentication from God, through the Pope as his divine principal's earthly agent, ensured that all war conducted pursuant to papal dictate was necessarily *just*. Whether the instruments of these dictates - Christian princes and the subjects under their aegis - were aggressors or acting in defence of their own territories, was immaterial:<sup>35</sup>

'Formally speaking, the church's authority was decisive in the determination of just war. Accordingly, from the standpoint of substantive law, a just war was one waged *ex justa causa* [from just cause] ie for the purpose of pursuing legal demands, regardless of whether the war was aggressive or defensive, either strategically or tactically.'<sup>36</sup>

Critical, therefore, was the acknowledgment implicit within this formulation that it was as acceptable to wage a *just aggressive war* as it was to undertake an unjust defensive one. Equally significant was the inextricable linkage between the perceived justness of war and the concrete order of the *RPC* on behalf of which war was waged. This was not an evaluation of the relative merits of the decision to engage in war, imposed from 'outside' the theologically grounded order but rather one integral to it. Universal to the extent that it bound all within the order united in Christian belief, it was also particularistic in the sense that it rejected, on specific creedal tenets, those not within the aegis of Christianity. Neither peace nor war were free-floating, normative, general

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<sup>34</sup> *Supra*: Schmitt *Nomos*, 63.

<sup>35</sup> *Ibid*: 120.

<sup>36</sup> *Ibid*.



concepts but imbued with the solidity of concrete institutions.<sup>37</sup> Crucial to Schmitt was that the doctrine of *just war*, within the *RPC*, rested on the *ipso facto* ‘justness’ of the crusades and missionary wars waged to preserve the theological order of Christian Europe – the world which, for the human instruments of papal edict, circumscribed all meaningful existence. However, it was the ostensible viability of the notion of *just war* within the confines of the *RPC* that provides the foundation for Schmitt’s polemic against the 20<sup>th</sup> century distortion of it. For what operates efficaciously within one specific social and political structure may have profound - indeed shattering implications - when arbitrarily transposed, at least in part, to a wholly distinct geopolitical, ideological and normative framework in its new guise as the *crime of aggressive war*.<sup>38</sup>

Dangerous in the extreme, for Schmitt, was recognition by scholastic theologians within the *RPC* of the right of resistance afforded to every individual potentially ensnared within a manifestly unjust war. As soon as notions of the ‘justness’ of war emerged this accorded an individual – at least within the *RPC* – the right to decide unilaterally whether or not to follow his overlord into war. This, Schmitt emphasizes, arose only because of the institutional protection accessible to those opposed to the exercise of unjust war:

‘The individual who refuses his obedience had in his church in other words, in his confessor and his church authority– a determined supernatural footing. One refers not to the empty space, to his individual judgment but rather to clear institutions and even with regard to his conscience, the individual has a represented, secure *forum internum*, in the form of his confessor.’<sup>39</sup>

Tenable, therefore, due purely to those institutional safeguards at the fulcrum of the *RPC*, is it plausible to postulate any exigency within a non-theologically grounded system of international law that obligates an individual to resist her own country? To determine that the decision by the national sovereign authority to wage war is unjust and, in consequence, that resistance is appropriate, permissible or even mandatory? This capacity or duty to disobey appears contrary to the basic tenet of absolute obedience to

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<sup>37</sup> *Ibid*: 63.

<sup>38</sup> William Hooker *Carl Schmitt’s International Thought Order and Orientation* (Cambridge: Cambridge University Press, 2009), 76, ‘Schmitt stresses the spatial and conceptual uniqueness of the European Christian order so as to rubbish contemporary attempts to decontextualise medieval doctrines of just war and reapply them to radically different modern conditions’.

<sup>39</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’ 124, 188.

the sovereign entity, to which Schmitt consistently subscribes. Never is it to be left to the vagaries of individual conscience who to obey and in what circumstances compliance is warranted. The more so, he claims, where ‘*fixed international institutions that the individual can turn to for information and protection are not created*’.<sup>40</sup> *Just war*, with the demands this imposes on individual citizens once trans-national law – in the absence of an established institutional framework – asserts supremacy over the domestic law of nation-states, poses insuperable challenges. Sufficiently taxing within a political and juridical system where the concept of *just war* is already embedded within the ethos of a concretely existing order, this decision becomes exponentially more exacting where the reverse is true. Not merely is the outcome of this dilemma pivotal to Schmitt but the more so that the quandary is even able to emerge. Presumably unconcerned about the invidious choice this poses the individual *per se*, far more plausible is the potential impact on sovereign authority any conflict of loyalty represents.<sup>41</sup> Ramifications to state integrity invoked by the need to decide between the primacy of the as-yet undetermined adjudication of the justness of war at international level and intrastate positive law is, in Schmitt’s view, key to the distinction between the *just war* doctrine of the *RPC* and its professed parallel within the 20<sup>th</sup> century global order.<sup>42</sup>

Characteristics of the *RPC* that, in summary, rendered the concept of *just war* feasible were:

- Bracketing of war within the concrete order of Christian Europe wherein war was waged by Christian princes against those not of the faith<sup>43</sup>
- Evaluation of the justness of war by the Pope as the acknowledged and unchallenged representative of God on earth
- Necessitation of a moral-theological and juridical evaluation of the question whether a war was just or unjust<sup>44</sup>
- Lack of an organised, well-defined, state-centric system with the notion of unassailable state sovereignty that traditionally accompanies it
- A qualified right of resistance available to an individual ordered to participate in a manifestly *unjust* war (that is, a war not authorised by the Pope)

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<sup>40</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 188.

<sup>41</sup> As the discussion of the Schmittian skein in Chapter 3 demonstrates, Schmitt had little regard for the notion of pre-political rights of the individual vis-à-vis the state.

<sup>42</sup> See *supra*: Schmitt ‘The International Crime of the War of Aggression’, 321: ‘James Brown Scott, the American international law jurist sees in the modern turn to a discriminatory concept of war a return to the Christian theological doctrine of just war. But modern tendencies do not resurrect Christian doctrines. Rather, they are ideological phenomena attending the industrial-technical development of modern means of destruction.’

<sup>43</sup> On this point, see *supra*: Schmitt *Nomos*, 58.

<sup>44</sup> *Ibid*: 57.

- Effective institutional safeguards according redress to an individual who exercised the right to resist an order to embark upon unjust war

All were unique to the specific context the medieval *RPC* comprised but, once detached from it, the concept of *just war* became ripe for exploitation. Such displacement of categories and with it, the transformation of the *just war* concept came to connote, for Schmitt, one overriding and unavoidable challenge: the change in the empirical and juridical status of the party against whom *just war* is waged.<sup>45</sup> For as the *RPC* waned and the theological evolved into the moral, the dangers latent within both for a misplaced re-conceptualisation of the opponent were, in Schmitt's view, already gathering pace. This was an inevitable by-product of the dichotomy within the same conflictual arena of those adjudged to be consonant with the *justness* of war with the remainder engaged in its antithesis. What this heralded, in the last resort, was the elimination of war as a legal institution with all the consequences that ensued. Though this negation of war within the *RPC* was avoided, the tendency towards a discriminatory concept of the enemy was, ultimately, to prove inescapable. Suppressed during the concrete order of the *JPE*, the toxic potential of the *unjust enemy* concept the *RPC* engendered was to attain consummation in the post-WWI global order. As Europe stuttered from the dying embers of the *JPE* into the pseudo-universalism of the post-Nuremberg era, it was the resurrection of the *hostis perfidus* – the foe – that came to occupy the forefront of Schmitt's invective.<sup>46</sup> But how did this transformation occur?

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<sup>45</sup> *Ibid*: 66: 'As long as they were consistent with historical reality, such universal and core concepts of enmity as tyrant and pirate not only obtained their meaning from but affirmed the existence of the concrete international law of the empire'.

<sup>46</sup> The consequences of the intensification of enmity with the collateral dehumanisation of the enemy is explored later in the context of Schmitt's lament over the super-session of the notion of *just enemy* by the revival, in distorted form, of the concept of *just war*.

## (ii) The age of the conquistador

Positioned between the medieval, theologically grounded *RPC* and the state-centred *JPE* of the 17<sup>th</sup> to early 20<sup>th</sup> centuries was the age of the conquistador with the discovery of the New World – the Western Hemisphere – to the West and India to the East. No longer did Europe – even from a European perspective – constitute the entire world but the epicentre of a developing global configuration of peoples. Within this Age of Discovery, Schmitt identifies the famous *relectiones* of Francisco de Vitoria as an emblematic expression of the evolution of *just war* and the juridical status of the enemy who opposed it. Derived from traditional concepts, it was the doctrine of *just war* – epitomising papal authority at its zenith – that provided the Spanish with the legal title not only to occupy and annex territory but to subjugate peoples indigenous to it. Further, the preservation and aggrandisement of the organically-evolving remnants of the *RPC* were still, for Vitoria, the overriding criteria for determination of the *justness* of war. Had this been the extent of his contribution it would, perhaps, have augured little new. At this point, however, does Schmitt detect a subtle shift away from the discriminatory concept of war?

Momentous, to Schmitt, was the embryonic neutrality, as yet underdeveloped but with the ‘purest motives of amoral-theological objectivity’<sup>47</sup> that Vitoria appeared to countenance. No longer did subscription to the prevailing notion of *just war* preclude exercise of a more tolerant attitude towards the opposition – specifically in his case, the aboriginal occupants of the New World.<sup>48</sup> A development worthy of appropriation, this trend towards ‘humanisation of the enemy’ was, in Schmitt’s view, the triumph of the *jus publicum europaeum* – the period that straddled the theologically-grounded medieval *RPC* and its 20<sup>th</sup> century pseudo-moral universalistic counterpart. What Schmitt perceives as the attributes of the *JPE* and its lamentable disintegration are crucial to his critique of the Nuremberg process and the pseudo-universalism that underpinned it. How this facilitates formulation of an interpretative model for analysis of the *nullum crimen* principle is deferred until the closing stages of this chapter as is scrutiny of Schmitt’s conceptualisation of *nomos* and its linkage with concrete order thinking. The next segment focuses on what Schmitt deems the squandered potential of the *JPE* and the extent to which comparison between its state-based and spatially grounded

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<sup>47</sup> *Supra*: Schmitt *Nomos*, 115.

<sup>48</sup> On Schmitt’s treatment of Vitoria, see *ibid*: 105ff.

Eurocentric system - and the spatially dislocated wilderness that followed - informs his polemic against the global disarray of the post-WWI period and beyond.

### (iii) The age of state supremacy within the *jus publicum europaeum*<sup>49</sup>

‘While the *res publica Christiana* of the Middle Ages had been a strictly European order, its successor, the *jus publicum Europaeum*, was the first global order, even if based on European sovereign states.’<sup>50</sup>

Whereas the *RPC* was regulated by the immutable tenets of Christian natural law doctrine, the *JPE* that inherited its mantle as the dominant, European public international law system bore its allegiance to positive law or *Volkerrecht*.<sup>51</sup> Antonymic to the ideological concerns and preferences of natural law doctrine and antithetical to all-embracing notions of universality, this was an institution conducive to selected aspects of a positive system of law.<sup>52</sup> More specifically, the *JPE* was a secular institution deriving its quintessential authenticity from the shared cultural traditions deep-rooted within it, as well as the positively-given treaty and convention-based norms that regulated the relations of the nation states it embraced.

Not purely dependent on volatile and voluntary ties ‘among the presumably unrestrained will of equally sovereign persons’, it was, on Schmitt’s interpretation, an epoch that owed its coherence to ‘the binding power of a Eurocentric spatial order encompassing all sovereigns’ within it.<sup>53</sup> The concept of the state, as an agency of rationalisation and detheologisation commenced with scholars such as Gentili and Ayala and juridical recognition of the state, as a legal entity, became embedded within European law from the Peace of Westphalia 1648 until its dissolution in 1914.<sup>54</sup> The

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<sup>49</sup> See Gary Ulmen ‘American Imperialism and International Law: Carl Schmitt on the US in World Affairs’ *TELOS* No. 72, (Summer 1987), 43, 44: ‘Considering the present global antithesis of East and West, Schmitt finds iconography more historically and analytically suitable than ideology...In Schmitt’s understanding, iconography is constituted of those various conceptions of the world deriving from religion and tradition which have their own geography. He speaks of a circulation of iconographies: a rotation and relocation of problems as well as elites. The great struggle, begun during the Age of Discovery, particularly the discovery of the New World, soon became a confessional struggle between Roman Catholicism and northern Protestantism, Jesuitism and Calvinism. Out of that iconographic struggle arose the first spatial order or *nomos* of the earth: the *jus publicum europaeum*’.

<sup>50</sup> Gary Ulmen *Introduction to The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Ltd, 2003), 25.

<sup>51</sup> *Ibid*: Ulmen, 10.

<sup>52</sup> It is important here not to conflate the idea that the *JPE* is a positive institution in a historical sense with the value neutral legal positivism that Schmitt remorselessly vilifies in the intrastate context and also in relation to the later years of the *JPE* when treaties and other interstate agreements are made without any concrete grounding in the relations between one European state and another. This is discussed *infra* with regard to the descent of the *JPE* into what Schmitt views as a morass of hollow positivistic provisions.

<sup>53</sup> *Supra*: Schmitt *Nomos*, 148.

<sup>54</sup> *Ibid*: 159ff where Schmitt lauds the efforts of Gentili, Ayala and Vattel in contrast with those of Grotius though even in Grotius, he discerns a trend towards the secularisation of traditional natural law doctrine.

*Westphalian* system of public international law this inaugurated gathered momentum after the Treaty of Utrecht 1713, as the era of the nation state held sway. Though temporarily undermined by the French Revolution of 1789, the Congress of Vienna (1814-15) re-established the old order and, for Schmitt, '*this was one of the most remarkable restorations in history*'.<sup>55</sup>

Concomitant with this development was the instigation of an interstate positivistic *jus inter gentes* and the synchronous demise of the natural law-based *ius gentium*. Allied to this was the recognition of states and the governments within them as a type of legal institution; the quasi-contractual relationships between states as reciprocally trustworthy partners and, most potently, '*the principle of non-interference in another state's constitutional matters, regulated legally*'.<sup>56</sup> Vested in each equal sovereign - none superior to another and no highest instance or court of last resort supreme over any - was the untrammelled right to decide, both on an intra and inter-state level.<sup>57</sup> Equivalent to moral persons in the state of nature, nation states '*with equal legitimacy and equal rights*' were able to confront one another as '*representatives of jus belli, without a common, institutional higher authority*'.<sup>58</sup>

Reminiscent of a Hobbesian conceptualisation of interstate relations where security existed only within the state and not outside it and no state existed between states, neither legal war nor legal peace was feasible.<sup>59</sup> Because the state absorbed all rationality and all legality, there remained within the international arena '*only the pre and extra legal state of nature in which tensions among leviathans were governed by insecure covenants*'.<sup>60</sup> Ultimately crucial, therefore, was that each sovereign state-

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<sup>55</sup> See *supra*: Carl Schmitt 'Theory of the Partisan', 15.

<sup>56</sup> *Supra*: Schmitt *Nomos*, 304.

<sup>57</sup> See *supra*: Schmitt, *Constitutional Theory*, 295 where Schmitt makes it clear that the democratic principle is undermined by treaties and declarations under international law: 'The application of the democratic principle is evident in the fact that for the conclusion of treaties and declarations under international law, the will of the representative is no longer decisive and the concept of ratification is brought in into disarray because the concept of representation is not properly recognised'.

<sup>58</sup> *Supra*: *Nomos*, 147: Schmitt mentions that all significant authors have subscribed to this view, including Hobbes, from Leibnitz to Kant and from Samuel Racher to Johann Ludwig Klüber.

<sup>59</sup> See *supra*: Kanwar 'Dark Guardian of the Political': 'Insofar as international law is from the beginning a cosmopolitan or solidarist project, Schmitt, like Hobbes before him, is seen as denying the very possibility of international law'.

<sup>60</sup> *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 48.

person within a ‘*territorially concrete spatial order*’<sup>61</sup> was the sole empirical arbiter of the relative justice of its own cause, with unconstrained entitlement to determine ‘*autonomously concerning justa causa*’.<sup>62</sup> Because war between states was an affair of state, deriving its dignity, honour and rights from the fact that only states waged war between states and states alone could confront each other as enemies, war between them was capable of being neither just nor unjust.<sup>63</sup>

‘The state had become independent with respect to the question of whether state authority was legitimate or illegitimate. Just as state wars became independent of the question of the justice or injustice of the grounds of war in international law, so too did the question of *justa causa* become independent in *international law*. All law came to reside in the existential form of the state.’<sup>64</sup>

What this signified was the triumph of the secular sovereign state system over questions of substantive right ‘*understood in the early feudal-legal, estate-legal or creedal-theological sense*’.<sup>65</sup> Characterised above all, by mutually equally and sovereign states where respect was owed one to another it was this that led to what, for Schmitt, was a laudable transformation of war.<sup>66</sup>

Through the vehicle of the sovereign territorial state and the relationship between specific spatially concrete and organised orders, that is, military actions between state-organised armies against their foreign counterparts, war for the first time was

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<sup>61</sup>See *supra*: Carl Schmitt, ‘The Grossraum Order of International Law’, 75, 77: ‘The indispensable elements of a spatial order have until now been found primarily in the concept of state, which more than a personally determined area of rule, means first of all a territorially limited and territorially closed unity’.

<sup>62</sup> *Supra*: Schmitt *Nomos*, 157.

<sup>63</sup> *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 47.

<sup>64</sup> *Supra*: Schmitt *Nomos*, 204.

<sup>65</sup> *Ibid*: 157.

<sup>66</sup> On this point, see Gary Ulmen ‘Towards a New World Order: Introduction to Carl Schmitt’ No. 109 (Fall 1996), 3-29, where Ulmen emphasizes that the post-medieval law of the *JPE* from the 16<sup>th</sup> to the 20<sup>th</sup> centuries sought to repress the so-called *justa causa* for war. Drawing on arguments made in Schmitt’s *Nomos of the Earth*, this new order was based firstly on the separation of moral-theological from juridical-political arguments and secondly the separation of the just cause of war grounded in moral arguments from the juridical question of the just enemy, exemplified by the criminal, that is, the proper object of punitive action; also Alessandro Colombo ‘The realist institutionalism of Carl Schmitt’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 21, 23, ‘Through the secularisation of the public sphere and the neutralisation of conflicts that resulted from the civil wars of religion, its fundamental contribution has been to transform international cohabitation into a relation between specific, spatially concrete and organised orders able to be conducted with *comitas* (courtesy) and with *jus* (probity). Modern international politics becomes in the era of the *jus publicum europaeum*, not the materialisation of the Hobbesian state of nature but rather the political and juridical response to it, as well as to the experience that provides its existential truth’.



bracketed.<sup>67</sup> Not only was this made possible by the equipoise between the nation states within Europe but due to a similar balance between the territorial land mass of Continental Europe and the spatially unbounded sea, to which the island of England formed a seminal connecting link;<sup>68</sup> between the territorially-grounded Eurocentric spatial order and the non-European soil outside it<sup>69</sup> - most particularly, the Western Hemisphere of the New World - still susceptible to appropriation by European states.<sup>70</sup> Tantamount to an amphitheatre of war – a *theatrum belli* - the continent of Europe ‘comprised the enclosed space in which politically authorised and militarily organised states could test their strength against one another under the watchful eyes of all European sovereigns’.<sup>71</sup> Uniquely of all wars across the globe, European land wars during the *JPE* were fought by armed forces, respectively organised by the states on each side of the conflict.<sup>72</sup> What this presaged, for Schmitt, was a historic sea-change in the co-existence of nations and the re-categorisation of war waged amongst them.<sup>73</sup>

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<sup>67</sup> See *supra*: Schmitt *Nomos*, 158.

<sup>68</sup> See *supra*: Ulmen ‘American Imperialism and International Law’, 49: ‘In the perspective of the *jus publicum Europaeum* all land belonged to European states or open spaces free to be occupied. The sea remained outside the spatial-political order...Spain too remained landbound and in spite of its oversea empire, did not become a sea power. France opted for a terrestrial form of government and became the paradigm for the continental European state. After the Treaty of Utrecht (1713), Holland also became landbound. But England was not so deeply enmeshed as her rivals in European politics. England alone took the step from a landbound to a maritime existence and thereby became the bearer of the universal maritime domain of a Eurocentric global order and the defender of the other side of the *jus publicum Europaeum*’.

<sup>69</sup> See Peter Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War, Military Occupation and World Empire’ *Studies in Political Science* Vol. 27, 1-143, 54, ‘the concept of sovereignty as envisaged by Hobbes and Bodin was the principle of order while, beyond Europe, a concept of divisible sovereignty as envisaged by Grotius was the principle of order’.

<sup>70</sup> On this point, see *supra*: *Nomos*, 148 where Schmitt emphasizes the significance of a spatial structure inherent in the idea of a balance of European states which made possible a continental law of European sovereigns ‘against the background of the immense open spaces of a particular type of freedom’; also *supra*: Ulmen ‘American Imperialism and International Law’, 48: ‘The discovery of the New World and the ensuing struggle for land initiated what Schmitt calls “global linear thinking”. Once maps and globes indicated the actual form of this New World, lines of division were drawn: first the *rayas* of the Spanish and Portuguese, then the “amity lines” of the French and English. “Europe” ended where the New World began. The world “beyond the line” was without law.’ *Ibid*: 50: ‘The third global line – the Western Hemisphere – was drawn only after the spatial order of the European sovereign states was established. It set the New World apart as an independent spatial order, although it still had a historical and dialectical relation to the preceding lines’.

<sup>71</sup> *Supra*: Schmitt *Nomos*, 142.

<sup>72</sup> *Ibid*: 309.

<sup>73</sup> See *supra*: Rasch ‘Lines in the Sand: Enmity as a Structuring Principle’, 253, ‘Schmitt clearly marks the difference between symmetrical and asymmetrical modes of warfare (thus the difference between warfare “this side” versus the “other side” of so-called amity lines that separated Old Europe from the New World) as the difference between wars fought against “just enemies” and those fought for a “just cause”. The former recognise a commonality amongst combatants that allows for reciprocity; the latter does not. Wars fought against enemies one respects as part of the same cultural “space”, no matter how subdivided, allows for the desirable constraints on the conduct of war...This self-differentiated unity can assume the restrained and restraining order of civilisation because it has inoculated itself against outbreaks of “natural” and lawless violence by displacing them in the New World’.

With super-session of the creedal civil wars that had been obsessed with the justness of war, state sovereigns were now able to end the associated and inevitable ‘*murderous assertions of right and questions of guilt*’.<sup>74</sup> No longer were juridical interests concerned with ‘*the normative content of justice and the substantive content of *justa causa* but rather with form, procedure and jurisdiction in international as well as domestic law*’.<sup>75</sup> Because wars occurred between equal sovereign states with the attendant neutralisation of conflicts between religious factions, a cool rationalisation overtook the fervid histrionics of the theologically-inspired medieval era.<sup>76</sup> Destruction of the church-controlled bracketing of war, epitomised in the *RPC* by the proliferation of unregulated religious conflict, was replaced by a new bracketing of war within the new Euro-centred spatial order of the earth.<sup>77</sup> Within the condition of normalcy that characterised the land mass of continental Europe what, therefore, developed was a juridical framing of war - a “*war in form*”,<sup>78</sup> this, in sharp contradistinction with the state of exception that prevailed in the New World, where unregulated conflict reigned supreme.<sup>79</sup> It was this crucial bracketing of war on mainland Europe that, for Schmitt, was to provoke far-reaching implications.

Coalescing around juridical recognition of the sovereign state and the re-conceptualisation of the enemy within a secularised model of war, the notion of *justis hostis* supplanted that of just war. Transformed as it was into an international order characterised by liquidation of civil war, the legitimisation of a realm of relative reason and the attendant humanisation of war, the *JPE* demanded that respect be accorded opponents in war.<sup>80</sup> Within a concrete order where belligerents with the ‘*same political*

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<sup>74</sup> *Supra*: Schmitt *Nomos*, 157.

<sup>75</sup> *Ibid.*

<sup>76</sup> See *supra*: Ulmen ‘American Imperialism and International Law’, 48: ‘Following the Reformation, theologians were excluded from questions of international law. From the 16<sup>th</sup> to the 20<sup>th</sup> century Eurocentric international law sought to repress the theologically-based concept of *justa causa*, the just cause of war. More specifically, the formal criterion for the determination of a just war was no longer the authority of the Church but the equally legal sovereignty of all states.’

<sup>77</sup> See *supra*: Rasch ‘Lines in the Sand: Enmity as a Structuring Principle’, 258: ‘What Schmitt regards as an enviable achievement – that is, the balanced order of restrained violence within Europe – presupposed the consignment of unrestrained violence to the rest of the world’.

<sup>78</sup> *Supra*: Schmitt *Nomos*, 141; Schmitt also refers to this in the French style: ‘une guerre en forme’.

<sup>79</sup> *Ibid*: 237.

<sup>80</sup> See *supra*: Ulmen ‘American Imperialism and International Law’, 49: ‘In Schmitt’s view, the transformation of moral-theological concepts into juridical-political arguments, specifically the juridical formulation of *justus hostis*, resulted in a limitation of war, the transition to “war in form” similar to a duel, the rationalisation and “humanisation” of war. This new concrete order and containment of war

*character and the same rights’...‘both recognised each other as states’, elision of the categories of enemy and criminal foe became unsustainable.<sup>81</sup> ‘Not only was the concept of the enemy able to assume a legal form but the enemy ceased to be someone “who must be annihilated”’.<sup>82</sup> What this entailed was that as ‘European state war thus became an armed struggle between hostes aequaliter justi’<sup>83</sup> it was indefensible to condemn and punish individual protagonists as rebels, criminals or felons. Where one warring state refused to arrogate exclusivity as to the putative ‘justness’ of its conduct, no longer was it plausible to designate its opponent as ‘unjust’, with all the pejorative ramifications this engendered. Superseded as it was by a non-condemnatory concept of the enemy, the ‘foe’ became purely rhetorical.<sup>84</sup>*

Intrinsic to the elimination of the *justa causa* question, this refreshingly, non-discriminatory concept of the enemy in war was, to Schmitt, symbiotic with ‘*the construction of the international law of the interstate spatial order and to the bracketing of European war*’.<sup>85</sup> Relativisation of enmity, and delimitation of war to the combatants engaged in it, precluded any incipient drift towards a global total war that would have extended beyond the military sphere into the economy, culture, intellectual life, church and society.<sup>86</sup> What this appeared to guarantee was the continuation of everyday existence irrespective of a condition of ongoing warfare.<sup>87</sup> Hardly surprising, therefore, that with this promise of stability within the state, augmented by an implicit non-interventionist protocol binding upon each sovereign state one to another - the *JPE* was to find its intellectual champion in Carl Schmitt.<sup>88</sup>

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derived both from theoretical and practical factors, among them the conception of a European equilibrium of states resulting from land appropriations in the New World’.

<sup>81</sup> *Supra*: Schmitt *Nomos*, 142.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid*: 157.

<sup>84</sup> George Schwab ‘Enemy or Foe: A Conflict of Modern Politics’ *TELOS* No 72, (Summer 1987), 194, 198.

<sup>85</sup> *Supra*: Schmitt *Nomos*, 165.

<sup>86</sup> See *supra*: Ulmen ‘Just Wars or Just Enemies’, ‘The 20<sup>th</sup> century of “total war” has demonstrated the civilising and even “rational” policy of Eurocentric international law grounded in the *jus publicum Europaeum* – the substitution of the concept of “just enemy” for that of a “just war” and the related “bracketing of war” whereby it became possible to have truly “limited” wars’.

<sup>87</sup> Gary Ulmen ‘Return of the Foe’ No. 72, (Summer 1987), 187-194, 191: ‘Totalisation consists of the inclusion of non-military factors into the realm of hostilities.’ Ulmen points out that the suspension of the distinction between combatants and non-combatants results not only in a quantitative but also a qualitative expansion of war; not the mitigation but intensification of enmity.

<sup>88</sup> See *supra*: Schmitt ‘The Grossraum Order of International Law’, 115, ‘What was the peace of the European international order as apparently upheld by states from 1648 to 1914? How is a peace and with it an international law possible between sovereign states, each of whom claims a free right to war, left to

Emanating from the bracketing of war within Continental Europe and the displacement of *just war* in favour of *just enemy*, occurred what Schmitt perceives to be a further significant progression in the evolution of law between nations, that is, emergence of the unequivocal status of neutrality. Once the justice of war was no longer based ‘on conformity with the content of theological, moral or juridical norms but rather on the institutional and structural quality of political forms’,<sup>89</sup> this possibility of neutrality for third parties in international law arose. No longer mandatory for by-standing states to align their allegiance to the state able to claim authentication by reference to a theologically-determined *just cause*, it was entirely apt for such states to function as truly impartial observers. Not merely non-partisan onlookers but genuine ‘*guarantors and guardians of international law*’, the feasibility of ‘*real international law*’ was directly dependent on the existence of ‘*real neutrality*’.<sup>90</sup> Akin to a duel between individuals before independent witnesses, with its quintessential ‘justness’ derived not from the identity or merits of the victor but the preservation of law in an institutionalised *form*, interstate war similarly became an institution where spectators were entitled to retain their neutrality.<sup>91</sup> In no sense, did exercise of this right to remain neutral render them either legally or morally culpable, any more than legal accountability was ascribable either to the belligerent states or to the individual citizens within them.

Paramount to the concept of neutrality was the juridical equality of all states within the *JPE*, conjoined with the non-derogable right this conferred for any state to remain impartial or, conversely, to join in and take sides. Implementation of the *ius ad bellum* - the right to wage war – became enshrined in the concrete order of ‘*an interstate international law grounded in a balanced spatial structure of self-contained states, each*

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its own sovereign decision? It goes without saying that the coexistence of such sovereign institutions of power proceeds not from a substantially given actual peace but from the continual possibility of war. This means that the peace is only “not war”. But such a peace is only possible for only so long, such a situation built upon an era construction like “not war” is bearable only so long as war is not total. War, as presupposed in the earlier system of European international law was, in reality, only a partial war, be it a cabinet war of the eighteenth century, be it a war of combatants – a tradition that held fast in the following era until 1914. This is the core of international law.’

<sup>89</sup> *Supra*: Schmitt *Nomos*, 143.

<sup>90</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 106.

<sup>91</sup> *Ibid*: 105: ‘states conducted war against other states as a concrete order on the same level. This is similar to a duel, if duels are legally recognised in a given system, finds its inner order and justice in the fact that two honourable men demanding satisfaction stand against one another, even if these two men are of very different physical strength and skill with weapons.’

with defined territorial limits and fixed borders'.<sup>92</sup> Within this system of international law, war was 'a relationship of one order to another order, and not from order to disorder'.<sup>93</sup> As 'war lost its criminal character and punitive tendencies',<sup>94</sup> no longer was it legitimate to discriminate between the just and unjust participant. Inconceivable, therefore, was the least intimation that nation states, far less the occupants within them, would ever be held criminally liable for the act of waging war. A by-product of the presupposition that 'European international law did not recognise international jurisdiction of one state over another or of one sovereign over another',<sup>95</sup> it was axiomatic that no state could be brought to task, unless in violation of treaties or other provisions to which it had voluntarily subscribed and specifically incorporated within its own domestic law.<sup>96</sup> Such prospect was simply beyond the realm of contemplation in the concrete order of the *JPE*, where all war - within its spatial boundaries - in concert with the concepts of *neutrality* and *just enemy* that accompanied it, acquired the status of legal institutions.<sup>97</sup>

Affiliated with the foregoing containment and institutionalisation of war was the procedure that followed its cessation. 'A peace treaty with the vanquished party [thus] became possible',<sup>98</sup> with the collateral respect to the fallen opponent this implicitly invoked:

'Given the fact that war was fought against enemies rather than against rebels, criminals or pirates, it was possible to establish numerous legal institutions. In particular, it became possible to view prisoners of war and the vanquished no longer as objects of punishment or vengeance or as hostages and no longer to treat private property as war booty and to conclude peace treaties with self-evident amnesty clauses.'<sup>99</sup>

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<sup>92</sup> *Supra*: Schmitt *Nomos*, 167.

<sup>93</sup> *Supra*: Schmitt 'The Grossraum Order of International Law', 105.

<sup>94</sup> *Supra*: Schmitt *Nomos*, 309.

<sup>95</sup> *Ibid*: 263.

<sup>96</sup> As, for example, with Article 4 of the Reich Constitution 1919, by which international law, as it then existed, was incorporated within German domestic law. See, however, *supra*: Schmitt *Constitutional Theory*, 121: 'An international law contract as such is never a constitution in the positive sense. It also cannot be put into the constitution of an independent state'.

<sup>97</sup> See *supra*: Ulmen 'American Imperialism and International Law', 65: 'In the international order of the *jus publicum Europaeum* the recognition of one state or government by another was based on equality and recognition and, in the case of war, on the concept of *justus hostis*. Every recognition in international law was fundamentally an expression of the fact that the state in question had a legitimate spatial dimension and belonged to a recognised spatial order'.

<sup>98</sup> *Supra*: Schmitt *Nomos*, 142.

<sup>99</sup> *Ibid*: 309-310.

All invaluable attributes of the *JPE* to the conservative-minded Schmitt, each held the key to the rationalisation and humanisation of war: the well-being of those captured in war, the retention of private wealth and the subsequent economic stability of the protagonists - whether victor or loser – caught up in the disruption that war was prone to generate. During the currency of conflict, effective and acceptable rules governing war were codified in a series of conventions, not least to ensure the humane treatment of prisoners-of-war and incarcerated non-combatants alike.<sup>100</sup> Certain categories of weapons were controlled or proscribed and wars became *clean*. The need to wage war once satiated, peace treaties containing explicit amnesty provisions precluded the unilateral stigmatisation of one protagonist at the expense of another. Nor was the future of any participant asymmetrically prejudiced as a direct consequence of either the empirical vagaries of war, or its all-too random outcome.

Critical also, for Schmitt, was that within the epoch of the *JPE*, the only subject of international law and the sole entity, therefore, potentially susceptible to accountability was the state. As international law acknowledged liability of the state alone, a crime in ‘international law’ did not equate to a crime in the sense of a state’s criminal law:

‘War was conceived of strictly as a relation between states, not individuals or groups. In international law, war was pursued neither by individuals, nor by heads of states personally but by the state as such. The enemy was *justus hostis*, ie he was distinguished from a criminal.’<sup>101</sup>

This was the inevitable and fully warranted consequence of the demise of the *RPC*. With the ending of the struggle over the *just cause* of war and the decline of spiritual authority, as embodied in the pope, individual citizens of a nation state had no means of determining whether or not a conflict - actual or proposed – met the criteria of being ‘just’ or what those criteria were meant to be. If the new spatial order of the European state-centric system was to survive, removal of the prerogative of choice was, therefore, indispensable. If left to individual subjects to decide on the comparative justice or injustice of governmental action in the war-making sphere, civil war and anarchy were ineluctable.<sup>102</sup> Untenable was any disorder within the state consequent upon the

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<sup>100</sup> Hague Regulations 1899 and 1907 available online:

<<http://www.yale.edu/lawweb/avalon/imt/menu.htm>>

<sup>101</sup> *Supra*: Schmitt *Nomos*, 263.

<sup>102</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 190: ‘In this situation, the individual citizen...who did not belong to the political circles of the regime had to leave the judgment as to the justice or injustice of a war to his national government’.

decision of individuals within it to adjudicate upon the relative justness of any war the state contemplated. Only when secure in the total and unwavering loyalty of its own subjects was each equal nation state free to exercise its own right of autonomous decision-making in relation to the perpetration of war.

Concomitant with nullification of the medieval right of resistance was the exoneration of the individual citizen from personal accountability for state actions – specifically the consequences of the decision to wage war:

‘The modern state of the European continent resulted from the fact that it disposed of the medieval right to resistance and replaced it with its own legality and legal judicial remedies. All legality of a modern state rests on the assumption of the legality of all government and administrative acts.’<sup>103</sup>

Now beyond the remit of international law arising from a state-level decision to wage war – whether or not classified as ‘aggressive’ - and *a fortiori*, immune from the strictures of interstate *criminal* law (save where specifically integrated into relevant municipal law), what the individual owed – and the *JPE* demanded in return - was a correlative and unqualified duty to obey the sovereign state authority. What this, in essence, presupposed was an unequivocal confidence in, and compliance with, the legality, due process and established procedures of the *JPE*. The latter operated as a spatially circumscribed, concretely-grounded, pragmatic positivism, derived from and embedded within an equilibrated, Eurocentric and state-based system.<sup>104</sup> A self-regulating co-existence of antagonistic powers organised through the medium of violence and characterised by the sundry social customs and legal institutions ingrained within it, none more significant than the right of each equal sovereign states to wage war in exercise of the *ius ad bellum* and the absence of criminal liability for it.<sup>105</sup>

- Equality of sovereign states with none superior to the other
- No overarching trans-national or supra-national authority
- Obligation of each sovereign state not to intervene in the affairs of another sovereign state
- Clear dichotomy between war and peace without blurring of the distinction between them
- Bracketing and containment of war

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<sup>103</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 191.

<sup>104</sup> See *supra*: Schwab ‘Enemy or Foe’, 194, 198: ‘The *justa causa* of the medieval period was subordinated to the exclusive judgment of the sovereign’.

<sup>105</sup> See *supra*: Rasch ‘Lines in the Sand: Enmity as a Structuring Principle’, 257.

- Repudiation of the putative just cause of war
- Relativisation of enmity<sup>106</sup>
- Formalisation of the concept of *just enemy*, whereby the enemy enjoys lawful rather than criminal status
- Unequivocal entitlement to *neutrality*
- Recognition of the state as the sole subject of international law with the assertion of absolute sovereignty this connotes and the attendant insistence that '*state sovereignty is eroded by political assertion of the individual subject*'<sup>107</sup>
- Abnegation of individual accountability under international law, whether criminal or otherwise
- Consequent superfluity of protection of the individual from the strictures of *international law*
- Protection of the individual as a matter of both theory and praxis '*from arbitrary and irrational, because incalculable, violence, by states acting as moral persons living in an unregulated but serendipitously achieved balance of power.*'<sup>108</sup>
- Unqualified duty of the individual citizen to obey the dictates of his or her sovereign state
- Feasibility of the cessation of war by peace treaty
- The unconditional right of each sovereign state to wage war and thereby to determine its own political existence<sup>109</sup>
- Respect for the traditions and institutions of the concrete order
- Lack of foreseeability either of the criminalisation of war *per se* or individual responsibility for the act of waging it

Indispensable to Schmitt within the *JPE* was, therefore, the '*philosophical bolstering of the core component of sovereignty*'<sup>110</sup> and its capacity to constitute an effective bulwark against the assertion of liberal universalism. These were the qualities that, above all, emanated from '*states possessed of a political idea in the sense of a concrete orientation, an understanding of their own peculiarity and their successful functioning in a pluriverse*'.<sup>111</sup> This secular tradition - capable of abrogation '*only through secure, new institutions*'<sup>112</sup> - prevailed amongst all nations of the European continent from the end of the *RPC* until what Schmitt regards as the fateful 20<sup>th</sup> century re-moralisation of international law. Whilst no doubt true that his account of the *JPE* in *Nomos of the*

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<sup>106</sup> *Supra*: Schmitt 'Theory of the Partisan', 11-78, 47, 'The war of absolute enmity knows no bracketing. It finds its justice and meaning in this will to reach its extreme consequences'.

<sup>107</sup> *Supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 101.

<sup>108</sup> See *supra*: Rasch 'Lines in the Sand: Enmity as a Structuring Principle', 257; see also 'The International Crime of the War of Aggression', *ibid*: 190, 'The individual state citizen, who...resolved to resist the war led by his government as an unjust act could find neither in domestic opinion nor in domestic law any footing or protection'.

<sup>109</sup> See *supra*: Schmitt *Constitutional Theory*, 383: 'A state that renounces conclusively its right to self-defence and transfers this right to another state or to another organ does not have its own political existence'.

<sup>110</sup> *Supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 141.

<sup>111</sup> *Ibid*.

<sup>112</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 190.



*Earth* 'is ultimately a politically defensive and even nostalgic work',<sup>113</sup> its significance must not be underestimated. Pending further scrutiny of this fateful transition, exposition of the crucial impact of the *JPE* on what Schmitt implicitly deems one of its foremost achievements - entrenchment and unassailability of the *legality* principle is fleetingly deferred, as are the countervailing consequences of its demise.

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<sup>113</sup> William E. Scheuerman 'Carl Schmitt and the Road to Abu Ghraib' *Constellations* Vol. 13, No.1, (2006), 109-124; Scheuerman also indicates that Schmitt was, perhaps, more concerned with underscoring the virtues of the (now bygone) traditional European state system than with outlining a constructive alternative to the self-destructive universalisms (eg. liberalism and Marxism) that he deemed culpable for the "global civil war" which would inevitably ensue. Schmitt did, however, postulate the *Grossraum* theory as a model for the new international order he envisaged.

## The Monroe Doctrine: the advent of US imperialism

Evident from the above is the allure, for Schmitt, of those components unique to the *jus publicum Europaeum*. Chief amongst these was the juridical formalization of war between equal sovereign states and the limiting of war this produced. Feasible because of the fundamental separation of the juridical-political sphere from its creedal-theological counterpart the *JPE* - as the last bearer of occidental rationalism - eliminated the categories of *just war* and its corollary, the *unjust enemy*.<sup>114</sup> Anathema, therefore, to Schmitt, was any prospect of their reincarnation. Were humankind to witness the collapse of the *JPE*, and the Eurocentric spatial concrete order synonymous with it, this realisation would become ever more proximate. Introduction into the juridical framework of the notion of aggression and its conflation with the *just war* concept represented an unwarranted perversion both of medieval scholastic doctrine and the theories propounded by Vitoria.<sup>115</sup> What this invoked was flagrant disregard of the real concrete reasons for war in the sense the *RPC* required in favour of a flawed concession that '*the injustice of the aggression lies not in the establishment of the cause of war but in the crime of aggression itself*'.<sup>116</sup> Though resurrection of the illegalisation of war - with its novel conceptualisation of the aggressor as '*a felon in the most extreme criminal sense*'<sup>117</sup> - was both a regression and distortion that Schmitt would have preferred to avoid, it was the carnage of the two World Wars that ultimately compelled him to confront them.

As a prelude to this regrettable degeneration in the concept of war, what came to occupy his writings on international law - from the 1930s in particular - was his account of the

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<sup>114</sup> Schmitt's nostalgia for the *JPE* is evident not only in *Nomos* but also *supra*: Schmitt 'Theory of the Partisan', 11-78: 'The epoch of the state is coming to an end. The state, as the model of political unity, as the bearer of the most outstanding of all monopolies, namely the monopoly of political decision, this splendid achievement of occidental rationalism is coming to an end'.

<sup>115</sup> See *supra*: Ulmen 'Just Wars or Just Enemies', 99-113, 112, 'From the Middle Ages to the present, from Vitoria to Schmitt, the logic of international law has been that just wars are total wars which transform the *iustus hostis* into a *perfidus hostis*'; see Michael Walzer 'The Triumph of Just War Theory and the Dangers of Success' *Social Research* Vol. 6, No.4 (Winter 2002), 925-944: it is Walzer who is widely accredited with a post modern articulation of the notion of *just war* and its espousal within the Anglo-Saxon tradition through deployment of the precepts of military ethics and humanitarian motivation for war. This is the antithesis of the views of those such as Danilo Zolo who subscribe to political realism. See Danilo Zolo *Invoking humanity war, law and global order* (London and New York: Continuum, 2002). Into the same category would fall Carl Schmitt himself.

<sup>116</sup> *Ibid.*: Ulmen, 103.

<sup>117</sup> *Ibid.*

demise of the *JPE* and the regime that succeeded it. Shadowing this transition was the complex interrelationship between Europe and the Western Hemisphere – the United States-dominated continents of North and South America. More than any other factor, it was the escalating hegemonic aspirations of the US that was to provoke an inexorable transformation in the global inter-state order of nation states and the international law that claimed to regulate it. Where this momentous shift originated was in the European colonisation and land appropriation of the New World but what galvanised it was the formulation of the Monroe Doctrine (1823) that underpinned US isolationism throughout the 19<sup>th</sup> century and beyond. Why did the Monroe Doctrine exert such impact on the international order and how did the United States' departure from it, in 1917, shape Schmitt's subsequent invective against the imperialistic influence of the American contingent both at Versailles (1919) and Nuremberg (1945-6)?

What dictated US foreign policy from 1823, if not presaged earlier, was the Monroe Doctrine, located in the unilateral pronouncement, in that year, of its eponymous President. Neither a bilateral treaty nor a legislative enactment, it was from the outset characterised by the fact that the definition and interpretation of it lay exclusively within the domain of the US. Hallmarked by its intrinsic elasticity of concept and malleability of principle, the determining precept underlying its empirical deployment was not law but politics and power relations. As Schmitt observes, '*faced with such an indeterminacy of normative content, the positivist has the feeling of losing the ground under his feet*'.<sup>118</sup> Instigated on parameters of reciprocal non-interference of the US and Europe respectively into the affairs of one another – and in the case of the US extending to the entirety of inter-American relations - the Monroe Doctrine, as initially articulated, appeared purely defensive in both provenance and intent.<sup>119</sup>

Remarkable to Schmitt, however, was the insidious capacity, latent within it, for development from '*defensive posture to imperialistic expansion*'.<sup>120</sup> Born of a self-determined political isolation, the Monroe Doctrine enabled the US '*first to secure the*

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<sup>118</sup>See *supra*: Schmitt, 'The Grossraum Order of International Law', 75, 87.

<sup>119</sup>See also Mika Luoma-Aho 'Carl Schmitt and the Transformation of the Political Subject' *The European Legacy*, Vol.5, No.5, (2000), 703-716, 710: 'According to Schmitt, the Monroe Doctrine had three important consequences in international law: the independence of American states, the exclusion of colonisation in their territories, and the non-intervention in their territory by non-American powers and reciprocal non-intervention by American powers outside American territory'.

<sup>120</sup>*Supra*: Schmitt 'Forms of imperialism in international law', 117-142.

*Americas for the United States against the great Powers, then to submit all states in the Americas to its hegemony of the United States, then to justify the interference, the control, the international policing of the United States in the Americas’ before ultimately ‘exercising influence upon other powers that encompasses all of humanity’.*<sup>121</sup>

Incremental interference in other sovereign states within the Americas, not least Cuba – liberated with US assistance from its colonial overlord, Spain, in 1898 – became possible through a series of US-interpreted intervention treaties which the weaker nation had no option but to accept, as a *quid pro quo* for US support. Compelled by the US to incorporate intervention treaties within their own national constitutions, nation states that had previously enjoyed a measure of genuine autonomy found themselves locked into a quasi-protectorate relationship with the US, over which they exerted scant control. With the delimitation of sovereignty this engendered, a dialectical reversal ensued where, in Schmitt’s view, *‘the party that protects the freedom and independence of another state is naturally and logically also the party whose protection suspends the freedom and independence of the protected.’*<sup>122</sup> If additional evidence were needed to support his contention of the growing imperialistic tendencies of the US, this Schmitt locates in the practice of US recognition of other states. Facilitated by the political instability within Latin America where coups, revolutions and putsches were frequently the norm, the US exercised sole dominion over the determination of which regime satisfied its perception of legitimacy – in short, whether or not a government was deserving of legal recognition with all the benefits that flowed from it.

By specific reference to the 1923 response of US Secretary of State, Hughes, that the Monroe Doctrine enabled the United States, unilaterally, to define and interpret the doctrine and then to exact sanctions in reliance upon it, what this bespoke, to Schmitt, was *‘a practically classic example of the purest decisionism’.*<sup>123</sup> As long as the Doctrine remained defensively oriented and counter-imperialist vis-a-vis the ‘Holy Alliance’, this was an originary quality worthy of emulation. But its capacity for untrammelled decision-making – *‘a decisionist certainty where the genuine positivist feels the ground*

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<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 87.

*beneath his feet once more*'<sup>124</sup> - was, in Schmitt's view, far more problematic once the US sought to explore the potential latent within the Doctrine for empirical encroachment into the open-door "free" spaces of Asia beyond the Western Hemisphere.<sup>125</sup> Still more alarming was the incipient facility the Doctrine afforded for exploitation of the nebulous norms that purported to underpin it. A development of incremental concern, realisation of it was likely to ensue if vague and open-ended norms habitually crept into every treaty and convention that governed inter-state relations in the international domain. All the US needed to validate its embryonic imperialist ambition was to dress its self-interested decisionism in the cloak of a putative universalism – normative in orientation and ostensibly humanitarian in motivation. Methodologically speaking, this would:

'... consist in dissolving a concrete, spatially determined concept of order into universalistic "world" ideas and, in doing so, transforming the healthy core of a *Grossraum* principle of international law of non-intervention into a global ideology that interferes in everything, a pan-interventionist ideology as it were, all under the cover of humanitarianism.'<sup>126</sup>

With this, the positive law of every sovereign nation state would be susceptible to subjection by an overarching universalistic *international* law that perversely demanded fealty, first and foremost, from individual *world* citizens, in return for the elusive and, for Schmitt, unrealisable guarantee of perpetual peace.

Once the individual replaced the state, wholly or in part, as the subject of international law, the supranational and natural-law based recognition of the individual this connoted irremediably pierced the carapace of state sovereignty. Intervention into the internal affairs of a nation state became capable of legitimisation, not to safeguard the integrity of that state but ostensibly to preserve the welfare of the human occupants within it.<sup>127</sup> This apparently innocuous step – cognisance of the individual instead of the state as the primary subject of international law – was all that was required to vindicate intercession

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<sup>124</sup> *Supra*: Schmitt 'The *Grossraum* Order of International Law', 87.

<sup>125</sup> *Supra*: Schmitt *Nomos*, 290, 'Strangely enough the term, "Western Hemisphere" was opposed precisely to Europe, the old West, the old Occident. It was not opposed to Asia or old Africa but rather to the old West. The new West claimed to be the true West, the true Occident, the true Europe. The new West, America, would supersede the old West, would reorient the old world history, would become the centre of the earth'.

<sup>126</sup> *Supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 137.

<sup>127</sup> This is explored in more detail below in conjunction with Schmitt's critique of Article 6(a) of the Nuremberg Charter: the offence of *waging aggressive war* (crimes against peace); see *supra*: Schmitt 'The *Grossraum* Order of International Law', 90: 'Universalistic general concepts that encompass the world are the typical weapons of interventionism in international law'.

on humanitarian grounds. Because ‘*liberal individualism and transnational universalism turn out to be two poles of the same ideology*’,<sup>128</sup> it became clear ‘*not only [that] the original Monroe Doctrine but also almost all important fundamental questions of modern international law are threatened by the hegemony of this universalism in its most authentic sense.*’<sup>129</sup> Pivotal both to Schmitt and the US for diametrically conflicting reasons, the one suspicious and the other sanguine about the prospect of global subjugation to American influence, this was, therefore, a dimension of the Monroe Doctrine that neither could afford to ignore.<sup>130</sup> Awash with potential for exploitation on a global stage, inversion of US policy from its 19<sup>th</sup> century defensive posture to the veiled imperialism of the 20<sup>th</sup> century was to form the crux of Schmitt’s critique of the Nuremberg proceedings, along with the subversion of the *JPE*-derived *legality* principle it engendered.

By 1932, the year of his ‘*Forms of Imperialism in international law*’ this trend had, for Schmitt, derived staggering momentum from the US decision to intervene in WWI, where ‘*it turned a war that was essentially a European war into a world war*’ and ‘*thereupon pulled out again in a curious way directly after the war*’.<sup>131</sup> Pursuant to the astonishing 1917 volte-face of President Woodrow Wilson that prefaced the US entry into the war, the United States was ready to renounce the isolationism to which it had, until then, ostensibly subscribed.<sup>132</sup> Compounded, in Schmitt’s view, by the pressure it exerted upon the fellow-victors of the conflict to establish the League of Nations (1919), the US had effected a self- transformation into a global power with which to be reckoned.<sup>133</sup> Perversely declining to join the League, the US strategically guaranteed, via Article 21 of the Covenant of the League of Nations, the recognition and

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<sup>128</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 97.

<sup>129</sup> *Ibid*: 96.

<sup>130</sup> On this generally, see Chantelle Mouffe ‘The Dangers of a Unipolar World’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 148.

<sup>131</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 90.

<sup>132</sup> *Ibid*: 96: ‘The Monroe Doctrine, too, experienced a reinterpretation into a universalistic-imperialistic global doctrine through Th. Roosevelt and W. Wilson...The universalism of the Monroe Doctrine through Roosevelt and Wilson, meanwhile, was the corruption of the genuine Grosraum principle of non-intervention into an interventionism without borders’.

<sup>133</sup> See Jean-François Kervegan ‘Carl Schmitt and World Unity’ in *The Challenge of Carl Schmitt* edited by Chantelle Mouffe (London: Verso, 1999), 54-74, 61, ‘From 1932 onwards, the study of changes in the legal status of war and the critique of the political usages of humanitarian ideas refer as much to the United States, the prototype of a new kind of colonial power, as to France and Great Britain, traditional colonial powers’.

entrenchment of its Monroe Doctrine in international law.<sup>134</sup> From an empirical and normative standpoint, what this meant was that no party could expect to conclude any treaty with the United States without inclusion of an equivalent proviso regarding the application of the Monroe Doctrine.<sup>135</sup> Momentous in the extreme, this signified that not only the Monroe Doctrine itself but also every legal concept of international law was, likewise, a political plaything potentially subject to interpretation by whoever wielded the most power:

‘The end result of this achievement is that nobody may demand anything of the United States which is not in accord with the Monroe doctrine while the United States may at any time demand respect for the Monroe Doctrine, whereby it is simultaneously recognised that in case of doubt only the United States may determine exactly what the content of the Monroe Doctrine is.’<sup>136</sup>

Confident of its hegemonic position within the Americas, together with its global potential the US, thereafter, retreated into the shadows once more, content that its Latin American acolytes - ensconced within the League of Nations - would protect US interests to the fullest extent. Denied any right of intervention in inter-American affairs, Europe had to suffer the ignominy of the League being ‘*lame in the American leg*’, not least because of the ‘*unique and highly elastic connection of [US] official absence with effective presence*’ in European matters.<sup>137</sup> This, for Schmitt, signified the exercise of power without responsibility.

Armed with this retrospective insight into the hovering influence of the United States - especially its incipient re-interpretation of the Monroe Doctrine - how does Schmitt

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<sup>134</sup> Article 21 of the Covenant reads: ‘Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration, or regional understandings like the Monroe Doctrine, for securing the maintenance of peace.’ The full text of the Covenant is accessible online at [http://avalon.law.yale.edu/20th\\_century/leagcov.asp#art21](http://avalon.law.yale.edu/20th_century/leagcov.asp#art21) accessed 20<sup>th</sup> July, 2011; see *supra*: Carl Schmitt ‘The Grossraum Order of International Law with a Ban on Intervention for Spatially Foreign Powers’, 87: ‘...since the League of Nations and especially Article 21 of its Charter was wrested (at the time) from European victor powers by President Wilson under the threat that if the Article was not included, the United States would not accede to the League then, however, the United States did not join the League, even though Article 21 remained in the Charter’.

<sup>135</sup> See *ibid*: Schmitt, 85, where Schmitt indicates that Article 21 was not the first occasion where the United States had insisted that cognisance be made of the Monroe Doctrine: ‘Since the First Hague Conference (1899), the United States has succeeded to great effect primarily against English resistance at seeing to it that the “reservation of the Monroe doctrine” always be expressly or tacitly valid in the praxis of international relations’.

<sup>136</sup> *Supra*: Schmitt ‘Forms of imperialism in international law’, 117-142.

<sup>137</sup> *Ibid*: 117-142; see Gary Ulmen ‘American Imperialism and International Law: Carl Schmitt on the US in World Affairs’ *TELOS* No. 72, (Summer 1987), 43-71, 60: ‘Cuba, Haiti, Panama and Nicaragua were not only economically and politically dependent on the US through the Monroe Doctrine: they were also and expressly bound to the US by treaties’.

interlink this with the collapse of the *jus publicum europaeum*?<sup>138</sup> Seemingly impervious to the charge that ‘*the only glue holding together the Westphalian state system was an act of decision and a naked typology of power*’<sup>139</sup> what other factors contributed towards what Schmitt considers its lamentable disintegration? And if Schmitt seeks to ‘*link space to a particular human activity so that space is tied to the concrete reality of peoples rather than the triumph of abstract ideals*’,<sup>140</sup> to what extent did the categories he deems crucial within the *JPE*, not least the concept of war itself, fall prey ‘*first to the fiction of value neutrality and then to the fact of the “tyranny of values”*’?<sup>141</sup>

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<sup>138</sup> *Supra*: Schmitt ‘The Grossraum Order of International Law’, 89 where Schmitt speaks of the ‘reinterpretation of the Monroe Doctrine from a concrete geographically and historically determined concept of Grosraum into a general, universally conceived principle for the world that is to be valid for the entire world and demands “ubiquity”’. This re-interpretation stands together in close connection with the falsification of the Doctrine into a universalistic-imperialistic principle of expansion. The reinterpretation is of special interest to us because it makes clear the point at which the policy of the United States leaves behind its continental spatial principle and binds itself with the universalism of the British Empire’.

<sup>139</sup> *Supra*: Hooker *Carl Schmitt’s International Thought Order and Orientation*, 137.

<sup>140</sup> *Ibid*: 145.

<sup>141</sup> *Supra*: Ulmen ‘American Imperialism and International Law’, 71



## The plunge of the *jus publicum europaeum* into the abyss of value neutrality

With the late 19th and early 20th century *neutralisation* and *depoliticisation*<sup>142</sup> of the state and the value-neutral positivism integral to this process, the state became increasingly unable to withstand threats to its integrity, emergent from within.<sup>143</sup> Conjoined with this spiralling enfeeblement of state sovereignty on an internal level, the nation state suffered a similar diminution of sovereignty on the international plane. Paramount to the vitality of the nation state, both within and without its confines, was sovereignty - the Janus-faced concept that was, for Schmitt, irreplaceable. Selective and historically questionable though, on occasions, his account tends to be, beyond doubt is his contention that vestiges of the traditional core attributes of the *JPE* – especially the concept of the equality of sovereign states - were in evidence as late as the 1907 Hague Convention Respecting the Laws and Customs of War on Land and even the 1949 Geneva Conventions.<sup>144</sup> As long as the nation state rather than each individual citizen within it conducted war, ‘*a norm of international law could never reach him. Rather, in all cases, a commutation, a transformation of the norms, rights and obligations of international law into intra-state norms, rights and obligations of the individual state citizen had to be awaited*’.<sup>145</sup>

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<sup>142</sup> See *supra*: Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich, 1-143, 106 where Stirk describes *depoliticization* as a neutral sphere in which there would be no conflict but only common debates and exchanges of opinion. A *neutral* state is one that succumbs to indirect forces of competing groups.

<sup>143</sup> For an account of Schmitt’s polemic against value neutrality within the nation state, see *supra*: Chapter 3; also Carl Schmitt ‘The Age of Neutralisations and Depoliticisations’ *TELOS* No. 96, (Summer 1993), 130; also *supra*: *Nomos*, 236: ‘...all conceptual formulations characteristic of this stage of development had the same result; the state-centred positivism dominating the thinking of contemporary jurists no longer was able to supply the conceptual tools to form institutions capable of illuminating the reality of such a confusion of intrastate sovereignty and supracommunity free economy’.

<sup>144</sup> See *supra*: Schmitt ‘The International Crime of the War of Aggression’, 175; on the issue of Schmitt’s selectivity, see *inter alia*, Chris Brown ‘From humanized war to humanitarian intervention: Carl Schmitt’s critique of the Just war tradition’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 56, 63; note, however, that Schmitt does have concerns about the implications of the Second Hague Convention 1907, as explained below; for a further critique of Schmitt’s admiration of the *JPE*, see Jan Muller ‘Carl Schmitt’s Method: Between ideology, demonology and myth’ *Journal of Political Ideologies* Vol. 4 (1), (1999), 61-85, 74, ‘In fact, however, Schmitt sought not only to understand new realities through concepts or, as he claimed at other points after 1945, to preserve the concepts of the European laws of peoples, the *ius publicum europaeum*, of which he saw himself as the last genuine representative. This self-description as the keeper of an arcane knowledge and a more substantial, more humane form of law was an apologetic *ex post facto* masking of his role in developing a new international law of ‘great spaces’ which, at the very least partially, serve to legitimate the invasions taken by the Nazis’.

<sup>145</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 175.

Augmented by the juridical respect the Hague Convention accorded to non-combatants, with the limitation of war and the relativisation of enmity this engendered, what this indicated was that the structure of international law remained intact. These nonetheless, remained but isolated examples of a growing trend towards the transition from European international law into a ‘general “international law”’.<sup>146</sup> And even here, a significant shift in *ambience* was discernible between the First Hague Peace Convention of 1899 - in Schmitt’s view, purely European - and its 1907 namesake, where the involvement of American and Asiatic participants rendered it ‘no longer European in the former sense’.<sup>147</sup> Naively confident, in 1899, that European international law had triumphed, ‘the feet of those whom they should be showing the door already were standing before it’.<sup>148</sup> What hastened this drift away from a truly European conceptualisation of international law was loss, by the *JPE*, of its own spatial identity.

Once no longer possible to distinguish European soil from overseas soil, then ‘the whole spatial order of European international law had to be abandoned because the bracketing of internal, interstate European wars had an essentially different content than the pursuit of colonial wars outside Europe’.<sup>149</sup> A precipitating factor in this was the presence of the United States at the Congo Conference 1884 when, on April 22 of that year, the US chose to recognise the flag of the International Congo Society - not previously a state - thereby ‘disorienting the core concept of European international law’.<sup>150</sup> Born of the scramble of European states for acquisition of land in Africa, those who promoted it had no proper understanding that the unseemly competition it generated would expedite the collapse of a concrete order that had previously cemented together the ‘family’ of European nations. What this signified was a catastrophic inversion or conflation of norm and exception. A crucial symptom of the disintegration of the *JPE*, this Schmitt ascribes to:

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<sup>146</sup> *Supra*: Schmitt *Nomos*, 183.

<sup>147</sup> *Ibid*: 231.

<sup>148</sup> *Ibid*: 232.

<sup>149</sup> *Ibid*: 221.

<sup>150</sup> *Supra*: Ulmen *Introduction to The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, 27; see also *supra*: *Nomos*, 217, ‘But the United States did not ratify the Congo Act and, later, in World War I (1914), when neutralisation of the Congo Basin became a practical issue, the United States rejected any participation. Thus, at the Congo Conference, the United States demonstrated a mixture of absence in principle and presence in practice – a remarkable contradiction which, after World War I, would become even more pronounced in Europe’.

‘the onset of a jurisprudence of purely positivistic ie purely intrastate and interstate contractual norms that turned the concrete order of a truly European international law into a collection of somehow valid norms. Thereby, European international law lost any sense of the spatial structure of a concrete order and of the essential and specific distinctions in soil statuses in international law.’<sup>151</sup>

Fatal to the spatial order of the *JPE* where the contractual provisions, regulating interstate relations in continental Europe, were interpreted and applied exclusively in conformity with the concrete order which engendered them, there surfaced a new and dangerous tendency towards the propagation of norms of doubtful precedent, for the most part, based on transitory and heterogeneous situations.<sup>152</sup> Beautifully worded documents were, in Schmitt’s view, transformed into mere facades by what he terms ‘*an impenetrable web of contractual agreements, with fundamental provisos of various sorts*’.<sup>153</sup> As ‘*the maxim pacta sunt servanda was waved like a juridical flag over a completely nihilistic inflation*’<sup>154</sup> of numberless treaties, sundry provisos contrived to empty contradictory pacts of substantive content.<sup>155</sup>

Susceptible, for example, to this critique was the Second Hague Convention 1907, drained of concrete relevance by a surfeit of provisos that were overly amenable to manifold interpretations, many capable of undermining the *JPE* and the traditions that upheld it.<sup>156</sup> Never, for Schmitt, was the concept of an international legal order to be comprehended as a closed system of norms but always ‘*something that is present*

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<sup>151</sup> *Supra*: Schmitt *Nomos*, 220.

<sup>152</sup> *Ibid*: 238.

<sup>153</sup> *Ibid*: 239.

<sup>154</sup> *Ibid*.

<sup>155</sup> This is similar to the critique of value neutral legal positivism that Schmitt levels against the legal order *within* European states. See for example, Carl Schmitt ‘The Plight of European Jurisprudence’ *TELOS* No. 83, (Spring 1990), 35-70, 36, 37: ‘The positivism of domestic law is similar to the positivism of treaties. The separation of internal and external, of domestic law and international law is so absolute that formally there can be no conflict between them. It is true that one speaks of international obligations being “transformed” into domestic law. All such transformations, incorporations, extensions etc., are, however, only sham bridges over the gulf that divides inner and outer...At the turn of the 19<sup>th</sup> to the 20<sup>th</sup> centuries...this international law dissolved into innumerable and indistinguishable relations between fifty to sixty states all over the world, ie into a general arrangement lacking any spatial concreteness. Of course, such a positivism of treaties is only a valuable as those treaties between states and the internal laws upon which it rests. From the standpoint of jurisprudence, it is nothing more than a normative fiction whose value is relative and temporal, as is in the case of the whole *Weltanschauung* of 19<sup>th</sup> century positivism. It intentionally ignores the material [as opposed to the formal] significance of law ie. the political, social and economic meaning of concrete orders and institutions’.

<sup>156</sup> See *supra*: Schmitt *Nomos*, 224: ‘Towards the end of the 19<sup>th</sup> century, European powers and jurists of European international law not only had ceased to be conscious of the spatial presuppositions their own international law but had lost any political instinct, any common power, to maintain their own spatial structure and the bracketing of war’.

*existentially*'.<sup>157</sup> Deriving ersatz justification from what they defined as *positivism*, international law jurists categorised all the empirically real questions of the day as simply too *unjuridical* to warrant consideration.<sup>158</sup> In contrast to the first stirrings of the embryonic *JPE* at the end of the 16<sup>th</sup> century - the advocates of which commanded its theologian detractors to keep silent - its impending death three hundred years later was to witness jurisprudence, in the name of legal positivism, electing to '*remain silent with respect to all the great contemporaneous legal issues*'.<sup>159</sup> Inexorably wounded by this detachment from the political and social challenges of the day and the consequent inability to defend its own existence, international law – defined in terms of a state-centred Eurocentric spatially bounded concrete order - became ripe for dissolution.

Sustained by an array of positivistic provisions, all disastrously alienated from concrete reality by their human devisors and interpreters, the value neutrality that, for Schmitt, ultimately promulgated the suicide of the Weimar Republic within Germany, was thus also to contribute towards the undoing of the *interstate* European international order.<sup>160</sup> If chief among its casualties in the *intrastate* domain was the internal constitutional order of Germany and with it, the embargo against *ex post facto* criminal law, it was in its attenuation of the *JPE* – the sphere of *interstate* relations – where Schmitt implicitly discerned a similar outcome. For with the demise of the concrete order of the *JPE*, as with the legal order enshrined within Germany prior to the Nazi overthrow of the Weimar Republic, the *legality* principle was in dire jeopardy. Particularly evident in the post-WWI decade, the dubious legalisation of the *status quo* the Treaty of Versailles

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<sup>157</sup> *Supra*: Schmitt *Constitutional Theory*, 381; see *supra*: Schmitt *Nomos*, 73, 'The modern positivism of enactments was the creation of disillusioned jurists, whose mental attitude...was the basis for the claim of the supremacy of the natural sciences. These jurists did not notice that, in the nihilism of such times as theirs, enactments became only destructive acts...they did not once see the degree to which their putative legal positivism was calling into question their own historical, intellectual and professional propositions'

<sup>158</sup> See *supra*: Schmitt *Nomos*, 239; within this category, Schmitt placed 'the distinction between universal and particular international law, elaboration of the concrete political meaning of the state-centred, continental concept of war vis-a-vis the state-free and sea-centred Anglo-Saxon concept of war or a rethinking of spatial problems, such as those raised by the Monroe Doctrine, the line of the Western Hemisphere and the new relation between politics and economics'.

<sup>159</sup> *Ibid.*

<sup>160</sup> See *supra*: Kanwar 'Dark Guardian of the Political': 'Just as early liberal theorists sought to replace the state of nature within the domestic arena with the systematic rule of law, so to do modern liberals aspire to overcome the state of nature between nations by subjecting international conflicts to a rational and universally binding system of universally enforceable legal norms. In Schmitt's view, the proliferation of liberal legal devices on the international scene merely provides a new set of weapons'; see also *supra*: Schmitt 'The Plight of European Jurisprudence', 35-70, 44, 'The crisis of European jurisprudence began a century ago with the victory of legal positivism. The great turning point was the 1848 Revolution. Our fathers and grandfathers abandoned an outmoded natural law and saw a great step forward from illusion to reality in the transition to what they called "positivism".'

1919 purported to establish was overhung by the ‘*conceptually empty ideograms and “logical reductions” of a “pure legal doctrine”*’.<sup>161</sup> Epitomising an idealess contractual positivism, this was to prove incapable either of sustaining the concrete spatial order of the *JPE* or of establishing a new global order.<sup>162</sup>

One additional threat – foreshadowed by the incipient reinterpretation of the US Monroe Doctrine – was poised to provoke an even more-fateful transformation in the concept of war and the system of European international law entwined with it. Augmented by the misguided value-neutral positivism that bedevilled the closing years of the *JPE*, the hijacking of universal concepts was, in Schmitt’s view, crucial in hastening its demise.<sup>163</sup> Cynically masquerading as humanitarian-inspired universalism – under the banner of an ‘*ideology of pacifism*’,<sup>164</sup> the US project of imperialism was designed to propagate interpretation of the newly nebulous norms of interstate treaties, in a manner wholly conducive to the interests of the United States.<sup>165</sup> At the mercy of this US-dominated evolution of international law was the beleaguered *JPE* and stranded within the shattered cadaver of this once (for Schmitt) ‘magnificent’ interstate order, clung the *nullum crimen, nulla poena sine lege* principle – hitherto deemed by Continental Europeans fundamental to the preservation of juridical due process. Whatever factors were instrumental in the creation of a post-*JPE* ‘global order’ were,

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<sup>161</sup> *Supra*: Schmitt ‘The Turn to the Discriminating Concept of War (1937)’, 33.

<sup>162</sup> Amongst these, in Schmitt’s view, was the destructive and abusive role of the of the League of Nations in using positivist international law.

<sup>163</sup> *Supra*: Hooker *Carl Schmitt’s International Thought Order and Orientation*, 146, ‘Positivism is accelerating history towards an unrooted unpolitical ungrounded universalism from which there can be no return’; *ibid*: 147 where Hooker highlights Schmitt’s ‘familiar critique of the way this law has witnessed elevation of the individual subject on the one hand and a slide into treaty positivism on the other’.

<sup>164</sup> *Supra*: Schmitt ‘The Turn to the Discriminating Concept of War (1937)’, 33; liberals wish to achieve perpetual peace by taming the excesses of political power, ostensibly to enable individuals to exercise their individual rights and private interests in a strife-free environment. War creates uncertainty and instability and must, therefore, be outlawed in favour of a state of pacifism that liberals wish to constitute the ‘norm’. For liberals, it is as if peace is a pre-ordained purpose of a transcendent entity which ordains that warring states will ultimately agree to abolish war entirely.

<sup>165</sup> See *supra*: Kanwar ‘Dark Guardian of the Political’: ‘the idea of a binding international rule of law is necessarily an illusion, albeit a potentially dangerous illusion suited to the needs of those political interests best capable of exploiting the radical indeterminacy of the law. The real question is always who will be able to take advantage of the decisionist essence of international law. Who decides a study of political power is important? Rhetoric serves an ideological front for a system that is fundamentally decisionist. Schmitt suggests the United States would decide’; liberals regard war as immoral and hence insist on the taming of state sovereignty in the international arena by legal regulation just as they require the subordination of the sovereign in the domestic arena by the rule of law. What they aspire to is the internationalisation of war such that war becomes ‘civil war’ within a ‘single world order’.

therefore, crucial to the fate of the *legality* principle and it is to the influence of US-inspired universalism, at Versailles (1919) and beyond, that the next segment turns.<sup>166</sup>

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<sup>166</sup> *Supra*: Schmitt *Nomos*, 237, ‘That a family or community of European states suddenly opened the doors of its house to the whole world, was no mere quantitative expansion and enlargement but rather a transition to a new plane. At first, of course, it was a headlong leap into the nothingness of a universality lacking any grounding in space or on land. Not even the spectre of a new concrete spatial order of international law replaced the concrete order of the former *ius publicum Europaeum*’

### **The Treaty of Versailles: acceleration towards annihilation of the *JPE*?**

‘In contrast to “international”, “interstate” means that states as political unities marked off from the outside by firm boundaries, “impenetrable”, “impermeable”, stand opposed to one another and alone bear the decision over the question of its own existence (“sovereign” means precisely that a foreigner does not decide the question of political existence). “International” by contrast designates (in the proper German manner of expression) the simultaneous elimination and subsumption of national distinctions, a penetration that extends beyond state boundaries.’<sup>167</sup>

As the above extract reflects, the 1928 Schmitt was even then conscious of the inherent ambiguity in the word “international” and its propensity to obfuscate what was, in his view, a clear distinction between interstate and international relations.<sup>168</sup> Conjoined with acceptance that ‘*aggression was not yet a juridical concept of traditional European international law*’,<sup>169</sup> it was to *interstate* relations that the *just enemy* within a non-discriminatory concept of war properly belonged. Still valid at the beginning of the First World War (1914),<sup>170</sup> all these were destined to succumb to the transformation of international law and war, heralded by the 1917 United States’ entry into the conflict.<sup>171</sup> What Europe had envisioned as a source of salvation was instead to fling down a challenge to the survival of the *jus publicum europaeum* to which it was ultimately unequal.<sup>172</sup> This presaged the closing stages of a 200-year epoch of public international

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<sup>167</sup> *Supra*: Schmitt *Constitutional Theory*, 381.

<sup>168</sup> *Ibid*: ‘A large part of the misunderstandings and errors that dominate the fundamental deliberations of international law today are explained by the fact that the word “international” is ambiguous and can designate relations that are politically opposed to one another. The German manner of expression makes possible a clear distinction between interstate and international and intellectual integrity requires that the distinction be honoured’.

<sup>169</sup> *Supra*: Schmitt *Nomos*, 259.

<sup>170</sup> *Ibid*: ‘At the start of the war, the formal declaration of war was regulated by the Third Hague Agreement of 1907 as a preliminary, unequivocal and motivated proclamation. It was not an act of aggression in any incriminatory or discriminatory sense. On the contrary, it was a proper act and expression of war in form’.

<sup>171</sup> *Supra*: Schmitt ‘The Turn to the Discriminating Concept of War (1937)’, 31: ‘The problem of the discriminating concept of war entered the history of modern international law with President Wilson’s declaration of war on April 2, 1917, under which he led his country into war with Germany’; see *supra*: Schmitt *Nomos*, 259, ‘The First World War began in 1914 as a European war in the old style. The warring powers mutually considered themselves to be equally legitimate and sovereign states. They were recognised as such in international law and were *justi hostes* in the sense of the *jus publicum europaeum*. Aggression was not yet a juridical concept of traditional European law. At the start of the war, the formal declaration of war was regulated by the Third Hague Agreement of 1907 as a preliminary, unequivocal and motivated proclamation. It was not an act of aggression in any incriminatory or discriminatory sense. On the contrary, it was a proper act and expression of war in form. The declaration of war was based on the desire for juridical form and on the premise that there is no third party in matters of war and peace’.

<sup>172</sup> *Supra*: Schmitt ‘Theory of the Partisan’, 11-78, 78, ‘In 1914, the nations and Governments of Europe stumbled into WWI without any enmity. Real enmity arose only out of the war, which began as a conventional war between states on the basis of European international law and ended as a global civil war of revolutionary class enmity’.

law, based on what Schmitt deems a proud tradition of '*warring powers mutually considered as equally legitimate and sovereign states*'.<sup>173</sup>

The involvement of the United States in what had previously been an entirely European conflict disrupted the spatial order of the *JPE* and changed the face of international law and politics for ever. With the benefit of hindsight, the victorious European Powers could perhaps have been more trenchant in delimiting the influence of the US - both during the negotiations preceding the post-WWI Treaty of Versailles and the subsequent drafting of it. That they did not do so signified a definite shift in the balance of power and, with it, the accompanying transformation of the global order - from what Schmitt perceived the zenith of attainment to a fateful retrogression in the international sphere. As the polar opposite of the US-influenced perspective that viewed the Eurocentric statist order as regressive and its own universalistic initiatives as the exemplar of enlightenment, was the *JPE* destined to survive the ravages of the post-WWI peace process?<sup>174</sup>

Though Schmitt lauded the spirit of Article 228 of the Treaty for what he deemed its ratification of the core components of the established international order, it was Articles 227 and 231 that, in contrast, evoked his particular disquiet. Article 228 stipulated that the defeated German Government recognise the right of the Allied nations to bring before military tribunals those accused of the commission of acts in violation of the laws and customs of war. Entailed by the obligation imposed on Germany to hand over suspected transgressors to the Allies, this denoted the destruction of *amnesty* - an established legal institution that was traditionally an integral part of the peace process between equal adversaries. The attendant discrimination this invoked against the vanquished party represented, for Schmitt, an unmistakable – and unwarranted - change in the juridical protocol regulating cessation of war.

Article 228 paradoxically also recognised the inherent legality of war. In facilitating the prosecution of perpetrators for acts committed during ongoing warfare, that is, in violation of pre-existing norms of '*classical European international law*',<sup>175</sup> the juridical distinction between the *jus in bello* and the *jus ad bellum* was preserved. Defined by

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<sup>173</sup> *Supra*: Schmitt *Nomos*, 259.

<sup>174</sup> What Schmitt cannot accept is any natural law limitation on the right of every state to wage war.

<sup>175</sup> *Ibid*: 261.



Schmitt as ‘war crimes in the old sense’,<sup>176</sup> these encompassed acts carried out during hostilities, for the most part by members of the Armed Forces of a belligerent state. Located *inter alia* in The Hague Conventions 1899 and 1907, the norms of maritime law and the positive provisions relating to prisoners of war,<sup>177</sup> the fact of their existence, coupled with potential imposition of punitive sanction for their infringement, signified that it was neither feasible nor legitimate for war to be outlawed or criminalised.<sup>178</sup> Not only did Article 228 leave the legal institution of war unaltered, but its invocation of the positive norms enshrined within the *JPE* ensured that the maxim: *nullum crimen, nulla poena sine lege* remain valid. In this correlation between the *legality* principle and Article 228, rested the fundamental presupposition that the concrete order of the *JPE* was, for Schmitt, both harbinger and fortress of the embargo against *ex post facto* criminal law. During this ‘golden’ age of interstate relations, each cleaved one to the other in a seamless unity.

Concerns about the eradication of *amnesty* aside, Article 228 was, therefore, consistent with what Schmitt regarded the incontrovertible norms of classical European international law. Article 227 was to prove less tractable. This provision arraigned Wilhelm II of Germany, the former German emperor and therefore Head of State, for ‘*a supreme offence against morality and the sanctity of treaties*’.<sup>179</sup> No attempt was made to define the nature or ambit of this offence nor did the Allies waste any energy in concealing the newness of it. To this extent, the nations, emerging the victors from the war against Germany, successfully engineered a correlative triumph of ideas of ‘morality’ over positive precepts long established within classical European

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<sup>176</sup> *Ibid.*: 260.

<sup>177</sup> These were subsequently enshrined in the Geneva Convention 1928 and 1949. See *supra*: Carl Schmitt ‘Theory of the Partisan’ *TELOS* No. 127, (Spring 2004), 11-78, 32: ‘The four 1949 Geneva Conventions are the work of an admirable human disposition and humanitarian development. Given that they guarantee the enemy not only its humanity but also justice in the sense of recognition of its rights, they remain within classical international law and its tradition, without which such a humanitarian work would be unthinkable. Its foundation remains the conduct of war based on the state and consequently a bracketing of war with its clear distinction between war and peace, military and civilian, enemy and criminal, war between states and civil war’.

<sup>178</sup> See *supra*: Kervegan ‘Carl Schmitt and World Unity’, 54-74, 67: Kervegan points out that for Schmitt, the state was the vector of modern international and national political order. As such, it is the foundation stone of the *JPE*. Within this system, ‘international law established a statute of rules of war...This new law of war replaces the notion of a just war (that is, one whose causes are just) with that of the formally conducted war; with the recognition of sovereign states implying that the *jus ad bellum* should apply to them without restrictions, the emphasis is shifted henceforth to the *jus in bello*’. Kervegan highlights that pivotal to the *JPE* was the rationalisation, humanisation and juridification it created.

<sup>179</sup> The Treaty of Versailles is accessible online: <http://www.firstworldwar.com/source/versailles227-230.htm>

international law. In essence, Article 227 constituted a naked act of decisionist law-making – of *normification* - without even the courtesy of lip-service, far less genuine adherence either to prior substantive law or the demands of due process.

On a procedural level, the provision enabled the convening of a special tribunal, composed of five judges, one from each of America, Britain, France, Italy and Japan. Constrained only to the extent of the nebulous directive to satisfy ‘*the highest motives of international policy with a view to vindicating the solemn obligations of international undertakings and the validity of international morality*,’<sup>180</sup> the tribunal was empowered to fix such punishment as it considered appropriate. Indicted under Article 228 was the German Kaiser, Wilhelm II, though his former Chancellor, Bethmann-Hollweg had, in 1919, *assumed full responsibility for his administration (1914-17) and for all official acts performed under the Kaiser*.<sup>181</sup> This ascription not only of individual but exclusive criminal accountability, combined with manifest lack of specificity in both offence and punishment, caused Article 227, for Schmitt, to ‘*acquire the odium of an all-too-personal law of exception*’.<sup>182</sup>

Though his invective against this provision - founded as it was on an apparent repudiation of arbitrary law-making - was ostensibly at odds with the discretionary latitude he wished, at intervals during the Weimar Republic, to see vested in the executive, was Schmitt’s position nonetheless consistent? Perhaps so, given that his manifest intention in both interstate and intrastate contexts was to recognise and buttress the sovereignty of the nation state. In the first – the domestic domain - Schmitt wished to imbue the sovereign state authority with whatever discretionary licence was required both to suppress enemies within and enable it to garner sufficient resources to compete, and even to wage war, beyond its confines. In the other – the international arena – whatever norm-creating discretion was exercised and consequent norms imposed either from outside or above the concrete order were likely to fetter the self-determining authority of the nation state they sought to regulate. This, Schmitt was not prepared to countenance. Interference with state sovereignty, whether from above, outside or within

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<sup>180</sup> *Supra*: <http://www.firstworldwar.com/source/versailles227-230.htm>

<sup>181</sup> *Supra*: Schmitt *Nomos*, 262.

<sup>182</sup> *Ibid*: 263.

the discrete legal order it comprised, was untenable and it was from the classical European international law of the *JPE* that Schmitt derived vital endorsement.<sup>183</sup>

Not only did Article 227 violate this precept and, in turn, encroach on the unassailability of state sovereignty and the immunity traditionally accorded to Heads of State but also potentially criminalised opponents in war, hitherto classically regarded as *just enemies*.<sup>184</sup> Worst of all, for Schmitt, was that it purported to create a '*new crime of war*'.<sup>185</sup> This Article 227 compounded by reliance on notions of '*morality and politics rather than exclusively to law*'.<sup>186</sup> Further, just as the ambit of the crime was subject to the vagaries of the prosecuting authorities and even public opinion, so too was the punishment left entirely to the presiding judges. Not only was it difficult for the defendant to determine the exact nature of the transgression that comprised the subject of the indictment against him but by virtue of his putative assumption that punishment would ensue in the event of his conviction, he was supposed to '*anticipate the judge's decision*'.<sup>187</sup> Though the Netherlands refused to extradite Wilhelm for trial with effect that the intended proceedings against him soon passed from the '*the legal consciousness of European governments and peoples*',<sup>188</sup> the damage for Schmitt, was potentially incalculable.

For the first time, some American delegates – amongst them Robert Lansing and James Brown Scott, though notably not John Dulles or other members of the US contingent – had supported the viability of holding Heads of State criminally accountable for the act of war. Most portentously, this entailed recognition that '*aggressive war, as such, be*

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<sup>183</sup> John P. Mc.Cormick 'Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt' *Annual Review of Political Science* Vol. 10, (2007), 315-339, 330: 'It is tempting to reduce Schmitt's complaints here to base resentment but he certainly has a point, as illustrated by even a casual comparison of Germany's treatment of defeated France, with France's treatment of Germany in 1919'.

<sup>184</sup> See *supra*: Kervegan 'Carl Schmitt and World Unity', 54-74, 60, 'This succeeds in transforming international law into an annexe of penal law and war into a matter of law and order, aimed at suppressing those responsible. But above all, criminalizing the enemy succeeds in eliminating any limitations on acts of war, limits inscribed in modern laws of war'.

<sup>185</sup> *Supra*: Schmitt *Nomos*, 262; see *supra*: Ulmen 'Just Wars or Just Enemies', 99-113, 102 where Ulmen explains that Schmitt traces the origin of the modern criminalisation of aggressive war to a letter dated December 14, 1910 by Andrew Carnegie to the Trustee of the Carnegie Foundation where he announced the transfer of 10 million dollars 'to destroy war, this blemish on civilisation'. Carnegie went on to say that 'war is essentially criminal' though Schmitt asks rhetorically why it should be criminal given that it was not law but power that governed the outcome.

<sup>186</sup> *Ibid*: Schmitt, 263.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid*.

*designated a moral crime against humanity.*<sup>189</sup> Not analogous to *war crimes* in the old sense, this was an entirely novel brand of offence - a crime of a new type.<sup>190</sup> Wholly antithetical to the established norms of the *JPE*, this unprecedented criminalisation of war threatened to shatter the legitimate pre-conceptions of alleged perpetrators within Continental Europe. Prefacing the Versailles Treaty, the Commission of the Responsibility of the Authors of War issued a draft Report dated March 12, 1919, containing a passage reflective of the dominant American view. Emphasizing the relentless cruelties and unbearable suffering of the preceding war, it included terminology that paid scant allegiance to traditional understandings of positive law:

‘The evidence for this moral crime against humanity is convincing and conclusive. The law, which is as inseparable from the feeling of justice, is restrained and even helpless before the nations that have perpetrated such cruelties, unable to use the law to punish such crimes. But the originators of this shameful war should not go into history without a stigma. They should also be brought before the court of public opinion and receive the judgement that humanity pronounces against the originators of this greatest of all crimes against the world.’<sup>191</sup>

Adjudged by the innovative criteria it had itself formulated, the Report classified WWI as a war of aggression, both unjust and unacceptable. Had the Kaiser been tried and punished for this novel offence, it would have established a precedent for what was a ‘conscious divergence from the concept of war in traditional international law’.<sup>192</sup> Not only was this avoided but as Schmitt indicates, Article 228 framed the offence in terms of a moral crime against humanity in preference to a general criminalisation of war. Decisive also, to Schmitt, was that the content of the Treaty alone, not the negotiations conducted as a prelude to it, was capable of constituting binding precedent. Significant too was the ultimate refusal by the United States to ratify the Versailles Treaty – perhaps because of the incipient encroachment on state sovereignty that it presaged. Bound by its strictures the US would then have been to the same extent as every other signatory to it and this, the Americans refused to embrace. Against the backcloth of divergent public opinion in the United States, a separate Treaty between the US and Germany also excluded reference to either Article 227 or 228. Having primarily danced

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<sup>189</sup> *Ibid*: 265.

<sup>190</sup> *Supra*: Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War,’ 1-143, 99: Schmitt thought that if the victors did succeed in making wars illegal, there will be ‘something worse than wars; the formal juridical setting aside of the political or economic opponent who is not defeated in a war but is condemned to death in a legal process and executed.

<sup>191</sup> *Commission on the Responsibility of the Authors of War and on Enforcement of Penalties* American Journal of International Law Vol. 14, (1920), 334-335.

<sup>192</sup> *Supra*: Schmitt *Nomos*, 266.

to an American tune at Versailles, the European participants suffered the ignominy of swift desertion by their chief piper. Indicative, to Schmitt, of a subversive onslaught upon European self-determination, the flagrant hypocrisy of the United States did not bode well for the precepts vitally enshrined within the *JPE* - the concrete order of public international law that had been firmly embedded, for so long, in the public consciousness of European citizenry.<sup>193</sup>

This was not all. Schmitt initially compiled his commentary upon the Versailles process, in the aftermath of the Second World War, at a time when the Nuremberg proceedings were still unfolding.<sup>194</sup> Caught between the Scylla of wishing to establish that the Allied Powers at the Paris Peace Conference, 1919, had illegitimately sought to create an innovative offence of waging aggressive war and the Charybdis of needing – in the Nuremberg context - to demonstrate that no precedent had ultimately been set, Schmitt opted for the latter course. This did not, however, prevent him from confronting the dichotomy that arose between the predominant US stance towards the *supreme offence against morality* within Article 227 – waging aggressive war – where the American contingent, in the main, attached no overt significance to the host of novel ramifications it provoked and the proposed, similarly new category of *crimes against humanity*.

As discussed in Chapter 2, those same US delegates, Lansing and Scott, who had championed the passage of Article 227 – presumably dismissive of its retrospective connotations – proceeded to reject the inclusion of a provision criminalising *all*

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<sup>193</sup> *Supra*: Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War,’ 1-143, 100, ‘Germans would not be spared the choice of whether the German people preserves its will to political existence or allows itself to be psychically and morally ground down and thus consents to satiate the foreign Leviathans with its own flesh and blood’; see also John P. Mc.Cormick ‘Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt’ *Annu. Rev. Politit. Sci.* 2007 10:315-39 doi: 10.1146/annurev.polisci.9.081105.185034, 330, ‘Internationally, the more commercially successful nations, especially the Franco-Anglo-American alliance, instrumentalised universal morality to disrupt the Westphalian order and cripple so-called bestial, criminal and rogue states like Germany. Instead of mutual recognition of sovereign states, universal ideas of perpetual peace and human rights stigmatised vanquished nations as aggressive war criminals, as enemies of humanity (CP, 35). During World War I and the Versailles Conference, the Allies vilified Germany from the standpoint of morality, rather than treating it simply as a defeated enemy in objective political terms. Germany was not considered an equal member of the Westphalian brotherhood of states that simply happened to lose a war. On the contrary, Schmitt seethes, Germany was treated as a monster that must not only be defeated but humiliated – and perhaps destroyed’; for liberals, unilateral state action cannot be countenanced. All acts must ostensibly be authorised by legal norms.

<sup>194</sup> His comments in his 1945 ‘The International Crime of the War of Aggression’, 124ff are substantially repeated in his 1950 *Nomos*.

*atrocities* committed during conflict, whether or not in violation of the existing laws and customs of war. Referring *in concreto* not to Article 227, but to Article 228 and thus to offences analogous to war crimes in the old sense,<sup>195</sup> such acts they asserted were neither subject to a court of law nor was it legitimate to create an international criminal forum for their adjudication. Because ‘*a court is concerned with valid law and application, it leaves transgressions against custom and the treatment of crimes against humanity to a higher judge*’.<sup>196</sup> Capable of extrapolation from this was the implicit critique Schmitt directed towards the confusion rampant amongst the US delegates and, more tellingly, the selectivity of their adherence to the *legality* principle. That they were aware of the established embargo against *ex post facto* criminal law is beyond doubt. A glance at the rationale underpinning their repudiation of *crimes against humanity* suffices by way of substantiation. But why this reticence did not infuse the US embrace of the exponentially more innovative offence of waging aggressive war was to fuel Schmitt’s suspicions about the underlying imperialistic motivation of the United States. This, the US exacerbated by its refusal, as seen, either to sign the Versailles Treaty or to incorporate Article 227 within the separate treaty it later concluded with Germany.

One further provision, Article 231, the so-called “war-guilt” clause, was to attract Schmitt’s scrutiny. This required Germany to make financial reparations for the devastation it had allegedly caused to the Allied nations. Positioned not under “Penalties” but under “Reparations”, this ostensibly convinced Schmitt that its purport was the retrieval of economic losses sustained by the victors. Lurking in the background once more, however, was the latent suspicion that the location of Article 231, and the heading under which it appeared, was merely a ruse designed to conceal an innovative criminal-legal sanction, beneath a facade of sham legalistic terminology. The one prevented construal of Article 231 as a binding precedent for the punishment of the vanquished; the other was arguably closer to an accurate revelation of what Schmitt found reprehensible about the US-influenced Versailles process.<sup>197</sup> Distilled into the following: was Germany to bear responsibility only for those precise reparations stipulated in notes respectively written by the US delegate Lansing on November 5, 1918 and by Woodrow Wilson earlier that autumn? Or was Germany accountable for

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<sup>195</sup> See *supra*: Schmitt *Nomos*, 265.

<sup>196</sup> *Ibid.*

<sup>197</sup> See *supra*: Mc.Cormick ‘Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt’, 330, ‘Subsequently, the liberal nations replace the “no-fault” surrender characteristic of the eighteenth century with the kind of vengeful peace inflicted on Germany at Versailles’.

the pursuit of an unjust war of aggression that rendered it subject to unlimited liability? In support of the first was the insistence of John Dulles that war was not an illegal act in international law and thus, for Schmitt, the '*European legal concept of justus hostis was still discernible.*'<sup>198</sup> Conversely, the US President appeared to subscribe – though not without a degree of ambivalence - to the *just war* doctrine. If this were what Article 231 intended, the defeated state of Germany – tainted by guilt - was liable to make boundless restitution to the Allied Powers. Such controversies aside, however, Schmitt took the view that Article 231 made no definitive contribution to the resolution of the pivotal questions the Versailles process left unresolved, all destined to emerge afresh at Nuremberg:

'Was a total transformation in the meaning of war evident? Had the transition from the political concept of war between states in European international law to a discriminatory concept of war with one side just and the other unjust already occurred? And could the word aggression in this context be seen as a precedent for the complete criminalisation of aggressive war?'<sup>199</sup>

Because Article 231 was careful not to stray beyond the juridical concept of economic reparations, it did nothing to illuminate the issue of criminal liability and punishment arising from 'guilt' in war. More specifically, it did not seek to disturb what remained a critical distinction between the '*criminal guilt of certain individuals and the legal obligation of a state, since the latter concerned only financial and economic matters.*'<sup>200</sup> Fundamentally intact, therefore, was a concept of war that had prevailed in Europe for over two hundred years '*with all its legal procedures for pursuing war and protecting neutrality.*'<sup>201</sup>

'There existed, in no way, at Versailles a common intent to create a new crime of international law. There was no intention of abolishing a concept of war that had been recognised for 200 years, one that had determined the legal structure of all hitherto existing European international law, one with all its effects on war-conducting states and neutrals.'

Perusal of the succession of conventions and treaties made during the subsequent internecine period appears to substantiate the assertion, on Schmitt's part, that the Versailles process created no new offence of aggressive war.<sup>202</sup> If so, was the juridical

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<sup>198</sup> *Supra*: Schmitt *Nomos*, 268.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid*: 269.

<sup>201</sup> *Ibid*: 268; also *supra*: Schmitt 'The International Crime of the War of Aggression, 143.

<sup>202</sup> See *supra*: Chapter 2 for a discussion of *crimes against peace* and Appendix 1 for a schedule of the relevant provisions.

legacy of WWI the product of an array of muddled thinking and diverse political perspectives or a determined effort by European jurists to uphold the abiding tenets of the *jus publicum europaeum*, with its repudiation of the concepts of *just war* and *unjust enemy*? Did the strategy the US deployed at Versailles reflect its perception of the *JPE* as a quaint, regressive and obsolete interstate order, exemplified by the barbaric acceptance of the legality of war integral to it? To what extent did the United States' preference for the transformation of the concept of war influence the future of international law? Was this proclivity of the US towards a universalistic and monopolistic international order – the harnessing of moral categories – a prophetic blueprint for what was to happen at Nuremberg less than thirty years later?<sup>203</sup> Would the *legality* principle – as the US delegates, perhaps, disingenuously deployed in their repudiation of a new offence of *crimes against humanity* but otherwise flouted – have the resilience to endure? Or would the embargo on *ex post facto* criminal law succumb whether by volition or coercion to US imperialism? Previously sacrosanct within the positive law of Continental European states – not least of them France and pre-Nazi Germany – and therefore, by extension, embedded within the classical European interstate concrete order to which they belonged, how could it survive the dismantlement of the *JPE*? And how does the Kellogg-Briand Pact 1928, and Schmitt's analysis of it, illuminate his critique of what he perceives to be the menace of monopolistic universalism, not only to the *JPE* but also to the *legality* principle?

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<sup>203</sup>*Supra*: Stirk 'Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War,' 1-143, 99: Stirk highlights the rhetorical implication clear within Schmitt's critique, specifically that the League of Nations and Versailles meant death and degradation for the Germans.



### **The Kellogg-Briand Pact and beyond: the death of war?**

With barely concealed approbation, Schmitt points out that the League of Nations Covenant 1919 contained no explicit prohibition of war.<sup>204</sup> Nor did any initiatives over the ensuing five years unequivocally create an international *crime* of waging war, far less ascribe individual responsibility for it. Casual usage of the expression ‘crime’ in international law parlance was not tantamount, in his view, to a crime within the *nullum crimen nulla poena sine lege* principle. Intrinsic to this maxim was clear articulation and positivisation – that is, the recording of the essential components of the offence in written form - of the perpetrator, the penalty and the court.<sup>205</sup> Imperative within a Continental European way of thinking was prior law in the sense of a written, formally promulgated, penal law issued by the state. Because no other interpretation of the maxim was possible to a jurist of the European Continent, violation of the *legality* principle was inevitable in the absence of pre-established positive law that threatened discrete punishment.<sup>206</sup>

Waging wars of aggression as an international crime may have found its ‘*first widely visible expression for Europe*’,<sup>207</sup> in the 1924 Geneva Protocol. But implementation was abortive. This was due to the discord between the proposed signatories that arose from the textual failure to distinguish satisfactorily between the various political, juridical and concrete issues it sought to embrace. Not least of these were the notions of aggression and defence that, to Schmitt, were ‘*not absolute moral concepts but rather events determined by the situation*’.<sup>208</sup> How was it feasible to define the aggressor and apportion guilt or to determine whether or not war was unjust when ‘aggression’ and ‘defence’ varied with the fluctuating exigencies of conflict? When aggression was artificially equated with unjust war and the sole criteria for banning unjust war hung on the issue as to whether or not the violating protagonist was the aggressor, then who was to decide what constituted aggression and, by extension which war was unjust? For Schmitt, ‘*the justice of a war in its entirety cannot be detached from the question of justa causa, in other words, the causes of war and the entire context of foreign*

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<sup>204</sup> See *supra*: Schmitt ‘The International Crime of the War of Aggression’, 131.

<sup>205</sup> *Supra*: Schmitt *Nomos*, 271.

<sup>206</sup> See *supra*: Schmitt ‘The International Crime of the War of Aggression’, 131.

<sup>207</sup> *Ibid*: 146.

<sup>208</sup> *Ibid*: 149.

*politics*'.<sup>209</sup> Importation of notions as to the justness or otherwise of war could not be divorced from the concrete circumstances in which war was waged any more than a sophistic definition of the aggressor sufficed to resolve the real causes of war.

Though legal formalism was indispensable if penalisation of war was to be achieved, this obscured, for Schmitt, the practical problems of lack of security and armament that impelled states to wage war. To attempt to delineate and compress the great political issues of the day either into a neat juridical-formal package or one infused with specious moral overtones was, to, Schmitt a monumental error. The monstrous problems consequent upon this would create a nightmare for the individual state citizen, unable even to cling to an assurance that the criminalisation of war correlated to '*an elementary simple abolition of the danger of war*'.<sup>210</sup> Unable to respond to the '*objective contexts of the question of just war*',<sup>211</sup> the Geneva Protocol failed. Even had it taken effect, it contained nothing that would have detracted from the traditional European respect for state sovereignty, recognising as it did the territorial independence and political independence of the aggressor state. Nor was there intended to be penalisation of war in '*a truly criminal legal sense*',<sup>212</sup> all the threatened sanctions - economic, financial and military - being directed purely against the state. Containing no repetition of the Versailles attempt to exact retribution from a Head of State nor, relatedly, against members of government or any other individual citizen, the Protocol, therefore, was closer to a classically European understanding of interstate relations than a US-sponsored universalistic model. The so-called designation of the crime of aggressive war was nothing more than '*a special kind of delict of international law*', a wrongdoing that corresponded with the '*hitherto existing tradition of European international law to differentiate the delict*'.<sup>213</sup>

The Protocol did not comprise a foundation for penalisation of individual state citizens sufficient either to constitute a crime or stipulate the appropriate punishment for it within the meaning of the *nullum crimen, nulla poena* principle. Were any attempt to be made to re-introduce the crime of aggressive war in the future and worse, to ascribe

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<sup>209</sup> *Ibid*: 150.

<sup>210</sup> *Ibid*: 154.

<sup>211</sup> *Ibid*: 154-155.

<sup>212</sup> *Ibid*: 147.

<sup>213</sup> *Ibid*: 148.

accountability for it to ordinary state citizens, this would necessarily entail a fundamental violation of the *legality* principle.<sup>214</sup>

Inchoate in 1924, the US-propagated ideological vision of a unified pacific order, founded on the just war doctrine, had not yet consummated its influence over what were the core components of the particularistic and decisionist state-dominated *JPE*. But was this to change? What did the ‘*American promoters of an “outlawry of war”*’<sup>215</sup> hope to achieve through the Kellogg Pact, 1928, with its formal condemnation of war as an instrument of national policy? Clear from the earlier discussion of the Pact is that it contained no definition of war; no sanction for infringement of its provisions and, according to Schmitt, no organisation.<sup>216</sup> Based only on vague notions such as moral condemnation of *states* - rather than individual citizens of them – through public opinion, it did not, for Schmitt, ‘*serve as the legal foundation for the criminal punishment of particular persons for a totally new kind of international crime.*’<sup>217</sup> In essence, the Kellogg Pact lacked the positivisation of either crime or punishment, inscribed in formal writing, of the type required to satisfy the Continental European criterion of *lex* within the *nullum crimen nulla poena sine lege* principle.<sup>218</sup> This, for Schmitt, brought into the sharpest focus the intense opposition that separated the way of thinking of the Western Hemisphere from that of Europe. From the perspective of a contemporaneous jurist of France or Germany perhaps, any subsequent initiative to introduce sanctions for the putative crime of waging aggressive war would be impermissible. Put simply, such penalisation would be *ex post facto* and, therefore, illegitimate.

What troubled Schmitt afresh was also the renewed attempt to distort the concept of war. Not abolition of an entire institution such as slavery or an absolute prohibition in the sense of an undifferentiating ban of all war, irrespective of the relative justness of it.

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<sup>214</sup> Schmitt cannot countenance the prospect that those defeated in war should be treated as common criminals and victorious nations as ‘world policemen’.

<sup>215</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 155.

<sup>216</sup> *Supra*: Chapter 2.

<sup>217</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 160.

<sup>218</sup> The Kellogg-Briand Pact otherwise known as the Pact of Paris dated 27<sup>th</sup> August 1928 was signed by 63 nations, including all the major powers including Germany as the first named Contracting Party and the first signatory and was the main substantive provision upon which the prosecution rested its case during the Nuremberg Trials. It came into force on 24<sup>th</sup> July 1929. It is available online at: <http://www.yale.edu/lawweb/avalon/kbpact/kbmenu.htm>

Rather, this was aimed at condemnation ‘of a certain kind of war which it, in doing so, presupposes to be an unjust war, while it even sanctions just war through this same act’.<sup>219</sup> Integral to the distinction the Pact sought to make between just and unjust war was abolition of the right to neutrality enshrined within the *JPE*. Corresponding categorisation of the protagonists eliminated the right for bystanders to remain non-aligned. Failure to support the putatively just party rendered onlookers no less unjust than the original aggressor in the conflict and both became a foe, deserving of annihilation:

‘Within one and the same order of international law, there may exist just as little two contradicting concepts of war as there may exist two mutually exclusive conceptions of neutrality. The concept of war has therefore become a problem.’<sup>220</sup>

Significant, to Schmitt, however, was that neither the 1928 Pact nor subsequent developments in international law removed the right to neutrality. Evinced by the continuing recognition of the neutral status of Switzerland and Belgium, this exemplified the disingenuous selectivity of the US-influenced League of Nations.<sup>221</sup> Nor, even after 1928, did the League uphold the purported illegality of wars of aggression, far less adhere to penalisation for perpetration of aggressive war, with reference to specific individuals in the sense of the *nullum crimen* principle. A blatant example of this, Schmitt detected, in the 1935-6 Italian conquest of Abyssinia (Ethiopia), where the League formulated a coordinated system of juridical sanctions but resiled from designation of Italy’s conduct as an ‘*international crime in the criminal sense*’.<sup>222</sup>

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<sup>219</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 158; also *ibid*: 167, ‘Even the Kellogg Pact judges only unjust war. War is not, therefore, *ipso facto* and absolutely declared a crime. Rather, one differentiates between just and unjust war. Only for some radical pacifists and members of an unconditional “no-resistance” philosophy war was always a crime, without reference to justice or injustice’.

<sup>220</sup> *Supra*: Schmitt ‘The Turn to the Discriminating Concept of War (1937)’, 31.

<sup>221</sup> See *supra*: Schmitt *Nomos*, 249; also *supra*: Schmitt ‘The International Crime of the War of Aggression’, 173, ‘Switzerland, whose exemplary conduct in international law is universally recognised, declared in 1937 that it would no longer take part in any sanctions of the League of Nations and retreated to a position of integral neutrality...The Council of the League of Nations formulated a resolution on May, 14, 1938, that gave notice that it had received this intention and explained that Switzerland would not be called upon to participate in sanctions...In the fall of 1939, all neutral states, including the United States of America, confirmed their neutrality in the sense of old international law’.

<sup>222</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 170; also *ibid*: 189, ‘Not once in the case of Italy in 1935-6, the only case of a “proclaimed aggressor” did it manage to make any declarations, appeals to the citizens of an aggressor state or to prosecute a citizen as a participant in an international crime’; see also *supra*: Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War,’ 1-143, 103 where Stirk highlights Schmitt’s ambivalence. On the one hand, he vilifies the League of Nations for its failure not to reverse the Italian conquest but on the other, he would have been alarmed

Inherently ambivalent, in Schmitt's view, the open-ended norms the Pact enshrined did not epitomise genuine pacifistic ideals but lent themselves to cynical exploitation by those who – from their self-acclaimed evangelical bandwagon – would seek to promote *just* war, that is, war of a certain international type. Problematic, for Schmitt, was the arbitral question of the distinction between just and unjust war this inevitably evoked, as well as the manifold reservations within the Pact, all susceptible to differing interpretations. Once again, this betrayed '*extensive differences*' between the political situations of Europe and the United States that served to aggravate their respective perceptions of the Pact.<sup>223</sup> Whilst European jurists might adhere to a forlorn belief that the right to wage war in the interests of self-defence would remain a matter for the self-determination of each participating state, Schmitt was less sanguine. Disquieting in the extreme was the triumph it heralded of the reconfigured Monroe Doctrine over the League of Nations Covenant. If this bestowed on the US the sole prerogative to define, interpret and apply every norm of international law, '*the Kellogg-Briand Pact could have a similar function for the Earth to that which the Monroe Doctrine had for the Americas*'.<sup>224</sup> Supplanted by a '*liberalist, humanist, global ideology*' poised to encroach on the sovereign integrity of other nation states, the Doctrine in its originary, authentic sense found itself consigned to history.<sup>225</sup>

Armed with this self-propounded inversion of isolationism and imperialism, the United States was quick to discern the thinly disguised potential for global domination latent within the Pact. What the signatories to it had pledged was condemnation of war as an instrument of *national* policy. Nowhere, however, was war renounced as an instrument of *international* policy and it was this lacuna that the US was ready to grasp. Axiomatic it was that imperialism operated exclusively in the international sphere and was entirely distinct from national interests. How then could the United States ever infringe the strictures of the Pact when, as consistent with global superpowers, all of its endeavours were purportedly geared to the waging of *just war* for *international* purposes with its

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had intervention occurred. This, for Schmitt, would have produced a scenario more horrendous than the one whose vices it claimed to rectify.

<sup>223</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 164, 'The real argument of the American jurists will always remain that the Kellogg Pact binds all states and nations to the universal conviction of mankind and that, according to this conviction, war is a crime that Hitler and his accomplices doubtlessly committed'.

<sup>224</sup> *Supra*: Schmitt 'Forms of imperialism in international law', 117-142.

<sup>225</sup> *Supra*: Kervegan 'Carl Schmitt and World Unity', 54-74, 63.

counterpart the vilification of others, who failed to adhere to the asymmetric criteria the US alone prescribed? Hence, the Kellogg Pact conferred on the United States a dubious licence to impose a re-moralised and, for Schmitt, sham cosmopolitanism where it willed. Duplicitous in the extreme, international liberalism found itself with free rein to *'use universal morality, pacifism, perpetual peace and human rights to subdue nations that are just being honest about their concrete specificity'*.<sup>226</sup>

This augured for the entire globe what the Versailles-authorised French annexation of the Rhineland had meant for Germany during the 1920s.<sup>227</sup> Under the guise of an authentic peace settlement, France had plundered foreign territory for economic gain and heightened the shame of the nation it had defeated in war. Graver than the pure financial reparations of Article 231 of the Versailles Treaty, this was tantamount to humiliation.<sup>228</sup> Now, with the propaganda and worldview the post-WWI settlement had generated – augmented by the intrinsic elasticity of the Kellogg Pact, the US would have no compunction in hijacking *'putatively universal principles like humanity, peace of the eternal variety, justice, progress and civilisation'*.<sup>229</sup> Not only would the stronger 'lion' states be able to control, defeat or annex weaker nations in an empirical sense, but more insidiously, their confiscation of universal concepts would facilitate manipulation of the vague and elusive norms of international law.<sup>230</sup>

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<sup>226</sup> See *supra*: Mc.Cormick 'Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt', 343.

<sup>227</sup> Mika Luoma-Aho 'Geopolitics and grosspolitics' in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 36, 38-39, 'Legal texts such as the Treaty of Versailles and the Kellogg-Briand Pact had criminalised war and transformed it into police action...Schmitt saw humanitarianism as a dangerous political 'religion' which in its attempt to neutralise the political nature of man succeeded only in bringing chaos and violence in its wake.

<sup>228</sup> See *supra*: Luoma-Aho 'Geopolitics and grosspolitics', 36, 38, 'In his 1925 critique of the Versailles Treaty, Schmitt argued that the Rhineland had been made the 'object' of international politics; its destiny was no longer in the hands of the German state but in those of the Pact powers. This new form of political subjectivity exercised in the name of the League of Nations was rendered possible by giving primacy to international law over international politics. Since objects are created by international law by subjects powerful enough to create and enforce that law, entities thus created are devoid of the ability to make their own political decisions. If the interests of the controlling political subject are at stake, it uses its rights of intervention to overstep the sovereignty of the controlled political object...The occupation and demilitarisation of the Rhineland on the pretext of international law diminished the territorial sovereignty of the Weimar state'.

<sup>229</sup> William Rasch 'Anger Management: Carl Schmitt in 1925 and the Occupation of the Rhineland' *The New Centennial Review* Vol. 8, No. 1, (Spring 2008), 1-18, 2 accessible online at [http://muse.jhu.edu/journalsnew\\_centennial\\_review/v008/8.1.rasch.html](http://muse.jhu.edu/journalsnew_centennial_review/v008/8.1.rasch.html) (accessed 06/07/2011),

<sup>230</sup> See *supra* Stirk, 'Schmitt, Crown Jurist of the Third Reich on Pre-emptive War', 1-143, 102: Stirk points out that for Schmitt, it was the indeterminacy of the Kellogg-Briand Pact that proved the great superiority, the astonishing political achievement of the United States. The Pact, with its distinction between legitimate and illegitimate wars, its claim to determine what counted as peace and what did not, was the great threat; see also *supra*: Schmitt *Legality and Legitimacy*, 35 where Schmitt highlights the

Worse still, this would be achieved in the name of a spurious humanity that would hold in thrall the perception of those human beings whom they wished to beguile and dominate.<sup>231</sup> Though curiously envious of US imperialism as ‘*a beggar in rags speaking of the riches and treasures of others*’, terrifying for Schmitt was the prospect that a political power was able to ‘*determine on its own the forms of speech and even the mode of thought of other peoples, the vocabulary, the terminology and the concepts*’.<sup>232</sup> Defeat was proportionate to the extent a vanquished people was forced to submit to the imposition of a foreign vocabulary, to a foreign notion of law and most appallingly, an alien conceptualisation of what international law comprised.<sup>233</sup> Denuding a nation state of the right of self-determination; of the right to wage war; of the authority to exercise its sovereign will without inhibition or restraint and, therefore, of total autonomy in the international realm no less than domestically, was the most profound mortification a victorious power could exact.<sup>234</sup>

If this was anathema to Schmitt paramount, in contrast, was the preservation of untrammelled state sovereignty of which the *JPE* was the arch-guarantor. Though presaged by incremental inroads during the internecine period, still unconsummated at the onset of WWII, in 1939, was the wholesale attenuation of the sovereign nation state. Intrinsic to fruition of what was, for Schmitt, this lamentable outcome was the notion of just war with the penalisation of aggressive war concomitant with it. Vital, therefore,

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indeterminacy of the Pact and the consequential risk of exploitation by what he labels the ‘higher third’: ‘But one sees immediately that the pact becomes worthless for the critical case at which it was directed, specifically the case of war, at least so long as the pact is applied with unconditional legal equality, and for example, so long as an imperialistic great power or group of powers plays the higher third and itself interprets and sanctions the indeterminate concepts of the pact, including especially the concept “war” which is likely to occur in political reality.’ This Schmitt equates with the political party in possession of the premium of power in the domestic arena which is then able to eliminate the principle of constitutional legality – the equal chance.

<sup>231</sup> For a critique of this position, see *supra*: Kanwar ‘Dark Guardian of the Political’: ‘Though he specifically attacks open-ended legal standards, he considers all international law to be indeterminate. This rests on his assertion that you cannot institutionalise relationships between heterogeneous and antagonistic political entities. Thus, even if an international court of concrete orders was to deal with disputes exactly the way Schmitt would prescribe for a municipal system, he would not accept its sovereignty or its legitimacy. There is still the fundamental problem or requiring a homogeneous political culture, which is the most irrational aspect of his theory. Extermination of the enemy is fine as long as it is not done in the name of universal humanity’.

<sup>232</sup> *Supra*: Schmitt ‘Forms of imperialism in international law’, 117-14.2

<sup>233</sup> *Ibid*; also *supra*: Muller ‘Carl Schmitt’s Method: Between ideology, demonology and myth’, 61-85, 71, ‘Schmitt openly made the quasi-Nietzschean claim that history’s victors impose their concepts...In short, “Caesar dominus et supra grammaticam” as Schmitt liked to point out’.

<sup>234</sup> See *supra*: Stirr, ‘Schmitt, Crown Jurist of the Third Reich on Pre-emptive War’, 1-143, 94; also *supra*: Kervegan ‘Carl Schmitt and World Unity’, 54 – 74, 61, ‘In parallel with the contamination of international law with moral or humanitarian concepts, there is an attempt at relativising or overtaking the state, the subject and point of reference of classical international law’.

was that despite sequential encroachments by the Treaty of Versailles, the Kellogg-Briand Pact and other attempts during the period 1919-1939 to penalise aggressive war, the notion of *crimes against peace* remained only a moral postulate – not a criminal offence - at the onset of the Second World War. Not yet had the European interstate order ceded its claim to ‘*the greatest progress that international law had ever achieved for mankind*’ whereby, for almost three hundred years, ‘*war had purely been an affair between states.*’<sup>235</sup>

This was the perceived deficit that the nations – the United States in particular - emerging as victors from WWII, were determined to rectify: the unequivocal penalisation of aggressive war. Co-extensive with this ostensible divergence from classical European international law in the context of *crimes against peace* was the ascription of individual responsibility for their commission. And of still wider significance to Allied strategy at Nuremberg was the *nullum crimen nulla poena sine lege* principle. All of them: ostensible vindication of *crimes against peace*, attribution of individual responsibility for their commission; overstepping of the *legality* principle and the establishment of an *ad hoc* international tribunal to try the defendants - proved pivotal to the legitimacy of the Nuremberg process. But what, for Schmitt, comprised the unifying theme that precipitated coalescence of these outcomes: penalisation of aggressive war; the inauguration of the individual as the subject of international law; the inclusion of these and other *ex post facto* elements within the Charter in the face of the explicit reservations of the other participants at the London Conference, August 1945 – most notably, from the French contingent and, not least, the subversion of the *legality* principle itself? Was Nuremberg the paradigm of liberalism’s determination to camouflage ‘*its unprecedented, aggressive and pervasive domination under the veil of enlightenment and progress*’?<sup>236</sup>

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<sup>235</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 175.

<sup>236</sup> See *supra*: Mc.Cormick ‘Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt’, 343.



### **Nuremberg: the nadir of the *jus publicum europaeum***

Emblematic of Schmitt's declamation of the Nuremberg process was his unshakable conviction that the influence of liberal-inspired American jurisprudence would prevail over the system of laws characteristic of continental Europe. Manifested most vociferously in connection with his invective against *waging aggressive war*, what this also embraced were issues pertaining to the inherent legitimacy of the tribunal, ascription of individual responsibility, the essence of the *legality* principle and the significance of the pre-Charter negotiations.

#### **(i) The forum**

Unequivocal, in Schmitt's view, was that no precedent existed for an international penal court. Prior prosecutions involving the disposal of international pariahs, most notably pirates, had been dealt with by national courts and the essentially political nature of war meant that the outcome of the Second World War was, therefore, neither '*litigable or arbitral*'.<sup>237</sup> Not even the contemplated post-WWI prosecution of Wilhelm II had culminated in formation of an international criminal court nor had subsequent developments during the intervening period conduced to this outcome. No procedure for establishment of a forum of the type postulated in the Nuremberg Charter was prescribed by the Kellogg–Briand Pact nor had suggestions to inaugurate an international court at The Hague come to fruition, far less vest such court with criminal jurisdiction.<sup>238</sup>

Especially relevant here was the putative crime of aggressive war where never before had there been '*any universally international penal court that could have decided on the justice or injustice of a war at the outbreak or beginning of conflict without having to await the outcome of the conflict*'.<sup>239</sup> Against this background, Schmitt was in no doubt that creation of an *ad hoc* tribunal to deal with the Nazi defendants was tantamount to acceptance of a putatively international criminal court charged with jurisdiction over alleged breaches of international criminal law. Because, for Schmitt, the '*ban on ex post facto laws*' embraced a ban on an '*ex post facto criminal court*', violation of this was

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<sup>237</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 169.

<sup>238</sup> In the period that has elapsed since the Nuremberg proceedings and even after the creation of the first and only permanent and genuinely universalistic judicial forum, that is, the International Criminal Court, the United States has refused to allow its military personnel to be judged by any courts other than its own.

<sup>239</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 189.

manifest.<sup>240</sup> As such, this was a pivotal procedural and administrative flaw that marred the Nuremberg proceedings from their inception.<sup>241</sup>

## **(ii) Inscription of the individual within international law**

The fundamental question as to the validity of the tribunal aside, what the Nuremberg proceedings were to witness was a momentous evolution in the relative hierarchy and status of intrastate and international law. For the first time, Article 6 of the Nuremberg Charter unambiguously determined that individual state citizens of the Axis nations were criminally accountable under *international* law and it was in the context of *crimes against peace* where this was destined to prove especially problematic. Beyond doubt was the lack of substantive precedent at the onset of WWII for this offence<sup>242</sup> and worse, for Schmitt, it was '*not only a novum crimen but rather, in light, of its international character, a crimen novi generis* [a crime of a new type] *that is separated from offences against the rules of the laws of war and the real atrocities through its great moral and moral particularities*'.<sup>243</sup>

Exacerbated by putative ascription of individual responsibility for what had been, at most, an international delict for which states alone were liable, it was no surprise that that Schmitt reserved the main thrust of his invective for this specific category of offence.<sup>244</sup> Never had individuals been the subjects of international law and unqualified allegiance was required only to the internal legal-constitutional norms of the nation state

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<sup>240</sup> *Ibid.*: 170.

<sup>241</sup> See *supra*: Kelsen 'Will the judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 164-65, where Kelsen argued that the Nuremberg trial should not set a legal precedent because he hoped that at the end of the next war, the governments of victorious states would not be able to subject the defeated nations to retroactive and unilaterally defined crimes. It was incompatible with justice and was tainted by revenge, for the defeated nations alone to be subjected to judicial sanction in a court established by the victors. This was an abuse of the judicial function. See the discussion of Kelsen's position in Danilo Zolo *Invoking humanity war, law and global order* (London and New York: Continuum, 2002), 114-5, 'It was beyond doubt that the Allied nations also had omitted violations of international law and to enable justice to be done and seen to be done, a truly international court should have been established rather than a military tribunal with strongly selective competence. Only if the winning nations had been submitted to the authority of the same law applied to the defeated nations would it have been possible, in Kelsen's view, to preserve the juridical nature – that is, the generality and abstractness of punitive norms and thus meet the requirements for true international criminal justice'.

<sup>242</sup> See *supra*: Chapter 2 for an account of the novelty, at Nuremberg, of the crime of waging aggressive war.

<sup>243</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 177.

<sup>244</sup> It is important to recognise that Schmitt does not concede that, at the outset of WWII, even states were liable to account for the supposed illegality (delict) of waging aggressive war since he refutes the basic presuppositions that the act of war is capable of being a crime.

of which they were citizens.<sup>245</sup> Integral to the dualist interpretation prevalent throughout the War both in theory and praxis, not only in Germany but throughout other Continental European countries was, therefore, this pivotal precept that individual state citizens were incapable of committing an international crime. Because the state alone was the '*lone perpetrator of a delict of international law*',<sup>246</sup> the individual citizen was always immune from penalisation.<sup>247</sup>

Contrasted with this, on Schmitt's reading, was the Anglo-Saxon interpretation that upheld the notion that all international law, without more, was always the law of the land. Emanating from the English insistence on '*seeing the problem from the side of the individual*'<sup>248</sup> this denoted that individuals were bearers of all rights and, the corollary of this, were obliged to accept responsibility for every misfeasance that international law attributed to them. Certain English texts, supportive of the strict dualism between state and international law, were insufficient to displace or override what Schmitt labels the individualistic character of English law.<sup>249</sup> Neither the un-ratified Geneva Protocol 1924 nor the Kellogg-Briand Pact 1928 had supplanted the traditional sharp distinction between state and individual, and individuals remained ineligible to appear as litigants before the International Court of Justice in The Hague (Article 34). This notwithstanding, it was the above trend within Anglo-Saxon thinking that was to prove a catalyst for the US-instigated re-moralisation of this sphere.

Particularly fateful here was the intrusion of moral considerations into what had formerly been purely juridical and technical constructions. Degeneration into '*moral-*

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<sup>245</sup> See *supra*: Schmitt, '*The Turn to the Discriminating Concept of War (1937)*', 43, where Schmitt discusses the theory postulated by Scelle about a world order in which the individual becomes the primary subject of international law: 'Scelle believes in a historically irresistible development that in spite of all defeats, in spite of Fascist and National Socialist tendencies, shall lead from a state-centric to a trans-state view, from anarchy to hierarchy, to an increasingly clear specialisation of functions to a working out of a trans-state, universal ecumenical order. Individualism and universalism are the two poles that this international legal system moves between. Its logically consistent individualism balks at nothing...Decisive for Scelle is that the individual is seen as the lone subject of international law and as a direct member of the international community'.

<sup>246</sup> *Supra*: Schmitt '*The International Crime of the War of Aggression*', 175; states were only responsible for financial, economic or political consequences in international law such as liability for damages, sanctions backlashes and war itself in the relations of state to state.

<sup>247</sup> Within this assertion, Schmitt did not intend to include acts committed in violation of the *jus in bello*, that is war crimes in the old sense for which individual responsibility had been already established: see *supra*: Chapter 2.

<sup>248</sup> *Supra*: Schmitt '*The International Crime of the War of Aggression*', 176.

<sup>249</sup> See *ibid*: 176 where Schmitt refers to the leading text of Oppenheim in this regard.

*philosophical, ideological or even religious debates*’ evoked the moral pathos of American authors determined to establish that ‘*only man and not a state organisation or any other organisation, can be regarded as the upholder of international rights and obligations*’.<sup>250</sup> The tendency to vilify German jingoism and use this to justify their interpolation of the individual into a space monopolised by the state was, for Schmitt, unconvincing. A natural law-based universal recognition of the individual, with the correlative responsibility this engendered, signalled a transformation in the international order, primarily underscored by United States’ imperialistic zeal. When conflated with ‘*the question of the criminalisation of war*’, this entire problem attained ‘*a new trenchancy*’.<sup>251</sup>

Manifest, in summary, was that aggressive war was not a crime at the onset of WWII and, even if it were, individual citizens could never be held accountable for it.<sup>252</sup> To criminalise every person for aggressive war amounted to collective punishment without determination of relative guilt or innocence. Nothing less than strict liability, this was reminiscent of a primitive interpretation of the least defensible nature. It flew in the face of continental theory and praxis as did the conflict of loyalty it generated for the individual. Peculiarly pertinent to the *international crime of war*, the duty to obey the state authority and to be unflinchingly loyal to it was, to Schmitt, an unassailable precept ‘*in all states of the earth*’.<sup>253</sup> If the individual received an order to embark on an act of war (though not to commit atrocities), no defence availed him if he refused to obey. ‘*Neither in domestic opinion nor in domestic law*’ would a recalcitrant citizen locate ‘*any footing or protection*’.<sup>254</sup> The secular tradition of the *JPE* that bound the individual citizen to his national government was simply too strong and well-grounded.<sup>255</sup> Likewise, were any attempt made to punish him by an extra-state entity,

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<sup>250</sup> *Ibid*: 177.

<sup>251</sup> *Ibid*.

<sup>252</sup> On this point, see Thomas Hobbes *On the Citizen (De Cive)* (1642) ed. and trans. Richard Tuck and Michael Silverthorne (Cambridge: Cambridge University Press, 2007), XIV (4), 156, where Hobbes states that the natural law of commonwealths (the *lex gentium*) is part of the law of nature and that the precepts of the natural law of men and the natural law of commonwealths are similar. However, ‘because commonwealths once instituted, take on the personal qualities of men, what we call a natural law in speaking of the duties of individual men is called the rights of nations when allied to whole commonwealths, peoples of nations’. From this, it is clear that the proper subjects of international law are states and not individuals.

<sup>253</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 187.

<sup>254</sup> *Ibid*: 190.

<sup>255</sup> *Ibid*: 191.

the defence of *superior orders* should suffice to exonerate him from criminal responsibility.

To this extent, Article 8 of the Charter that sought to nullify the superior orders defence was not only in violation of continental law but also of the established legal norms of every nation of the world that demanded of its citizens an unconditional duty to obey such state's call to arms.<sup>256</sup> Scholastic natural law conferring a limited right of resistance had not re-emerged and the concrete institutions that would have facilitated this were non-existent. As such, determination of the putative justness or unjustness of war was not within the prerogative of an individual citizen. Individual state citizens were obligated to act on the basis of whatever decision regarding the act of war their state saw fit to make and any dissent on their behalf rendered them nothing more than traitors, susceptible to the most severe criminal punishments for high treason or sabotage. No moral choice referable to the justness or unjustness of the specific, present war was permissible but purely conscientious objection to every war as such.<sup>257</sup>

That should have been the end of the matter. Mindful, however, of the purpose of his *Gutachten*, that is, to provide an opinion to the industrialist Flick, who claimed to have had exercised no governmental authority, Schmitt went on to stress that the *state* was a juridical person.<sup>258</sup> As such, it alone was responsible for the puissant political decision to engage in war. This signified that if anyone was liable for penalisation, the Head of State was primarily accountable, in conjunction with members of the state government that opted to wage war. Manifestly at variance both with his polemic against Article 227 of the Treaty of Versailles and his ubiquitous valorisation of the non-impeachability of state sovereignty, the analytical stance that Schmitt here adopted was explicable only by reference to the specific context of its formulation, that is, the potential defence of Flick. To be immanently consistent, therefore, should not Schmitt have regarded as immune from penalisation and even prosecution not only the average citizen but also Heads of State and those within the inner circle of government?<sup>259</sup> If this were so, this

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<sup>256</sup> Note, however, that Schmitt makes a specific exception in relation to the commission of atrocities in relation to which he posits that the defence of superior orders would not be available to a perpetrator; see *ibid.*: 187.

<sup>257</sup> See *ibid.*: 192.

<sup>258</sup> See *ibid.*: 178.

<sup>259</sup> This is discussed further *infra* in connection with Schmitt's use of concrete order thinking.

would have invoked retention of the *acts of state* defence, which the Allies sought to nullify in Article 7 of the Charter.<sup>260</sup>

Nor was this the extent of Schmitt's critique of the ascription of individual responsibility for *crimes against peace*. For advocates of the momentum to outlaw war, war was a crime akin to piracy and those who perpetrated it were pirates. Within Anglo-Saxon formulated categories of international law, piracy did not comprise '*a delict of international law in the sense of a pure relation of states as with the typical delicts of international law*'.<sup>261</sup> What a pirate instead violated were norms of a universal international law and it was this specific norm of a supposedly all-embracing international law that applied to individuals of any nationality, not only in a legal but also in a criminal sense. Though pirates were still tried before national courts of the state whose interests were affected by the act of piracy, domestic law otherwise faded from the picture. What, to Schmitt, was implicit within the Allies' unilateral importation of individual criminal responsibility was their employment of the purported analogy between criminal punishment on account of piracy and penalisation in consequence of a war of aggression.<sup>262</sup>

It was this that betrayed the sharp distinction between what he categorised as an Anglo-Saxon mode of thinking and its counterpart in Continental Europe. Inextricable from the latter was the concept of law as positive law, a '*positivisation*' that was '*simultaneously a nationalisation*', whereby state law alone constituted a valid basis of punishment.<sup>263</sup> Self-evident to Continental European jurists, therefore, was that because an individual could never be the subject of a norm of international law, the crime of piracy was no more than a robbery at sea. Distinguished from other domestic crimes only due to the location of its perpetration, that is, the high seas, as a result of which a pirate could be punished by any state in the world, piracy in the conceptualisation of Continental European jurists remained purely '*an expansion of the realm of competence of domestic norms and authorities*'.<sup>264</sup>

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<sup>260</sup> Liberals do not accept the validity of the 'acts of state' defence or 'heads of state' immunity since both contravene the precept that all must be equal before the law.

<sup>261</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 165.

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*: 166.

Whereas within an Anglo-Saxon way of thinking, the pirate was an enemy of humanity, his predatory intentions indiscriminately directed against all states and his actions potentially inimical to all human beings across the globe, this was wholly beyond the '*legal consciousness of a Continental state jurist*'.<sup>265</sup> Every presupposition underpinning the Anglo-American notion of the pirate – denationalisation, the inability of the pirate to require his state to protect him and the equivalent negation of the state's entitlement to afford protection to the pirate – were alien to a Continental European perspective. Apparent, nonetheless, to Schmitt was the unfortunate equivalence adherents of the notion of aggressive war and its penalisation sought to derive for '*propagandistically comprehensible*' motives between the pirate and war criminal.<sup>266</sup> If recourse to the *jus gentium*, the so-called universal jurisdiction enabled the one to be punished, then why not the other and what was the barrier to a trans-national or even supranational tribunal for the imposition of sanctions against both? This, however, Schmitt was quick to counter on the basis that whilst piracy was a crime – a '*malum in se*' irrespective of the justness or otherwise of the act, the putative crime of aggressive war was implicitly founded on the distinction between just and unjust war.<sup>267</sup> In no circumstances, therefore, could an accused pirate ever seek to exonerate his conduct as acts of defence.

A further concrete distinction was, for Schmitt, vital between war and piracy. The first was of a quintessentially political nature whereas the second was epitomised by its unpolitical character. As such, the pirate acted '*out of a pure lust for acquisition. He is a robber, thief, and a plunderer.*'<sup>268</sup> Once the pirate proceeded from political motives, no longer was the definition of pirate applicable to him, just as treason was never an act of piracy. Only because of the non-political nature of piracy was it possible to deem the perpetrator in violation of a so-called delict of *international* law and still punish the wrongdoer in a national court, regardless of the nationality of the offender. Never was it feasible to deem a pirate guilty of an act of war – whether illegal or otherwise – just as it was outrageous to seek to classify an individual citizen of a warring state as a pirate. Conflation of war with piracy obscured the fundamental dichotomy between the protagonists involved in each: the one political and the other not.

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<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*: 167.

<sup>268</sup> *Ibid.*

What flowed from this obfuscation of categories was the unsustainable treatment it promoted of the opponent defeated in war (defined as an act of politically motivated belligerency), as if such adversary invariably lay beyond the realm of universal conscience. The consequentially '*debased enemy of humankind*'<sup>269</sup> was then to be denounced more damningly than a pirate and treated commensurately with this abject status before an internationally convened tribunal, to answer to the consciousness of the entire world (or in Schmitt's view, only to those responsible for the juridical process). If, however, the parallel the Allies sought to draw between perpetrators of war and pirates was to be minimally capable of cogency, confined it would have to be to those who committed atrocities *during* war, that is in violation of the *jus in bello* or acts strictly analogous to war crimes in the old sense. Untenable, in contrast, was the treatment, as pirates, of those who purely exercised their previously legitimate entitlement to wage war wholly consistent with the norms of classical Continental European international law.

Ascription of individual responsibility, therefore, signified the triumph of an Anglo-American interpretation of the universal crime of piracy - together with the precise ambit of the concept of universal jurisdiction that accompanied it - over what was the traditional construal of the same concept by Continental European jurists. This, Schmitt, discerned as the elevation of so-called universal precepts of natural law over the positive law of the *JPE*, of which pre-World War II Germany – or, at least, Weimar Germany – was a 'member' state. Nor was this all for if the importation and triumph of universalistic perspectives held sway in the context of individual accountability under the new order of international law the Allies envisaged, what of the *legality* principle itself?

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<sup>269</sup> *Ibid.*



### (iii) Legion perspectives of the *legality* principle

Emerging victorious from WWII, the Allied Powers, chief amongst them the United States, wished to avoid the sense of regret some of their counterparts may have experienced in the aftermath of the First World War. Crucial to their Nuremberg endeavour was, therefore, to ensure that the '*novum crimen*', the new crime of aggressive war, did not fall prey to the principle, '*nullum crimen*'.<sup>270</sup> Pivotal to this strategy – both in terms of implementation and outcome – was the precise definition and status of the putative ban on retrospective crime creation and punishment from the perspectives not only of the protagonists in the Nuremberg proceedings but also of their arch polemicist, Schmitt. Apparent in his *Gutachten* (1945) first was the significance accorded the *nullum crimen nulla poena sine lege* as a doctrine of *international law*. Next, its precise application, as exemplified in the praxis of Continental Europe, Britain and the United States – that is by reference to their internal legal-constitutional systems. Common to both international and domestic domains, the *legality* principle was, to Schmitt, a '*universally and internationally recognised clause*' containing '*the clear prohibition of recognising a criminal punishment if the act was not threatened with punishment at the time of its perpetration*'.<sup>271</sup> But relevant also was that each of Continental Europe, Britain and the United States of America adhered to it on an intrastate level in '*extraordinarily different ways*'.<sup>272</sup>

Never explicitly elucidated, however, is whether Schmitt takes the domestic law of the legal systems he scrutinises as his starting point from which to then extrapolate the status of the maxim in international law. In that event, which conceptualisation of international law does he utilise to substantiate his claim that the embargo on *ex post facto* criminal law and punishment is universally binding? Or does he posit that the norm prohibiting retrospective penalisation originates instead in the international domain, whence it thereafter permeates throughout all nations that are subject to the norms prescribed by international law. Alternatively, is this for Schmitt a specious distinction to draw – at least within Continental Europe – given that the law and traditions of the *JPE* were predicated on such norms as emanated on a consensual basis

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<sup>270</sup> *Ibid*: 177.

<sup>271</sup> *Ibid*: 128.

<sup>272</sup> *Ibid*.

though the interstate negotiation and common understandings of the states within it. On this premise, whatever doctrine of non-retrospectivity governed the intrastate practice of nation states, such as France and Germany, was capable of distillation throughout the *JPE* and became the unifying principle by which all nations in Continental Europe were bound.

If every nation state recognises one supranational law and within that supranational law, one non-retrospectivity norm is conceded to exist to which each state accords equivalent credence and interprets identically; or where acknowledgment of one universally binding international law is absent but there is exact confluence between the content and application of the norm against retrospectivity within the domestic law of every state affected by it, then this is likely to prove unproblematic. Where this, however, becomes tendentious is when nation states conceptualise international law itself in differing ways – either the United States-inspired universalistic model or the fundamentally particularistic and decisionist state-centric order of Continental Europe. Or where inviolability of the norm against *ex post facto* penalisation is divergently conceived, due either to differing perceptions of the norm within the specific context of international law or as a consequence of the internal diversities between nation states as to the interpretation and application of the *legality* principle?

Discussed later are the specifically international aspects of the *nullum crimen nulla poena sine lege* principle, its emplacement within the *JPE*, and the significance Schmitt implicitly attaches to this symbiosis. For the moment, Schmitt conducts his analysis from the perspective of the praxis of the nation states or groupings – with the notable exception of Russia - integral to the Nuremberg process.<sup>273</sup> Implicit within this is repudiation of any universally enforceable set of international norms binding either on the protagonists in WWII or the participants engaged in its juridical aftermath. What is, therefore, his primary concern is the respective status and construal of the *legality* principle within Continental Europe, Britain and the United States. As seen, the classical European interpretation of the maxim: *nullum crime, nulla poena sine lege* required the existence of prior written positive law. Nothing less than *lex scripta*

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<sup>273</sup> The constitutional position within Russia towards the legality principle is mentioned later, as is a possible rationalisation of Schmitt's decision to omit any reference to this in his 'The International Crime of the War of Aggression' work.

sufficed if subsequent violation of it was to be avoided. From the foundational precepts of Anselm von Feuerbach, whom Schmitt regards as the instigator of modern German penal jurisdiction, what was required was the '*positivisation of the concept of "justice" to a state law*' that '*goes here so far that only a written law can penalise an act*'.<sup>274</sup> Not only did this prohibit the retrospective application of penal laws but also any common law that sought to establish or intensify a punishment as well as any penalisation of an act by analogy. All of this the Nazis flouted to such an extent as to evoke an outcry across all the civilised nations of the world and this, for Schmitt, served to reinforce the entrenchment of the *legality* principle within the consciousness of all occupants within Continental Europe.<sup>275</sup> This stringent embargo on retrospective penalisation was the law to which pre-Nazi Germans subscribed, just as it was for France, one of the Allied nations responsible for the prosecution of the Nuremberg defendants.

This Continental perspective Schmitt contrasts with the English interpretation of the *nullum crimen nulla poena* principle. Because the English system relied so extensively on what he defined as the customary and legal character of the common law, this represented a fundamental distinction from the '*positive state-centric legal thinking of Continental European jurisprudence*'.<sup>276</sup> Natural justice, practical expediency and common sense variously supported judicial precedent-setting that was supposed to unveil what was already in existence.<sup>277</sup> Since law was not made but ostensibly only discovered by judges, this enabled precedent to reveal and establish punishability.<sup>278</sup> Provided a misdeed was sufficiently morally reprehensible to comprise a *malum in se*, English law discerned no problem in this judicial unveiling of it. Compliant with '*every*

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<sup>274</sup> *Ibid*: 131.

<sup>275</sup> See *ibid*: 130, where Schmitt uses the example of the international outcry at the retrospective imposition of a more draconian punishment (on 29<sup>th</sup> March 1933) of van der Lubbe in the aftermath of his arson attack on the *Reichstag*. Also attracting an uproar in public opinion was the introduction of 'the new Article 2 to the *German Penal Law Book* when through the law passed on June 28, 1935, the analogy in penal law was declared permissible and a creation of justice according to law *and* public sentiment was permitted for penal decisions'; see also *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 191 (referring to Schmitt's *State, Movement, People*), 'the principle forbidding retrospective punishment was so deeply ingrained that the Nazis were unable to obtain from the courts the lynching they wanted'. This was by reference to the van der Lubbe arson conviction in 1933.

<sup>276</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 133.

<sup>277</sup> *Ibid*: 134.

<sup>278</sup> United Kingdom law is now governed by the Human Rights Act 1988, Schedule 1, pt.1, art. 7. This incorporates into British law the legality principle contained in ECHR, art.7 and contains the usual *caveat* that nothing within this provision will prejudice the trial and punishment of any act or omission which, at the time of commission, was criminal according to the general principles of law recognised by civilised nations.

*healthy, human sense of justice*’,<sup>279</sup> pronouncement of an offence that was *prima facie* new but which was no more than the revelation in juridical terms of what had always, in conscience, been a crime, did not violate the non-retrospectivity principle. To Continental European jurists, the attendant reliance on natural law precepts – absent within their legal systems – was incomprehensible. As a concession to a positivist mode of thinking, acts outside the ambit of those that English law deemed *malum in se* were in contrast incapable, without more, of judicial discoverability. What was then required was positivisation of such offences - *mala prohibita* - by statute. With unmistakable adherence to ideas of equity and natural justice as well as positive law, the English system of law clearly sought to uphold the *legality* principle though, in the judicial context at least, with less rigid conformity to it than was expected in France and Germany.

‘*Conditioned by English and continental law*’ and still more ‘*aware of the contradiction between written and moral law*’,<sup>280</sup> American law was, for Schmitt, different to either and embraced elements of both. With a written constitution, the US patently relied on and, indeed, demanded written legislative penal law to a greater extent than did the English system. This notwithstanding, Schmitt detects in American jurists a ‘*pronounced sense of the opposition between positive legality on the one hand and moral legality, one based on natural law and its forms of convictions on the other hand*’.<sup>281</sup> Though sparsely analysed in his *Gutachten*, this blend of moral and juristic perspectives and the antithesis of the former to Continental positivist thinking appears to persuade Schmitt that the United States’ adherence to the *legality* principle was less effective than that of the other participants in the Nuremberg process. How these three interpretations of the putative ban on non-retrospectivity – the respective stances of France, the United States and Britain (and a fourth version postulated by Russia) - influenced the negotiations prefacing the implementation of the Charter, and the outcome of them, are the focus of the next segment. To what extent does this augment Schmitt’s critique of what he perceives the sham universalism of the US? Does this pervade all the crimes within the Charter? Or is it *crimes against peace* that is peculiarly susceptible to his polemical evaluation?

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<sup>279</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 134.

<sup>280</sup> *Supra*: Ulmen ‘Just Wars or Just Enemies’, 99-113, 108.

<sup>281</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 135.

#### **(iv) Nuanced negotiations**

What confronted the four Allied Powers – Russia, France, Britain and the US – convening in London in August, 1945, were the *crimes* to be incorporated within the Charter and the extent to which these conformed to the *legality* principle. This, in turn, invoked debate as to the status of the ban on retrospectivity in international law, the outcome of which, in Schmitt's view, was essentially determined by the perception of each of the participants to the London Conference towards it. Was it the strict adherence to positive law preferred by the French or the differing degrees of reliance on moral categories of the type infusing the American, and to a lesser extent, the British positions that was ultimately to predominate?

##### **(iv)(a) War crimes in the old sense: Article 6(b)**

*War crimes* in the old sense, that is, violations of the rules and customs of war, were not contentious. Long known in the '*realm of penal laws and military instruction of the states conducting war and in the literature of international law*',<sup>282</sup> penalisation of such crimes was substantially compliant with the legality principle.<sup>283</sup> Unequivocal both in respect of the criminal status accorded such acts and the degree of punishment they attracted this, in Schmitt's view, guaranteed conformity to the *nullum crimen, nulla poena* principle. Irrespective of the relative positions the negotiators at the London Conference were to adopt on more tendentious issues, unanimity upon inclusion of *war crimes* in Article 6(b) of the Charter was assured. The influence of the United States negotiators was not determinative of this outcome nor did Schmitt attempt to assert otherwise.

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<sup>282</sup> *Ibid*: 126.

<sup>283</sup> The only caveat to this was that, until the Treaty of Versailles 1919, the defeated state was not required to hand over its own citizens to the adversarial state for trial.

**(iv)(b) Crimes against humanity: Article 6(c)**

The inclusion within the Charter of *crimes against humanity* was more ambiguous, as the earlier discussion endeavours to explain.<sup>284</sup> Encompassing atrocities committed during peace as well as war; embracing the novel crime of persecution; permitting the juridical intervention into the jurisdiction of another sovereign state on humanitarian grounds to safeguard the occupants of that state and disregarding the *lex loci* – the law of the place where perpetrated, what was to become Article 6(c) of the Charter was laced with retrospective elements. All were overstepped by the Allies on the basis of the heinous nature of the acts the Nazis had committed. Had Schmitt squarely confronted the more problematic components, not least the issues the proposed indictment occasioned in terms of *jurisdictional* and *locational* retrospectivity, these may have proved insurmountable had he wished to remain internally consistent. Indispensable, as always, to Schmitt was the impregnability of national state sovereignty and potentially deleterious to this was the juridical intrusion contemplated by the concept of *crimes against humanity*. Wholly antithetical to the prescription regarding equality of sovereigns inscribed within the *JPE*, the postulated basis of Article 6(c) was, to this extent, incompatible with this fundamental tenet of the established Continental European order.

This notwithstanding, had Schmitt still aspired to assail *crimes against humanity* purely as a juridical concept, would the universal jurisdiction referable to the, perhaps, analogous category of piracy have come to his aid? Seemingly not, for it required fulfilment of a precondition that the WWII atrocities had been of an entirely non-political nature. More specifically, it was the *unpolitical* character of piracy that enabled transgressors to be denationalised and thereby rendered stateless.<sup>285</sup> Once diminished in status, no protection was due from their former state nor could their state provide protection to them. *Vis-a-vis* the perpetrator, state sovereignty was defunct. But because of the state-orchestrated carnage of the Jews, the ‘*planned killings*’<sup>286</sup> and the sheer scale of the cruelty against ‘*defenceless humans*’<sup>287</sup> that the Nazis perpetrated both prior to and during the War, categorisation of their acts of atrocity as non-political in nature

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<sup>284</sup> See *supra*: Chapter 2.

<sup>285</sup> See *supra*: Schmitt ‘The International Crime of the War of Aggression’, 166.

<sup>286</sup> *Ibid*: 127.

<sup>287</sup> *Ibid*.

was insupportable. On the basis of the ‘politically-oriented’ criterion for the invocation of universal jurisdiction that Schmitt himself ordained, the potential equivalence between *crimes against humanity* and piracy was bound to fail.

What Schmitt needed to identify was a non-juridical solution. One which would circumvent the legally-authorised encroachment on state sovereignty, entailed by penalisation of atrocities committed within the confines of the victims’ own state. Beyond comprehension was the ‘*rawness and bestiality*’<sup>288</sup> of the Nazis’ crimes, to which no defence or superior orders was available unless emergency circumstances arose, capable of excusing the wrongdoer. As manifestations of what Schmitt termed a *scelus infandum*, the atrocities had exploded ‘*the framework of all the usual and familiar dimensions of international law and penal law*’.<sup>289</sup> Because this rendered a political rather than juridical outcome imperative, the perpetrators were undeserving of the privilege of trial. Warranting a sentence ‘*solemn in its form and striking in its effect*’,<sup>290</sup> an outlaw beyond the protection and the remit of the law could expect nothing more.<sup>291</sup>

Evident to Schmitt was that the rules and categories of the usual positive law were inadequate and, indeed, woefully inappropriate to classify the monstrous acts for which the Nazis stood accused.<sup>292</sup> Atrocities of this type transcended the strictures of municipal law, whether criminal or constitutional, or what Schmitt hailed as the prevailing international law, founded in the *JPE*. Anxious not to minimise the inhumanities the Nazis had perpetrated or to detract from the proper epicentre of the forthcoming trial, that is, the legitimacy of penalisation of aggressive war, Schmitt was determined that never should a *scelus infandum* acquire precedential status. If the Allies were to include the category of *crimes against humanity* within the Charter, ‘*Hitler and*

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<sup>288</sup> *Ibid*: 128.

<sup>289</sup> *Ibid*.

<sup>290</sup> *Ibid*: 196.

<sup>291</sup> *Ibid*, where Schmitt uses the condemnation of Napoleon after his defeat in 1815 as an analogy to the acts of the Nazis save that the crimes of Hitler were greater than those of Napoleon. Hence the mode of disposition needed to be commensurately more strict and impressive.

<sup>292</sup> *Supra*: William Hooker *Carl Schmitt’s International Thought Order and Orientation*, 157, n.5, ‘Schmitt acknowledges that certain crimes of Nazism were outside the juridical freedom of international law.’

*his accomplices' actions would be comprised under rules and notions that would obliterate that which makes the abnormality and monstrosity of their actions unique'.<sup>293</sup>*

What was clear, to Schmitt, was that the classical interstate law of the JPE was antithetical to facets of *crimes against humanity*. As such, precedent in positive law was absent. Had a juridical option been Schmitt's preferred option, this would have presumably invoked disputes concerning the validity and relevance of natural law, that is, that the acts complained of were already deserving of criminally illegal status under the tenets of immutable norms, either divinely promulgated or discoverable through the innate reason of humankind. Unproblematic for those participants to the London Conference whose jurisprudential tradition embraced aspects of universal moral principles, not least the United States, this surprisingly also reflected the stance that the French negotiator and arch-positivist, Andre Gros, implicitly adopted during the pre-Charter negotiations.<sup>294</sup>

The plausibility from a Schmittian perspective of a similar embrace of natural law, or its repudiation, is explored later in connection with his critique of the subversion of the *legality* principle the Nuremberg proceedings engendered and the role of the United States in its decimation. Pending this evaluation, what influence, in Schmitt's view, did the US bring to bear to ensure that waging aggressive war, the crime that for their chief negotiator Robert Jackson embraced all others, featured in foremost position in what was to become Article 6(a) of the Charter?<sup>295</sup> And how, despite the novelty of the offence, did *crimes against peace* manage to inveigle its way into the Charter despite this fundamental 'impediment' and thereby bring to fruition the enterprise presaged by the Treaty of Versailles?

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<sup>293</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 197.

<sup>294</sup> See *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 86, 'Gros does not argue that there have been criminal prosecutions for these atrocities, a fact that he found fatal to the claim that aggressive war was an individual crime in international law. One can speculate that this view of atrocity might come from the natural law which forms the basis of international law and (contrary to the views of the Anglo-Saxon positivists) this law can be applied to individuals and to states. Otherwise, it is difficult to see how the French negotiators could find aggressive war *ex post facto* with regard to the Axis leaders but permit prosecution of non-war atrocities that were not crimes directly under the law of places where the defendants acted or their acts had effect'.

<sup>295</sup> Robert Jackson was US Attorney General during his nation's Land-lease Scheme, which had disregarded the established niceties of state neutrality. His fascination with the penalisation of aggressive war, with the attendant abrogation of the right to neutrality, was therefore arguably an *ex post facto* attempt to justify his prior 'wrongful' disregard of neutrality under the pretext of the universal concept of humanitarianism.



**(iv)(c) Crimes against peace and conspiracy: Article 6(a)**

What the Nuremberg process accorded Schmitt was an opportunity to intensify his polemic against the inauguration of the *crime of aggressive war* on an empirical, conceptual and normative level. Not only was this ‘*a novum crimen but rather, in light, of its international character, a crimen novi generis* [a crime of a new type] *that is separated from offences against the rules of the laws of war and the real atrocities through its great moral and moral particularities*’.<sup>296</sup> As such, it was impossible to avoid a drastic collision between *crimes against peace* and the *legality* principle. No less vexed was the offence of *conspiracy* for, as Schmitt indicated, ‘*the Anglo-American theory and praxis concerning participation in criminal acts differs in many respects from that of German jurisprudence*’.<sup>297</sup> This, he attributed to the lack of a codified penal law within England and the United States reflective of ‘*a lack of theory of the facts of the case in the German sense*’.<sup>298</sup> Further, in the absence of precedent for the penalisation of aggressive war, how was it feasible to be guilty of the crime of conspiring to commit it? Despite this lacuna in continental law regarding conspiracy and common plan, the American familiarity with the former concept, if not the latter, and the pressure the US negotiators to the Charter exerted upon the contingent from France and Russia, ensured that Article 6 ultimately inscribed both of these *crimes* within it.<sup>299</sup>

At the London Conference, the Russian representatives, I.T. Nikitchenko and A.N. Trainin raised staunch objections to *crimes against peace* and the notion of aggression, seemingly on the basis that only prior international agreements could prescribe the content of international law.<sup>300</sup> In the absence of these, no legal foundation existed for the criminalisation of aggressive war, nor could individuals be the direct subjects of international law. Neither was it permissible to intervene juridically into the internal

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<sup>296</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 177.

<sup>297</sup> *Ibid*: 183; see *ibid*: 185 where Schmitt cites the previous international inaction in response to Non-aggression Pacts as evidence that conspiracy was not formerly a *crime* in international law. Such Pacts would necessarily have involved ‘conspirators’ within the Article 6 definition but no move whatsoever was taken to prosecute the signatories to those Pacts, the Russians being amongst the ostensible culprits.

<sup>298</sup> *Ibid*: 184.

<sup>299</sup> The United States’ administration was well acquainted with the notion of conspiracy, having deployed it to considerable effect during the preceding decade (the 1930s) *inter alia* to disband the gangs of Al Capone.

<sup>300</sup> On this point, see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 80 n.62 to the effect that Soviet law rejects the ‘Anglo-American’ view that ‘international law is part of domestic law’.

affairs of another sovereign state. What motivated this approach was arguably not an insistence for assiduous compliance with positive law – defined in the sense of written prescriptions rather than custom – but the imperative of preserving unfettered sovereign self-determination within Russia. If the Charter enabled international law to interfere (retrospectively or otherwise) with the intrastate conduct of Germany, then what was to prevent similar future incursions into Russian constitutional affairs arising from its operations either within or beyond its state confines.

This notwithstanding, the Russian representatives ultimately agreed to the inclusion of *crimes against peace*, on the basis that the substantive criminal lawmakers at the Conference were the respective leaders of the participating nations, in their case, Stalin. The *legality* principle no more constrained the Soviet leader from acting retrospectively in the international arena than it restricted the Soviet government internally. Though the ban on retrospective law was inscribed within Czarist law from 1864 and the embargo on crime creation by analogy was abolished in 1903, the Russian Revolution of 1917 transformed the penal system. In consequence, the Soviet Constitutions of 1918, 1924 and 1936 omitted any reference to the legality principle and crime creation by analogy was permitted once more from 1926.<sup>301</sup> ‘Socially dangerous’ acts were later criminalised<sup>302</sup> and these provisions together came to represent ‘*an even more thoroughgoing destruction of the principle of legality than were the later Nazi German decrees*’ of 1935.<sup>303</sup>

Hardly surprising, therefore, that in light of the Soviet domestic law then extant, the Russian representatives agreed that retrospective criminal law was acceptable, provided it related only to the European Axis aggressors, chief amongst them Germany. This was one state verging on continental Europe that Schmitt could not claim subscribed to the *legality* principle prior to the Nuremberg proceedings and, perhaps, explains his notable silence concerning the Soviet approach either to the maxim itself or the *crime of aggressive war*. Potential embarrassment regarding the Russian intrastate embrace of retrospective criminal law creation and *ex post facto* punishment feasibly also accounted, in part, for the lack of reference in the indictments to the Nazis’ violation of

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<sup>301</sup> USSR Const (Fundamental Law) (31 January 1924).

<sup>302</sup> USSR Const (Fundamental Law) (5 December 1936).

<sup>303</sup> *Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 65.

the same precepts. If German defendants were to stand trial, at Nuremberg, accused of flagrant breach of the *legality* principle, then why not Soviet and other transgressors also? Manifest also was that had the Nazis been explicitly charged with violation of the ban on retrospectivity, it would have been tantamount to a concession on the Allies' part that the embargo had been already enshrined within the pre-existing norms of international law. Given the blatantly retrospective connotations of aspects of the Charter, this they did not dare risk.

If the Russian contingent was so easily persuaded to legislate in contravention of the *legality* principle, the French representative, Gros was more trenchant. Insistent that nothing was a crime until a legal penalty was attached to it, the penalisation of aggressive war clearly breached this interpretation of the *nullum crimen* doctrine. Absence of any criminal sanction for the postulated crime of aggressive war meant that any attempt to insert it into the Charter would be an act of retrospective crime creation. Every incipient momentum to introduce *crimes against peace* during the internecine period had, at most, achieved attribution of state responsibility, punishable by the usual economic and other reparations appropriate to such liability. In no sense was this a crime for which individual citizens or even heads of state could be deemed accountable. Without prior stipulations of punishment no *crime*, as such, existed. Though politically and morally desirable it may one day have been to penalise aggressive war, this time had not yet arrived and the defendants could only be indicted for breach of provisions of positive law already inscribed within pre-existing norms of international law.<sup>304</sup> Not wholly averse to recognition of customary law – as a supplement to written law - as a basis for precedent (though more so in the context of war crimes *per se* than waging aggressive war), ascription of individual responsibility for the putative category of crime against peace was an act of crime creation that Gros initially refused to countenance.

Without ever addressing the issue specifically, implicit within the French stance was that the legality principle *was* a limitation both on sovereignty and the criminal

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<sup>304</sup> Comments of Gros, in Minutes of Conference Session, 19 July, 1945, 297 published in Report of Jackson at 295, 297; see generally on this issue *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 81-90.

jurisdiction of criminal tribunals.<sup>305</sup> Why else would Gros have been so adamant that pre-existing international law alone ‘*must provide the substantive law of the tribunal to be created by the London Conference*’?<sup>306</sup> And that aggressive war should not be criminalised after the fact? Evoking concern for the French also was that the Charter sought exclusively to target transgressors from the Axis nations and did not therefore satisfy the criteria of generality and equality before the law to which both positivist France and the *Rechtsstaat* of Weimar Germany had sought to uphold. What represented a compromise solution for Gros was that the law should not be declared as such by the Charter but should be left to the judge to decide. Codification of international law was neither the responsibility of the Allies nor, indeed, even within their remit. Otherwise, the entire trial process and the verdict would be open to the charge of pre-judgment. Leaving determination of the content of the applicable law to the determination of the judge *was* an unusual step for a civil lawyer to adopt.<sup>307</sup> More reminiscent of a common law approach, it was nonetheless the only avenue available to the French if they were to reconcile their perceived need to acquiesce in the Charter process with the constraints of the *legality* principle and the violation of it engendered by the innovative *crimes against peace*.

Never deviating from their resolution that the Charter must encompass the crime of waging aggressive war, what remained at the forefront of the American perspective was the determination of Robert Jackson to realise his self-prophetic words of March 31, 1941:

‘I do not deny that in the 19<sup>th</sup> century, certain rules of neutrality were developed based on the idea of neutrality and that these rules have been supplemented by various Hague conventions. The application of these rules has become obsolete. Experiences since the World War have demonstrated their invalidity. The fundamental principles of the 19<sup>th</sup> century, according to which all warring parties must be handled equally, have been swept away by the consent of the League of Nations to the principle of sanctions against aggressors, through the Kellogg-Briand

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<sup>305</sup> France Declaration of the Rights of Man and the Citizen (1789) given constitutional status through France Constitution, preamble, and Decision of the Constitutional Council of 16 July, 1971 (Liberty of Association), art. 5, states: ‘The law may prohibit only those actions which are harmful to society. Nothing which is not expressly forbidden by law may be prohibited and nobody may be forced to do anything which it does not ordain.’ France Declaration of the Rights of Man and the Citizen (1789) art.8 states: ‘The Law may not establish punishments other than those which are strictly and evidently necessary and nobody may be punished except by virtue of a Law which was adopted and published prior to the offence and is legally applied’.

<sup>306</sup> *Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 84.

<sup>307</sup> See *ibid*: 85 for a fuller discussion of these issues.

Pact, and the Argentinian declaration outlawing war. We must return to *earlier* and *healthier* conceptions.’<sup>308</sup>

Clear from this was the almost obsessive US objective to resurrect notions of the *justa causa* of war in contravention of its countervailing repudiation within the epoch of the *JPE*. Almost as if three hundred years of tradition and classical European interstate law could be arbitrarily swept aside - ironically when dealing with *German* defendants - paramount was the desire to criminalise wars of aggression. If this meant disregard of pre-established positive law or creating new law where none previously existed, this was a small price to pay for inscribing the concept of *crimes against peace* within the international law of the future. Violation of the *legality* principle, concomitant with this *ex post facto* crime creation and punishment, was of no consequence. Not a limitation on sovereignty but merely a principle of justice which had to succumb to a higher justice - that is, of exacting punitive sanctions against the defendants for their ‘monstrous’ act of war - the so-called ban on retrospective criminal law hovered in a contingent condition.

Adumbrating the approach to the *legality* principle later adopted by the International Military Tribunal at Nuremberg,<sup>309</sup> what weighed most tellingly for the Americans was the need to establish its dispensability and the rationale required to secure it. This, they achieved by an ostensible allegiance to the universal precepts of natural law doctrine and it was this latent hypocrisy that was to fuel Schmitt’s polemic against the tactics the Allies employed. Dealt with later is his evaluation of what he deemed this purely expedient ploy on the part of the United States’ representatives to overstep the non-retrospectivity principle, a strategy still more significant in light of its explicit appropriation by the Tribunal. Undeflected either by potential criticism arising from their artful re-interpretation of the legality principle or French reservations as to the legitimacy of *crimes against peace*, the Americans were adamant that, in no circumstances, would it be left to the Tribunal to determine whether or not the Charter-defined law was correct.

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<sup>308</sup> See *supra*: Ulmen ‘American Imperialism and International Law’, 43-71, 64; also *supra*: Schmitt, *Nomos*, 298 where the final section of this extract reads: ‘we have reverted to *older* and *sounder* views’.

<sup>309</sup> On this point, see the discussion of the Judgment of the IMT *supra*: Chapter 2.

If the impasse between the Americans and Russians on the one hand and the French on the other appeared insoluble, what was the British stance towards the admissibility of the proposed *ex post facto* components of the Charter? Rather than impartially striving to bridge the disparities between the factions in its capacity as Chair of the Conference, ‘the delegation did squarely come down on the side of the Americans and Soviets that the charter should define crimes that would bind the proposed tribunal so that the *ex post facto* issue could not be raised’.<sup>310</sup> Once the British elected to favour the US perspective on waging aggressive war, irrespective of the incursion this entailed into the principle of legality, the die was effectively cast. To what Schmitt would deem their credit, the French remained intent on vesting in the Tribunal the jurisdiction to determine whether the crimes defined within the Charter, were in fact crimes under international law. To this end, they sponsored an amendment to the Charter suggesting that the substantive offences, including waging aggressive war, ‘shall be deemed to be crimes coming within the jurisdiction of the Tribunal’ – a substantive modification with which the Soviet contingent was disposed to concur. Though this ultimately did not find its way into the Charter, the final version of the Charter did contain sufficient latent ambiguity on the status of the principle of legality that the defendants did attempt to challenge – though without success - what they considered to be the *ex post facto* nature of *crimes against peace*.<sup>311</sup> Masterminded once again by the Americans, Article 3 furnished the Tribunal with adequate ammunition to reject the Motion of Defence Counsel.<sup>312</sup>

Apparent from the above was that the primary source of discord amongst the negotiators of the Charter concerning its contents, arose from those very components that threatened to infringe the ‘ban’ on retrospective crime creation and punishment. Emerging, therefore, most acutely in connection with the substantive *crime* of waging aggressive war, the inchoate *crime* of conspiracy and individual responsibility for both,

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<sup>310</sup>*Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 86; Gallant cites the British chairman, David Maxwell Fyfe speaking at the Conference on 23 July, 1945: ‘I want to make it clear in this document what are the things for which the Tribunal can punish the defendants. I don’t want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. I should like to know where there is general agreement on that clearly stated – for what things the Tribunal can punish the defendants. It should not be left to the Tribunal to say what is or is not a violation of international law’.

<sup>311</sup> See *ibid*: 88-91 for a detailed account of these issues.

<sup>312</sup> Motion adopted by all Defence Counsel, 19, November, 1945 1 IMT 168-170 discussed *supra*: Chapter 2.

these, in Schmitt's view, represented the acme of US influence. Not only did the United States deputation inveigle innovative crimes into the Charter under the pretext of universal notions of *justice, morality, 'traditions of fairness'*,<sup>313</sup> the punishment of such '*acts which have been regarded as criminal since the time of Cain*',<sup>314</sup> and '*an international crime before the conscience of humanity*'.<sup>315</sup> But, to Schmitt's chagrin, did so by transgressing or construing the *legality* principle in a manner antithetical to what he claimed was enshrined within the classical European international law of the *JPE* for almost three hundred years. All this in the guise of what, to Schmitt, was a purely pseudo-humanitarian justification. What remained in issue, therefore, was whether the ban on non-retrospectivity comprised:

Either:

- (i) A principle of justice that was forced to yield to a so-called higher justice,<sup>316</sup> one beset by exceptions<sup>317</sup> and which imposed no limitation on the sovereign will

Or:

- (ii) An unconditional and absolute embargo on retrospective penalisation

It was clearly the first of these that the US representatives dragooned their co-participants at the London Conference to accept but was this sustainable given that no

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<sup>313</sup>Jackson's *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>314</sup>Jackson's *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>315</sup>De Menthon: 5 IMT 588.

<sup>316</sup>See *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 125 where Gallant posits that the IMT and therefore, implicitly the United States were correct in stating that the *nullum crimen nulla poena sine lege* principle was not a limitation of sovereignty, at least in international law.

<sup>317</sup>On this point, see the comments of Hans Kelsen in response to the Nuremberg judgment in his article, *supra*: Kelsen 'Will the judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 164-65, 'a retroactive law providing for punishment for acts which were illegal though not criminal at the time they were committed...seems to be an exception to the rule against *ex post facto* laws'. As such, Gallant asserts that Kelsen was the most accurate when he concludes that aggressive war represented a transformation at Nuremberg of an international wrong into an individual crime; see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 116. The validity of this argument rests on the premise that waging aggressive war had even reached the status of an international *delict* at the onset of World War II. It also does not circumvent the *ex post facto* ascription of individual responsibility where none formerly existed.

opportunity had previously arisen for its status to be tested in the international arena? If individual responsibility for waging aggressive war had not been previously established on an unequivocal basis with effect that never before had an individual stood trial in an international forum for it, then how could the United States be so emphatic that the *nullum crimen nulla poena* doctrine could be so lightly discarded? If the authority to define crime was a true attribute of sovereignty and the principle of *legality* was a limitation upon it, then what precisely did the concept of sovereignty connote in this context? Why did the US conclude that the sovereign will must remain unfettered in the international realm when the domestic constitution of the same nation manifestly constrained its intrastate legislative freedom to enact retrospective statutes?<sup>318</sup> Was not the Charter a type of legislative instrument and should not, therefore, the US have conceded the illegitimacy of incorporating retrospective components within it, when this was constitutionally prohibited within the United States (at least within the legislative domain) in relation to its own citizens?

Given that the US purported to uphold as sacrosanct their professed ideologies of justice and morality, were not all individuals entitled under identical precepts to an immutable right to protection against the potential ‘immorality’ and ‘injustice’ of *ex post facto* crime creation? If so, were those ‘world citizens’ (or, in the Nuremberg context, the specific German defendants singled out as its targets), who were potentially affected by the ravages of retrospectivity to be denied their natural law ‘right’ to challenge the act of arbitrary crime creation the Charter ostensibly represented? Laced with a self-serving duplicity all augmented, in Schmitt’s view, the contention that the universalistic concepts the United States sought to instrumentalise were merely a smokescreen to cloak the ambitious imperialist agenda it so insidiously pedalled. Just as, to Schmitt, the global domination – economic, conceptual and normative – the US envisioned for itself was poised to supplant the epoch of the nation state, the so-called higher law or natural

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<sup>318</sup> Art 1 of the US Constitution states: ‘No Bill of Attainder or ex post facto Law shall be passed’ and ‘No State shall...pass any Bill Of Attainder, ex post facto Law or Law impairing the Obligation of Contracts...’ US Constitution Amendment V states: ‘No person shall...be deprived of life, liberty or property, without due process of law...’ US Constitution Amendment XIV (1) states: ‘No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law...’; see *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 533 Appendix C, ‘The ex post facto clauses were interpreted in the U.S. Supreme Court to prohibit retroactive legislative creation of crimes or increase of penalties in *Calder v Bull*, 3 U.S (3 Dallas) 386, 391, 396 (1798), and the due process clauses, U.S. Const. amends. V, XIV (1), were held to prohibit unforeseeable judicial expansion of criminal liability in *Boule v City of Columbia*, 378 U.S. 347 (1964), and *Rogers v Tennessee*, 532 U.S.451 (2001)’.



law it managed to insinuate with consummate success throughout the Charter negotiations, was set to prevail over the positive law of the *JPE* and the states within it.

Encapsulating his critique of the Nuremberg proceeding was, therefore, this perceived triumph of re-invigorated natural law jurisprudence, predicated on supreme and universal concepts and fatefully exploited by the United States, in Schmitt's view, over its continental jurisprudential counterpart. Not only did this prove persuasive in the English version of the Judgment of the IMT at Nuremberg, where the Tribunal observed that the maxim, *nullum crimen, nulla poena sine lege* was not a limitation of sovereignty but was in general a principle of justice.<sup>319</sup> But the French version of the same Judgment went one stage further in stating the maxim to be no more than a rule - generally followed - rather than a delimitation of sovereign authority.<sup>320</sup> Whether by accident or design, any allusion to *justice* was omitted.<sup>321</sup> Approved, in essence, by Bernard Roling, the Dutch judge at the Tokyo War Crimes Tribunal, the status of the legality principle was, however, further reduced by his interpretation of it '*purely as a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts as well as against arbitrariness of legislators*'.<sup>322</sup> Perhaps this was the slippery slope towards a wholesale abrogation of the ban on retrospective crime creation that Schmitt appeared to fear in the international realm.<sup>323</sup>

Given the purpose of his *Gutachten* it was unsurprisingly to the latter interpretation - the total inviolability of the *legality* principle - to which Schmitt elected to subscribe with what appeared, for him, an uncharacteristic reliance on natural law and morality, that is, the *inequity* of penalising ordinary citizens retrospectively for the putative *crime of aggressive war*. Was this an attempt, in 1945, to forestall the Allies' similar instrumentalisation of natural law categories and channel this to the advantage of the defence rather than the prosecution? Or was Schmitt seeking to advert to what may be

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<sup>319</sup> 1 IMT 171, 219

<sup>320</sup> See *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 2 for a discussion of the discrepancy of the two judgments which may have been due to the fact that the Nuremberg tribunal was reticent and vague on the *ex post facto* issue.

<sup>321</sup> See *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 125, where Gallant posits that overall, it was not possible to 'fairly state that the Nuremberg judgment as a whole represented the French view at the London Conference'.

<sup>322</sup> The Tokyo Major War Crimes Trial: Separate Opinion of Roling J., at 44-45, 109 (John R. Pritchard, ed., Robert M.W. Kemper Collegium Edwin Mellen Press, 1998) (November 1948).

<sup>323</sup> As explained *supra*: Chapter 2, such fear was ultimately unrealised since the legality principle was reintroduced into international law, as early as 1948.

termed procedural natural law (or even due process) rather than the substantive natural law concepts that the Anglo-American contingent, in particular, so effectively harnessed:

‘To bring a normal citizen...into such a conflict and to add on top of this a retroactive effect for the past, would violate every equity. In light of the creation of a not only new but also completely novel international crime, the power of the principle, “*nullum crimen, nulla poena sine lege* grows”. It is not only a principle of valid positive law but also a maxim of natural law and morality that the citizen who is not party to atrocities can unconditionally call upon.’<sup>324</sup>

Why a maxim based on morality would not inexorably yield to a higher morality, as with the US-driven perspective, Schmitt does not attempt to elucidate. Nor, in light of his generally articulated adherence to communitarian groupings rather than the individual constituents within them, does he explain his sudden, apparent concern for the plight of individual citizens. Neither, at this stage, is it clear how the same authoritarian Schmitt - notorious for his prior abnegation of contra-state individual rights - expects to reconcile this with the human right to challenge sovereign authority; a concession implicit within his asserted impregnability of the *legality* principle. Or the extent to which his valorisation of non-retrospectivity as an unqualified legal norm of *international* law marries with his treatment, whether explicit or implied, of the *nullum crimen, nulla poena sine lege* principle enshrined within the *domestic* constitutional law of pre-WWII Germany. Is it, ultimately, Schmitt’s instantiation of the concept of sovereignty that proffers a plausible solution to these and other inconsistencies endemic within his international and domestic law thinking, not least of them the status of the ban on retrospective crime creation and punishment?<sup>325</sup>

Whether this new-found, ostensible reliance on aspects of natural law is consistent with the overall tenor of his legal and political theory is discussed below. First, why in summary, does Schmitt react with such vehemence to the US appropriation of universalistic humanitarian concepts embedded, in their authentic manifestation, within natural law doctrine? Is it that he shares the view later taken by Justice Radhabinod Pal of India in his dissenting judgment before the Tokyo War Crimes Tribunal that to treat the legality principle as a mere, nonbinding principle of justice enables judges to ‘*ignore principles of justice in service of the sovereign powers that created their*

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<sup>324</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 196.

<sup>325</sup> This is discussed further *infra*: in connection with the use of concrete order thinking to uphold the *legality* principle.

court'.<sup>326</sup> Does Schmitt too believe that creation of crimes that did not exist at the date of commission debases what purports to be a judicial tribunal into '*a mere tool for the manifestation of power*'?<sup>327</sup> And why should this evoke concern for an authoritarian theorist who, in the domestic arena, generally subscribes to the notion – or at least recognises it as an empirical reality - that 'power' outranks 'law'?

Finally, if it is Schmitt's aspiration to mount an internally consistent critique of what he deems the US-impelled Nuremberg subversion of the legality principle and, in turn, uphold an outright ban on retrospective criminal law creation and punishment in the international arena, is it feasible to detect a more cogent foundation for this than natural law? Does the argument of Defence Counsel Pannenbecker that '*the principle of retroaction of penal laws...is a legal principle that [has found] legal recognition in all civilised countries as a prerequisite and basic principle of justice*'<sup>328</sup> find favour with Schmitt? Is he persuaded more by claims of the type propounded by Defence Counsel Stahmer that because the Charter was based on no single fixed ideology - nor was any alternative possible given that liberal states chose a condition without one – '*only a previously established legal text with clear legal meaning can provide a person with warning as to what the law prohibits*'?<sup>329</sup> That is, the ability to foresee the consequences of one's actions and to secure complete certainty and predictability from the perspective of individuals potentially bound by the criminal law?

This, according to Jahreiss, was a key aspect of the '*European continental conception of penal law*'.<sup>330</sup> But is reliance on the preservation of '*due process*' tenable,<sup>331</sup> for Schmitt, given the overt decisionism evident within his domestic theory for much of the Weimar period? Or is it plausible to substantiate Schmitt's allegiance to '*nullum crimen nulla poena sine lege*', at Nuremberg, by reference to a mode of thinking not yet fully elucidated in relation to the professedly unassailable status of this principle within international law? Before detailed consideration of these inquiries, it is to the precise

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<sup>326</sup> *Supra*: Gallant *The Principle of Legality in International and Comparative Law*, 1.

<sup>327</sup> *United States v Araki*, Dissenting Opinion of Radhabinod Pal at 36, 109 *The Tokyo Major War Crimes Trial* (John R. Pritchard, ed., Robert M.W. Kemper Collegium Edwin Mellen Press, 1998) (November 1948).

<sup>328</sup> 18 IMT 165.

<sup>329</sup> 17 IMT 504.

<sup>330</sup> 17 IMT 460.

<sup>331</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 174.

rationale underpinning Schmitt's polemic against the Allies' utilisation of moral categories, and the sustainability of this critique in light of his overall legal and political theory that the ensuing segment turns.

### **A monotheistic worldview: a step too far?**<sup>332</sup>

‘To be defeated in war is normal. But to be brought to trial by one’s enemy compounds that defeat, making it total and irreparable. Therein lies...the deep symbolic meaning of the Nuremberg and Tokyo tribunals. Victory would not have been complete without the celebration of a judicial rite to sanction the moral defeat of the losing side. Without that rite, a ‘new order’ could not have been established.’<sup>333</sup>

Though Schmitt was evidently dismayed by the 1945 defeat of the Germans at the hands of the by then American-commanded Allied forces, this neither encompassed the full extent of the subjugation his vanquished compatriots were destined to experience nor the brunt of his polemic against their ‘tormentors’. For, as seen, it was the ensuing Nuremberg process that, for Schmitt, symbolised a second and, perhaps, equally ignominious conquest, this time in a juridical – though in some respects also political – sense. From this victory of Anglo-American jurisprudence over its continental counterpart, what consequences does Schmitt claim ensue and is it correct that international law is, from his perspective, ‘*a progressive liberal project subject to the same critique as he delivers against liberalism in general, namely that it undermines the political and acts as a cover for special interests*’.<sup>334</sup>

What the United States endeavoured to achieve, at Nuremberg, was a radical transformation of the global order, with the attendant acquisition of absolute planetary authority through the rhetorical instrument of the universalising of humanitarian motivations.<sup>335</sup> But this epitomised all that was abhorrent to Schmitt: a quest for absolute military and economic hegemony in a space-less, universalistic dimension; the capacity to wage global wars without linkage to any territorial domain; the subversion of the existing interstate order based on state sovereignty; self-aggrandisement through establishment of an ideologically substantiated ‘global empire’ that appeals to universal values to justify its own use of force.<sup>336</sup> In essence, a conflict between the normativism and cosmopolitanism of those who sought a universalistic geopolitical international

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<sup>332</sup> Danilo Zolo ‘The re-emerging notion of Empire and the influence of Carl Schmitt’s thought’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 154, 162.

<sup>333</sup> See *supra*: Zolo *Invoking humanity war, law and global order*, 115 referring to the work of Pier Paolo Portinaro, introduction to A. Demandt (ed.), *Processare il nemico* (Turin: Einaudi, 1996), xvi-xvii

<sup>334</sup> *Supra*: Brown ‘From humanized war to humanitarian intervention’, 57, 61.

<sup>335</sup> See *supra*: Zolo *Invoking humanity: war, law and global order*, 39.

<sup>336</sup> On this, see the discussion *supra*: Zolo ‘The re-emerging notion of Empire and the influence of Carl Schmitt’s thought’, 154 and for a more detailed account in *supra*: Zolo *Invoking humanity: war, law and global order*, 40ff.

sphere and the countervailing anti-normativist and particularistic viewpoint that Schmitt so vociferously extolled.<sup>337</sup>

The culmination of the US-propagated reinterpretation of the Monroe Doctrine, 'Nuremberg ...offered up the same kind of moralising and persecuting justice as Versailles, only with fewer prospects for political renewal'.<sup>338</sup> Unendurable, for Schmitt, within this stratagem was the cynical exploitation of the so-called immutable concepts of natural law. What this policy facilitated and indeed, achieved in the Nuremberg context was the subordination of pre-established norms of positive law to the theologically-branded, transcendent values of the type the US advocated. Not only was natural law doctrine unpalatable to Schmitt – a stance he would perhaps have adopted irrespective of the identity of the appropriator - but more so the abuse of those values in furtherance of an objective that he adjudged an abomination. Unmistakeably affiliated to his valorisation of untrammelled state sovereignty<sup>339</sup> was his refutation of self-vaunted, super-legal ideologies as '*pseudo-universalistic, non-theological claptrap*',<sup>340</sup> this in sharp contradistinction towards the *super-legality* he promoted in the domestic context, ostensibly to fulfil and preserve the will of the people.<sup>341</sup> Rooted in his polemic against an imperialistic and sham-cosmopolitan depoliticisation that stultified international relations by distorting the friend-enemy antithesis,<sup>342</sup> Schmitt sought to '*demonise political super-legality as a misguided attempt to theologise 20<sup>th</sup> century realities*'.<sup>343</sup>

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<sup>337</sup> See *supra*: Zolo *Invoking humanity war, law and global order*, 57, 'To promote global hegemonic stability, the United States must subvert the 'old' international institutions and the legal order on which they are founded. It needs to experiment with new paths for the ethical and legal legitimization of the use of force in search for a doctrine of *ius ad bellum* more suited to present circumstances'; also *supra*: Ulmen 'American Imperialism and International Law', 54: 'On the one hand, he sees a liberal-economic distortion of the political resulting in the spatial chaos of international law; on the other, a democratic-political distortion of universalism resulting on *pseudo-universalism*...Concretely, political universalism is as much a fiction as "humanity" is a political subject. Even as he exposes American *pseudo-universalism*, Schmitt reveals the *political* nature of the US in world affairs'.

<sup>338</sup> *Supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 157

<sup>339</sup> See *supra*: Zolo *Invoking humanity war, law and global order*, 83: 'International protection of human rights and the whole cosmopolitan ideal inevitably require interference in the internal affairs of states; hence they are incompatible [not only] with the self-determination of peoples and the sovereignty of states.'

<sup>340</sup> Paul Piccone and Gary Ulmen 'Towards a New World Order: Introduction to Carl Schmitt' *TELOS* No. 109 (Fall 1996), 3-29.

<sup>341</sup> See *supra*: Chapter 3 on sovereignty and democracy.

<sup>342</sup> See *supra*: Schmitt 'Theory of the Partisan', 75, 'the substance of the political is not enmity pure and simple but the ability to distinguish between friend and enemy'.

<sup>343</sup> *Supra*: Piccone and Ulmen, 3-29.

Expedient appropriation of humanitarian ideals enabled emergent ‘superpowers’ to wage *just war* against all enemies of mankind who dared to deny the universality of such values as liberty, democracy, human rights and market economy.<sup>344</sup> Not only was this a spurious excuse for war but the concept of discriminating war represented, for Schmitt, the inexorable criminalisation of enemies as a prerequisite to their dehumanisation and debasement.<sup>345</sup> Once reduced to non-human status, this enemy of humankind became nothing more than a target to be utterly annihilated. Those flying the kite of humanitarianism could use their self-vaunted noble intentions to sanctify their full range of actions - however inhumane and monstrous – all in the name of what Schmitt deemed a purely specious legitimacy.<sup>346</sup> Wholly unsustainable to him was the asymmetric concept of humanity this denoted, where ‘*the fight in the name of humanity implies the denial of the very quality of being human*’.<sup>347</sup> Nowhere did Schmitt express this more eloquently and expansively than in his *Concept of the Political* (1927), a mid-Weimar work penned long before the ravages of WWII and its juridical aftermath:

‘Humanity as such cannot wage war because it has no enemy, at least not on this planet. The concept of humanity excludes the concept of the enemy because the enemy does not cease to be a human being – and hence there is no specific differentiation in that concept. That wars are waged in the name of humanity is not a contradiction of this simple truth; quite the contrary, it has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress and civilisation in order to claim them as one’s own and to deny the same to the enemy. The concept of humanity is an especially useful ideological instrument of imperialist expansion and in its ethical-humanitarian form is a specific vehicle of economic imperialism. Here one is reminded

<sup>344</sup> See *supra*: Zolo ‘The re-emerging notion of Empire and the influence of Carl Schmitt’s thought’, 154.

<sup>345</sup> For Schmitt, liberals demonise their opponents by using rhetoric such as ‘axis of evil’ and appropriate principles of ‘morality’ and morally corrective justice (including the imposition of reparations on defeated nations), supported by claims that these will have a deterrent effect on those who violate the standards that liberals prescribe.

<sup>346</sup> See *supra*: Zolo *Invoking humanity war, law and global order*, 58: Zolo refers to the opinion of Alain de Benoist that the triumph of the globalisation Schmitt feared was achieved through the polarity between economy (the great world market) and morals (the rights of man), the two prongs of the tongs that are tightening around the politics of state and the sovereignty of peoples. Thus, ‘it is de Benoist’s opinion that the ‘humanitarian war’ was, on the one hand, a neo-liberal war fought for the cause of globalising markets. On the other hand, it was a typical ‘ideological’ war fought not merely to defeat the enemy but to annihilate him as the embodiment of evil, injustice and the negation of law. The antagonist is first and foremost ‘guilty’ and must be subjected to the justice of the winners’.

<sup>347</sup> Fabio Petito ‘Carl Schmitt and the Western-centric and liberal global order’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 166; see also Carl Schmitt ‘The Legal World Revolution’ *TELOS* No. 72, (Summer 1987), 73-91, 88, ‘Humanity as such has no enemies. Everyone belongs to humanity. Humanity therefore becomes an asymmetric counter concept. If he discriminates within humanity and denies the quality of being human to a disturber or destroyer, then the negatively valued person becomes an unperson and his life is no longer the highest value; it becomes worthless and must be destroyed. Concepts such as “human being” thus contain the possibility of the deepest inequality and become thereby asymmetrical’.

of a somewhat modified expression of Proudhon's: who ever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity'.<sup>348</sup>

Why Schmitt articulated concern for the treatment accorded the enemy in war remains moot, given his overall denigration of the individual within the intrastate dimension. One possible explanation may lie in the recognition in the pre-Nuremberg international sphere of the equality of sovereign states *inter se* that Schmitt consistently admired within the *JPE*. This, in turn, required that respect be demonstrated by each state to the nationals of another, as subsequently inscribed within the various conventions implemented to protect 'enemy' combatants and non-combatants during a state of war. Though it is feasible that Schmitt did possess a well concealed residuum of compassion for the welfare of individual human beings, far more plausible is that he perceived Germany in the role of the 'colonised' state as was witnessed, for example, during the 1920s annexation of the Rhineland. Paramount, therefore, was that German nationals would never again be susceptible to categorisation as 'foes' of mankind and then abjectly humiliated at the merciless hands of a 'colonising' crusader that their dehumanisation would not only permit but demand.

Vital, to Schmitt, was that universalistic and monist concepts such as God, humanity and the world were not dragged from their supreme position, enthroned as they were above the maelstrom of concrete reality, that is, the pluralistic pluriverse he esteemed. Once dethroned, their dignity, meaning and essence were lost as '*they become involved in the brawl of political life and gain a false power and a false propinquity*'.<sup>349</sup> What this entailed was the fateful transformation of regulative ideas never intended to exercise power - whether direct or indirect - into '*a terrible instrument of the human lust for power*'.<sup>350</sup> Political exploitation of these supreme and universal concepts, through their identification with a single nation or grouping, culminated in a '*murderous imperialism. For this, the name of humanity can be misused no less than the name of God*'.<sup>351</sup>

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<sup>348</sup> *Supra*: Schmitt *The Concept of the Political*, 54.

<sup>349</sup> Carl Schmitt 'State Ethics and the Pluralist State' in *Weimar A Jurisprudence of Crisis* ed. Arthur J Jacobson and Bernhard Schlink (London: University of California Press, 2000), 300, 309.

<sup>350</sup> *Supra*: Schmitt 'State Ethics and the Pluralist State', 300, 309.

<sup>351</sup> *Ibid.*



Hijacking the supposedly immutable concept of humanity together with other universal concepts such as freedom and justice were therefore, to Schmitt, merely invidious tools *'to legitimise one's own political ambitions and to disqualify or demoralise the enemy'*.<sup>352</sup> Integral to the Nuremberg proceedings as well as their ineluctable outcome, was a three-pronged distillation of this tyranny of values, that is, on a conceptual, empirical and normative level. Conceptualised through the notion of *just war*, the so-called higher values of 'morality', 'justice' and above all 'humanity', perversely became the concrete instruments of an empirically-instantiated inhumanity, that is, the physical and cultural degradation of the enemy. Branded a criminal and inhuman, the opponent acquired a non-value.<sup>353</sup> And normatively, as at Nuremberg, those who instrumentalised those selfsame moralistically-tended values were perversely prepared to use them, in Schmitt's view, to infringe the human rights of those adjudged not to meet the criteria that they themselves prescribed. Squarely within this normativist imperialist agenda was the victory of universalistic international law over the domestic law of nation states, with the associated elevation of a manipulated set of natural law precepts over every positive municipal norm that presented an obstacle to its progression. Not least of these was the absolute ban on retrospective crime creation. Above all, what Schmitt appeared to find abhorrent was the utter sublimation of legal norms embedded within classical continental European international law to the more chimerical norms of natural law doctrine. But was this ostensible rejection of a moralistically focussed natural law compatible with the overall tenor of his legal and political theory? And if so, would a *consistent* Schmittian be able to harness natural law to criticise the Allies' subversion of the ban on retrospective crime creation?

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<sup>352</sup> *Supra*: Schmitt *The Concept of the Political*, 66; on the ostensible immutability of the concept of humanity, see 18 IMT 372, 375, where during the Nuremberg Trial of the Major Nazi War Criminals, Defence Counsel, Sauter, for von Schirach, argued that 'the precepts of humanity would be an unsteady foundation for a verdict because ideas on what humanity demands or prohibits in individual cases may vary depending on the epoch, the people, the party concepts according to which one judges'. This would add weight to the position that Schmitt advances to the effect that a nebulous concept such as 'humanity' is at the service of whoever wields the most power.

<sup>353</sup> See *supra*: Schmitt 'Theory of the Partisan', 77, 'The logic of value and non-value unfolds all its destructive consequences and forces the creation of ever newer and deeper discriminations up to the point of the annihilation of every life unworthy of existing'.

### Natural law through a Schmittian lens

A coherent response to the above inquiries requires a brief rehearsal of the three substantive *crimes* and the one inchoate *crime* for which the defendants, at Nuremberg, were indicted. Each attracts a distinct analysis and application of the legality principle and this, in turn, impacts on the relative significance of natural law vis a vis the *legality* principle. Below appears a summation, from a natural law perspective, of the criminal illegality of the four alleged offences at the date of the defendants' perpetration of them:

- (i) *War crimes* in the old sense were already established in international law and incorporated into German law by Article 4 of the Reich Constitution 1919. There was no need of natural law to overstep the *legality* principle
- (ii) *Crimes against humanity*: as seen, Schmitt advocated a political solution for the disposition of the defendants suspected of the commission of atrocities. This avoided the need for evocation of natural law either to condemn in a juridical sense the 'monstrous' acts the Nazis perpetrated or to justify the negation of the entire 'legal' order the Nazis established both in Germany and the nations whose territory they occupied. In contrast, those subscribing to a juridical route had no option than to confront the positive norms of the Nazi order and to convince the tribunal to set them aside. This was possible under traditional natural law doctrine on the premise that the positive norms of the Nazi regime failed to comply with the transcendent precepts to which natural law subscribes.

Similarly, the 'inner morality of law' that Lon Fuller stipulates as the pre-requisite criteria for a valid legal system – a form of immanent or procedural natural law – would also have invalidated the entirety of the Nazi legal system, insofar as it permitted acts contrary to Fuller's eight criteria for what constitutes 'law'.<sup>354</sup> Through nullification of these positive norms (either by

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<sup>354</sup> See Lon L. Fuller *The Morality of Law* Revised edition (New Haven and London: Yale University Press, 1969) for an exposition of the notion of the inner morality of law, in particular, at 39, '...the attempt to create and maintain a system of rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct paths to disaster. The first and foremost lies in a failure to achieve rule at all so that every issue must be decided on an ad hoc basis. The other routes are (2) a failure to publicize, or at least make available to the affected party the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot guide action but undercuts the integrity of rules prospective in effect since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected

reliance on classical natural law doctrine or via the inner morality of law), and to the extent that the never-repealed crime of murder – extant within the pre-Nazi constitutional order of Weimar Germany - was co-extensive with the concept of *crimes against humanity*, no substantive violation of the *nullum crimen nulla poena sine lege* principle could be deemed to have occurred. From a natural law perspective, any technical violations were mere niceties capable of being sidestepped in fulfilment of a ‘higher morality’.

This is precisely how natural law was utilised in *Streletz v Germany*<sup>355</sup> to enable conviction and punishment of border guards of the former East Germany charged with the unlawful killing of persons fleeing across the Berlin Wall, whose acts were legal under the positive criminal law of their own ‘evil’ regime at the date of commission. Once acts were characterised as *mala in se*, that is, to the extent that some or all of the conduct charged as *crimes against humanity* were *war crimes* by another name, natural law dictated that there was little injustice in holding accountable the alleged perpetrators.<sup>356</sup> Subsequent *lex scripta* merely positivised acts that were contrary to natural law since the dawn of time. Nor did deployment of this *substantive* natural law, and the norms inscribed within it, infringe *procedural* natural law – or due process – resting as it did on the need for certainty, predictability and generality in crime creation and punishment.

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party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally (8) a failure of congruence between the rules as announced and their actual administration. A total failure in any one of these directions does not simply result in a bad system of law. It results in something that is not properly a legal system at all’. See also Lon L. Fuller ‘Positivism and Fidelity to Law – A Reply to Professor Hart’ *Harvard Law Review* Vol. 71, (1958), 630 for a specific discussion referable to the Nuremberg proceedings.

<sup>355</sup> *Streletz v Germany* [2001] 33 EHRR 363; see Charles Sampford *Retrospectivity and the Rule of Law* (Oxford: Oxford University Press, 2006), 143-144 where the author, speaking of post-WWII West Germany, explains that the German Constitution contains an express, and, on its face, absolute and unequivocal prohibition of retrospective legislation. However, even where Germany recognises there may be circumstances where the admittedly strong arguments against retrospective criminal law are not always sufficient to avoid retrospectivity. Germany contains an unwritten ‘natural law’ exception for cases such as war crimes, based on the principle that the demands of substantive justice sometimes override the formal requirements of justice embodied in the general prohibition against retrospective criminal laws; also Greg Taylor ‘Retrospective Criminal Punishments under the German and Australian Constitutions’, *University of New South Wales Law Journal* Vol. 23(2), (2000), 196, 217-21.

<sup>356</sup> See discussion of *restitutional* retrospectivity *supra*: Chapter 2.

Key to this was the ability to foresee the consequences of one's actions and if conduct was *mala in se* or, as Schmitt labels it, a *scelus infandum*, then the perpetrators could not possibly have been unaware of the immorality of their behaviour and the consequential risk of punitive sanction if they persisted.<sup>357</sup> Again, no substantive violation of the *nullum crimen* principle occurred because the retroactive character, if any, of the *crime* for which the defendants are ultimately indicted, could hardly be considered incompatible with justice.<sup>358</sup> In summary, a natural law approach served a triple purpose:

- (1) To invalidate the positive legal norms of Nazi Germany
- (2) To treat the Nazi atrocities as *mala in se*
- (3) To regard the subsequent penalisation of those atrocities as wholly foreseeable by the perpetrators at the date of their commission of them<sup>359</sup>

However, whilst murder was a crime within the domestic law of Germany both prior to – and, indeed, during the Nazi regime, though conveniently not enforced against adherents to it – several aspects of *crimes against humanity* were novel.<sup>360</sup> To that extent, whatever legal order was adopted as a source of precedent: that of the Weimar Republic, of Germany during the post-Enabling Act 1933 period or the norms of the classical continental European interstate order, the outcome would have been the same. Such aspects of *crimes against humanity* did violate the ban on retrospective crime creation. Whether any of these arguments, based on natural law, morality or the relativisation of 'justice' would have found favour with Schmitt had he supported a juridical rather than a political solution is open to speculation. What remains to be seen is the extent to which a consistent Schmittian is

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<sup>357</sup> See *supra*: Gallant *The Principle of Legality in International and Comparative Law*, 123 for a brief discussion of these issues.

<sup>358</sup> Though Kelsen, the advocate of the 'pure theory of law' is the antithesis of a natural lawyer, this is essentially the quasi-moralistic argument he advances in his 'Will the judgment in the Nuremberg Trial Constitute a Precedent in International Law?'

<sup>359</sup> See *supra*: Taylor 'Retrospective Criminal Punishments under the German and Australian Constitutions', 196, 218, 'when such laws or practices require perpetuation of gross injustice, it cannot be assumed that there is a firm basis for citizens' reliance on their lack of amenability to retrospective change'.

<sup>360</sup> See *supra*: Chapter 2 for a full discussion of the arguably retrospective elements of Article 6(c) of the Nuremberg Charter.

able to resort to natural law to criticise any violation of the *legality* principle that *crimes against humanity* did invoke.

- (iii) *Crimes against peace*: as seen, no substantive precedent existed for this offence, either in the pre-Nazi Weimar Republic or in Germany during the post-Enabling Act 1933 period or in the legal norms of the classical continental European interstate order. Because *waging aggressive war* was not, in Schmitt's view, *malum in se* – which, as seen, his *Gutachten* refuted by drawing a distinction between it and *crimes against humanity* – he declined to advocate a purely political solution. Given that a juridical outcome was inevitable, further evaluation of this putative offence requires separate evaluation of those who adhere to natural law doctrine and those who reject it.

For the latter - amongst them, Schmitt, if it is accepted that the bulk of his *Gutachten* accurately depicts his apparent rejection of natural law – the substantive nature of the so-called offence of *waging aggressive war*, with its misguided revival and distortion of the just war concept was unsustainable. In the absence of substantive precedent within the living memory of the defendants, *waging aggressive war* was entirely innovative and as such invoked a clear breach of the *legality* principle.

For those in the first category and unlike *crimes against humanity*, it was not necessary to utilise substantive natural law to vitiate the entire Nazi 'legal' order. Nowhere did the Nazis specifically enact statutory authority directed at the 'legality' of aggressive war. Even had natural law been thus applied, this would have facilitated recourse only to the pre-existing positive law of the Weimar Constitution, or to classical continental European international law where again no legal norms existed to permit the penalisation of aggressive war. In essence, the constitutional law of both regimes within Germany, both before and after 1933 and the interstate law beyond the confines of Germany were silent on the issue of individual responsibility for waging aggressive war.

Essentially, therefore, little was gained from treating as invalid the positive law of the Nazi regime to enable them to indict the defendants for an offence that existed outside the remit of the evil it had generated. From a natural law standpoint, what the Allies asserted was that *crimes against peace* were tantamount to *mala in se*. If so, the prosecution of the defendants for their commission did not breach the *legality* principle, not least because the acts were already immoral – contrary to the laws of nature – when perpetrated. Even if not deemed sufficiently wicked to fall within the category of *malum in se*, it was still less inequitable to let ‘guilty’ men go free than to cause a technical infringement of what the Allies deemed a rebuttable ban on retrospective crime creation.<sup>361</sup> Never was it beyond the ability of the Nazis to foresee that their decision to wage war would ultimately be susceptible to penalisation. Is it feasible, however, for a critic of the above natural law based justification for *crimes against peace* to expose immanent inconsistencies within the Allies’ position – by deploying the selfsame precepts of natural law as did the Allies but this time, as with Schmitt, to undermine rather than to vindicate the criminal illegality of aggressive war?<sup>362</sup>

On this analysis:

- (1) *Waging aggressive war* was not *malum in se* but an entirely new type of crime neither divinely proscribed nor discernible from the constraints of reason written in the hearts of humankind
- (2) The ban on retrospective crime creation and punishment was absolute and, therefore, inviolable

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<sup>361</sup> See *supra*: Kelsen ‘Will the judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, where Kelsen, the advocate of the ‘pure theory of law’ perhaps surprisingly includes, amongst his defence of use of ex post facto provisions at Nuremberg that the violation of the legality principle to secure the conviction of the defendants was the lesser of two evils. Kelsen also argued that the defendants could not have been surprised by their prosecution and that it was no worse for them to be indicted for crimes which did not exist at the date of commission than it was for those to be prosecuted who simply did not know what the law was (when pre-established legal norms were in existence).

<sup>362</sup> *Supra*: Rasch ‘Lines in the Sand: Enmity as a Structuring Principle’, 253, 25, ‘Is it merely ironic or in fact profoundly symptomatic that those who most vehemently affirm universal symmetry (equality, democracy) are also most often than not the ones who opt for the most asymmetrical means of locating enemies and conducting war, that is, just wars fought for a just cause?’

- (3) Even if the ban on retrospective crime creation and punishment was a moral postulate rather than an absolute rule, violation of it would constitute an injustice surpassing all others. The *ex post facto* penalisation of the defendants for a crime, non-existent in a positivist sense at the purported date of its commission, was contrary to notions of morality and justice embedded within substantive natural law as well as contrary to procedural natural law (in the sense of the inner morality of law). As seen, this was precisely the position Schmitt unashamedly adopted in the concluding section of his *Guatchten*<sup>363</sup>
- (4) Unlike acts deemed *mala in se* (and perhaps even if they *were* an affront to the indelible precepts of moral law) how, in 1939, could the Nazis have reasonably have foreseen the ultimate juridical outcome of their decision to wage war?

Tenable though these countervailing natural law based arguments may be to what extent, however, is a *consistent* Schmittian (as opposed to a thoroughgoing natural lawyer) able to rely on either substantive or procedural natural law to undercut the Allies' own dependence on notions of morality and justice and the ostensible violation of the legality principle this engendered?<sup>364</sup>

- (iv) *Conspiracy*: as seen, no substantive precedent existed for this offence, either in the pre-Nazi Weimar Republic or in Germany during the post-Enabling Act 1933 period or in the legal norms of the classical continental European interstate order nor was the notion of a *common plan* established even within Anglo-American jurisprudence. From a Schmittian perspective, therefore, all the points referable to *crimes against peace* were *a fortiori* applicable to the inchoate offence of conspiracy.

To determine whether a *consistent* Schmittian is able to criticise the Allies' reliance on natural law at Nuremberg, with the fundamental subversion of the *legality* principle it engendered - invites scrutiny of the deployment or repudiation of natural law doctrine

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<sup>363</sup> *Supra*: Schmitt 'The International Crime of the War of Aggression', 196

<sup>364</sup> This is discussed *infra*: this Chapter.

within Schmitt's work. Is it possible for an adherent of his theoretical position to utilise natural law precepts to uphold what he presents as a sacrosanct ban on retrospective penalisation? Though certain immutable strands do emerge from his work: preservation of the 'political' and its interconnection with the friend-enemy antithesis;<sup>365</sup> the '*old and eternal relationship between protection and obedience*';<sup>366</sup> the unswerving and unqualified duty of every citizen to obey the dictates of his or her state, especially during a condition of war; the quasi-divine nature of sovereignty and the sovereign decision;<sup>367</sup> the ubiquitous 'exception'; even the 'unified will of the people' with its '*mysterious theological core*',<sup>368</sup> as a source of authentic law-making authority,<sup>369</sup> is it plausible to classify Schmitt as a natural lawyer?<sup>370</sup>

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<sup>365</sup> *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*, 159; Muller explains that for Schmitt, enmity could not be expunged from the world because it was God-given in the sense of being part of the natural disposition of human beings. It represented the dualism between the God of creation and the God of redemption.

<sup>366</sup> See *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 63 where 'human nature as well as divine right demands its inviolable observation'.

<sup>367</sup> See Carl Schmitt *The Leviathan in the State Theory of Thomas Hobbes*, 65.

<sup>368</sup> *Supra*: Nicoletti 'Carl Schmitt nella Stampa Periodica Italiana', 217-225.

<sup>369</sup> *Supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 115, 230, n.60, citing Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' (1920), 'Schmitt's argument was based on a certain notion of the constitution as a condition; the condition of the unity of the German people. What this unity consists of which has a substantive, not merely formal character, is not defined any more closely. It cannot be anything but a condition desired from a definite political point of view. 'Unity', as a wished for ideal of natural law, thrusts itself into the positive-legal concept of the constitution'. Kelsen also referred to Schmitt's assertion that the president was the representative of the collective will and the embodiment of the nation as an 'article of faith'.

<sup>370</sup> As late as 1947, Schmitt comments, 'the real problem – since 1848 – is not the relationship between positive law and natural law but rather that between legality and legitimacy'. See Catherine Colliot-Thelene, 'Carl Schmitt versus Max Weber: Juridical Rationality and Economic Rationality' in *The Challenge of Carl Schmitt* ed. Chantelle Mouffe (London: Verso, 1999), 180-194 (citing Carl Schmitt, *Glossarium* (Berlin: Duncker & Humblot, 1991). This was a journal maintained by Schmitt between 1947 and 1951. Given the propensity here to equate legal positivism with legality, a tendency already explicit by the early 1930s, (for this equation between 'legality' and 'legal positivism', see *supra*: Schmitt *Legality and Legitimacy*, '(A) closed system of legality establishes the claim to obedience and justifies that every law in opposition is abolished. The specific form of appearance of law here is the statute, specifically the justification of state compulsion to legality'), two residual categories remain within Schmitt's lexicon: 'legitimacy' and 'natural' law. The first, he unfailingly champions whilst the other is ambivalently cast as anachronistic. Notably, however, an occasional tendency exists for elision of the apparent distinction between them. On this point, see *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 67, 'The admirably perfected armature of a machine state and its complicated command mechanism acquire a specific rationality, a form of command and a plan expertly formulated and executed signifying the transformation of legitimacy into legality and the divine, natural or pre-state right into positive law.' On this basis, it is possible to argue that 'in the place of the legal positivist concept of a constitution, Schmitt had substituted the natural law aspiration of the unity of the German people'; see *supra*: Dyzenhaus *Legality and Legitimacy* (Oxford: Oxford University Press, 1997), 119; formal legality superseded by mass plebiscitary legitimacy, the latter imbued with dubious pre-modern substantive standards, allegedly possessing 'eternal validity' and 'indisputable rectitude'? On this point see *supra*: Scheuerman *Between the Norm and the Exception: The Frankfurt School and the Rule of Law*, 90-91.



## Negation of natural law

Manifest from the previous elucidation of his theoretical skein in the domestic sphere<sup>371</sup> and his fascination with the *jus publicum europaeum* in the international realm is Schmitt's absorption with the concrete reality and the legal norms that the exigencies of the empirical situation engender. Because the tenets of natural law - whether transcendent in origin or discoverable from the innate rationality of humankind written in the hearts of the discerners - are, by their very nature, permanent and enduring, how is it possible for Schmitt to subscribe to natural law theory?<sup>372</sup> What is vital to him is the existential survival of the sovereign authority within an ever-changing state of flux. Inflexible and unalterable precepts are of little pragmatic utility to everyday human existence where the sovereign must be ever-responsive to the demands of the concrete situation, however volatile and unpredictable. As a devotee of the historicist tradition, Schmitt is unable to grasp anything everlasting and, as such, all eternal values - within natural law, self-evident and unalterable - simply do not exist.<sup>373</sup> Likewise, liberalistic individualism holds no appeal to Schmitt. As such, he reserves no place - at least in the domestic sphere - for the assertion of any individual human rights capable of enforcement against the state and it is a sheer anachronism to set natural law limits to political power.<sup>374</sup> Non-existent in the state of nature, such 'rights' arise and endure only to the precise extent the sovereign decrees and permits.

During the Weimar Republic, Schmitt periodically alludes to the properties of rectitude, reasonableness and justice as a rod with which to berate the value neutral positivism that he purports to deplore within the Constitution.<sup>375</sup> Yet this appears to be a strategic device to condemn the fall from grace of legal positivistic thinking rather than born of any inherent allegiance to natural law doctrine.<sup>376</sup> Similarly, the positivisation of the

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<sup>371</sup> See *supra*: Chapter 3 - the Schmittian skein.

<sup>372</sup> See for example *supra*: Hobbes *On the Citizen (De Cive)*, 2007, XIV (2), 154, 'It is evident that divine laws do not arise from the consent of men nor do natural laws; for if they originated in human consent, they could also be abolished by human consent; but they are immutable'; also *ibid*: XIV (4), 156, 'Natural law is the law which God has revealed to all men through his eternal world which is innate in them, namely by natural reason'.

<sup>373</sup> See *supra*: Schwab *The Challenge of the Exception*, 20.

<sup>374</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 199.

<sup>375</sup> See *supra*: Schwab *Introduction to Political Theology: Four Chapters on the Concept of Sovereignty*, where Schwab asserts that for Schmitt, the German theory of Wilhelmine and Weimar periods did not rest on natural right or the law of reason.

<sup>376</sup> See *supra*: Schmitt *Constitutional Theory*, 181; also *ibid*: 183: 'The *Rechtsstaat* concept of law stands in a certain tradition. Because natural law lost its evident quality, the different properties of the statute such as reasonableness and justice under consideration become problematical. Even the appeal to good

domestic constitutional order connotes the transformation from the sovereign - conceived as the representative of God on earth – into the mere form of a state’s legal system.<sup>377</sup> This destroys the traditional and legitimate foundations for asserting ‘*divine right*’.<sup>378</sup>

Occasional evidence emerges of theologically-sourced invective, such as that against the constitutional equal chance enshrined in the 1919 Reich Constitution, condemned by Schmitt for its encouragement of ‘*godless cultural radicalism*’.<sup>379</sup> The formalistic or arithmetical subjugation of the will of the people, at the same time he describes as ‘*senseless, even immoral*’.<sup>380</sup> Notable also to Schmitt is that 17<sup>th</sup> century authors of natural law understood the question of sovereignty to mean the question of the decision on the exception and Kelsen’s pure theory of law, he rejects, in part, for its reliance on a point of ascription that lacks the ‘*unity of a system of natural law*’.<sup>381</sup> Never, however, does Schmitt abandon his belief that ‘*in political reality, there is no irresistible, highest or greatest power that operates according to the certainty of natural law*’.<sup>382</sup> What the sovereign – the president of Weimar Germany – possesses is a ‘*world-making God-like fiat of exceptional authority*’.<sup>383</sup> No power, whether direct or indirect, transcends the will of the people as embodied in the sovereign and all appeals to the will of God means

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faith and credit as a general legal principle cannot substitute for these natural law convictions in politically and economically different times’; see *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 92 where Balakrishnan highlights the difference between value neutral positivism of the type propounded by Kelsen and classical (and by late Weimar Germany) superseded liberalism, supposedly reliant on the law of reason and nature formed from concepts like private property and freedom, norms which were self-validating and valid above and before any political entity because they were right and rational; also *supra*: Caldwell *Popular Sovereignty and the Crisis of Weimar Constitutionalism*, 89 where the author explains that Kelsen rejected natural law because it could be used to justify the status quo and to make existing laws such as those guaranteeing slavery, marriage or property seem ‘natural’ or it could justify anarchy, denying law altogether in the name of an authentic natural order. Against these positions, Kelsen said that legal systems consisted of objective positive law and was therefore not identical to the world of ‘justice’.

<sup>377</sup> See *supra*: Scheuerman *The End of Law*, 62 where the author comments that normativism in its early version took on an expressly moral form. For Locke, for example, state action was acceptable only when based on cogent general norms which Locke saw as an attempt by mortals to reproduce the universalism of divine natural law.

<sup>378</sup> *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes*, 82.

<sup>379</sup> See *supra*: Carl Schmitt *Legality and Legitimacy*, 46; see also *ibid*: 48 when Schmitt speaks with concern at the prospect that any goal, however revolutionary or reactionary, hostile to the state of Germany, or even godless, is permitted and may not be robbed of the chance to obtain power via legal means.

<sup>380</sup> See *ibid*: 52.

<sup>381</sup> *Supra*: Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty*, 20.

<sup>382</sup> *Ibid*: 14.

<sup>383</sup> *Supra*: Mc.Cormick *Introduction to Legality and Legitimacy*, xxxv.

that the ‘*definiteness and validity of the people’s will is denied*’.<sup>384</sup> Untenable, therefore, for Schmitt is the idea that positive law is either void or voidable if it fails to comply with the normative expectations of an over-arching natural law code.<sup>385</sup> More emphatically still, it is decisionism that returns the concept of grace, which statute-thinking normativism relativises, back to its rightful place ‘*in an exalted divine order above human normativisation*’.<sup>386</sup> Though Schmitt readily employs theological allusions, what is clear is that he conceives the God-like power to which he makes frequent reference as an earthly omnipotent authority, unchecked by law, justice or conscience.<sup>387</sup> Equally beyond doubt is that the authority of law does not derive from a natural law in existence before the establishment of legislative power.

Though, therefore, Schmitt does subscribe to certain enduring precepts, evident from the above is that the legal and political theory he develops in the domestic sphere pays scant allegiance to classical natural law doctrine.<sup>388</sup> During post war interactions with other scholars, he reportedly lambasted Leo Strauss for the latter’s endeavour to conceal ‘*all too much behind natural law*’<sup>389</sup> and his *Glossarium* evinced similar scepticism concerning the validity of natural law concepts.<sup>390</sup> In contrast, Meier seeks to couch Schmitt’s rejection of pacifism and his polemic against universalism in the international arena in the language of the Antichrist – a false paradise imposed on the earth.<sup>391</sup> On this premise, the entirety of Schmitt’s political thought is supposedly reducible to the theological dogma of divine revelation that becomes the ultimate authority and absolute foundation of it.<sup>392</sup> But the evidence for this appears tenuous at best, Balakrishnan,<sup>393</sup>

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<sup>384</sup> *Supra*: Carl Schmitt *Constitutional Theory*, 266.

<sup>385</sup> See *supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 7: ‘Because positive law consisted of norms created by the power of the sovereign state that recognised no higher authority, the ethical principles embodied in natural law theories which might conflict with these norms or the power of the state were disregarded’.

<sup>386</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 59.

<sup>387</sup> See *supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes*, 32 where Schmitt speaks approvingly of Hobbes who believed that because state power is supreme, it possesses divine character; see *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 258, where Balakrishnan points out that Schmitt criticised the German post-WWII constitution, saying it was merely a refurbished natural law ideology and a tacit acceptance of Germany’s non-existence as a state.

<sup>388</sup> Whether his concrete order thinking owes any passing debt to natural law ideology is explored below.

<sup>389</sup> See Paul Gottfried ‘*The Nouvelle Ecole of Carl Schmitt*’ *TELOS* No. 72, (Summer 1987), 202-205 where the author refers to discussions between Schmitt and George Schwab on September 21<sup>st</sup>, 1992.

<sup>390</sup> Carl Schmitt, *Glossarium*, (19.7.1948), *Aufzeichnungen der Jahre* (Berlin: Duncker & Humblot. 1991) (Schmitt’s post war diaries compiled between 1947 and 1951).

<sup>391</sup> See *supra*: Hooker, 49.

<sup>392</sup> See Mika Ojakangas ‘A terrifying world without an exterior’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 205-207 for a

Scheuerman<sup>394</sup> and Muller<sup>395</sup> each disputing Meier's contention that Schmitt intends his allusions in *The Crisis of Parliamentary Democracy*, to 'great moral decisions',<sup>396</sup> to indicate allegiance to a theologically-grounded natural law belief. This criticism of Meier, at least on this point, seems well made.<sup>397</sup> For it is clear that Schmitt intends to emphasize the primacy of a decision, born from the existential exigencies of the concrete reality and, (as with Sorel), the omnipresent need to cohere with the historical mission, moment and myth of a unified 'people'.<sup>398</sup> Far more plausible it remains, therefore, that Schmitt remains suspicious of natural law doctrine and the potential for strategic exploitation embedded within it.

Linking his ostensible repudiation of natural law in both national and international law is his distrust of precisely this type of manipulation of 'higher law' by the '*rule and sovereignty of men or groups who can appeal to this higher law and thereby decide its content and by whom it should be applied*'.<sup>399</sup> Reflective of the specific critique Schmitt

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cogent discussion of these issues and Schmitt's references to the New Testament Second Letter to the Thessalonians as the putative authority for Meier's argument; for an account of Meier's claims, see Heinrich Meier *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy* (Chicago and London: The University of Chicago Press, 1998) trans. Marcus Brainard from *Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie*, 1994 and Heinrich Meier *Carl Schmitt and Leo Strauss: the hidden dialogue* (Chicago and London: The University of Chicago Press, 1995) trans. J. Harvey Lomax from *Carl Schmitt, Leo Strauss und "Der Begriff des Politischen": Zu einem Dialog unter Abwesenden*, 1988.

<sup>393</sup> *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*; after breaking with the church in the mid-1920s, it does not appear that Schmitt published anything that one could construe as religious for 25 years, during a period that could be considered a vital time in terms of both his life and work.

<sup>394</sup> *Supra*: Scheuerman *The End of Law*.

<sup>395</sup> *Supra*: Muller *A Dangerous Mind: Carl Schmitt in Post-War European Thought*

<sup>396</sup> *Supra*: Schmitt *The Crisis of Parliamentary Democracy*, 66, 'Out of the depths of a genuine life instinct, not out of reason or pragmatism, springs the great enthusiasms, the great moral decisions and the great myth'.

<sup>397</sup> See *supra*: Schmitt *Roman Catholicism and Political Form*, 17, where Schmitt does speak of the political being unable to exist without authority and that this authority itself depends on an 'ethos of belief'; however see the comments on this and Schmitt's later work in John P. McCormick 'Review: Political Theology and Political Theology: The Second Wave of Carl Schmitt in English *Political Theory*', Vol. 26, No. 6. (December 1998), 830-854, 837 where the author contrasts the distinction of friend and enemy steeped in normative substance in *Roman Catholicism and Political Form* with his *Concept of the Political* where this normative element has disappeared. With reference to Meier's theory, McCormick states, 'As for the political theology thesis promoted by Meier and others as it pertains to Schmitt, it quite simply underestimates the secular aestheticization of politics that is a crucial component of Schmitt's work. Traditionally religious and existentially aesthetic orientations are not necessarily mutually exclusive of each other but one always seems to take precedence over the other in interpretations of Schmitt, himself and fascism in general'.

<sup>398</sup> See *supra*: McCormick *Carl Schmitt's Critique of Liberalism Against Politics as Technology*, 115 where the author claims that it was a mistake for Schmitt to resort to myth. Reliance on a new religiosity that sought to make meaning through the manufacture of myth, where the movement is everything and the goal nothing is what Sorel advocated and Schmitt endorsed.

<sup>399</sup> *Supra*: Schmitt *The Concept of the Political*, 66.

levelled against the Allies' penalisation of aggressive war in the aftermath of the Second World War, what emerges is that his invective against Allied policy was there, at least, compatible with his overall rejection of the nebulous norms of natural law. Echoing his polemic directed towards the spurious inclusion in international treaties of moral, philosophical or ideological formulas, purportedly anchored in the quest to secure 'human rights' and to universalise humanitarian ideals, Schmitt remained determined that spurious appeals to the authority of God did not suffice to confer genuine legitimacy.<sup>400</sup> Equally certain is that contrary to an explicit passage, in his 1945 *Gutachten*,<sup>401</sup> where he described the *legality* principle as a maxim of natural law and conscience and decried its infringement as a gross inequity, it does not appear feasible for Schmitt to use substantive natural law precepts as a foundation for his critique of the Allies' violation of it. Not and remain immanently consistent with his own prior prescriptions. No less categorical is that natural law enabled the Allies to emasculate the ban on retrospective crime creation and punishment to devastating effect.

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<sup>400</sup> *Supra*: Schmitt 'The Legal World Revolution', 73-91.

<sup>401</sup> See *supra*: Schmitt 'The International Crime of the War of Aggression', 196.

## Permutations of positivism

### (i) The Hobbesian dimension

Perfectly consistent with Schmitt's repudiation of natural law is his invective against the Allies at Nuremberg for their use (or abuse) of the immutable precepts of morality and justice. If *he* does not subscribe to natural law, then his criticism of others for reliance on it - *inter alia* to undermine the legality principle - is not perverse. But how is it then plausible for Schmitt to seek to uphold what he seeks to represent as an absolute ban on retrospective penalisation by deployment of the same natural law doctrine for which he castigates the Allies? Is not one of the primary attributes of natural law doctrine its recognition of the autonomy of the individual and the existence of pre-judicial contra-state rights? Is this not the very bedrock of the *legality* principle? If so, how is it feasible to seek to acknowledge and uphold a categorical embargo on retrospective penalisation and, at the same time, repudiate the rights that natural law accords? If Schmitt professes to distrust natural law because of the risk of selective misinterpretation by those in possession of power, how problematic is this likely to be?

Where power transcends law, is it possible to sustain the *legality* principle? Is not the exercise of untrammelled power strangely reminiscent of his Weimar-era decisionist theory? Does this admit the possibility of any limitation on sovereignty? How does this differ from a Hobbesian stance towards the non-retrospectivity of criminal law? In his domestic-orientated writings, does Schmitt ever explicitly address the issue of the *nullum crimen nulla poena sine lege* doctrine? If so and such expressly articulated commentary, read in conjunction with his overall legal and political theory during Weimar Germany, lends support to the acceptability of retroactive penalisation in the domestic sphere, how, if at all, is it possible to reconcile this with his uncompromising critique of the Nuremberg process in the international arena?

Much of his efforts during the Weimar period, Schmitt targets against the futility of the liberal project that seeks to oust the possibility of the 'exception' and, instead, to conceptualise the entire legal system as a closed system of norms that ultimately degenerates into the value neutrality that Schmitt claims to abhor. Inescapable within his analysis, is the perspicacity of his prediction that the liberal *Rechtsstaat* would founder, as it did, at the crucial moment. With the 'legal' acquisition of power by the

Nazis and the subsequent suspension of the 1919 Reich Constitution by the Enabling Act 1933, the ‘basic rights’ provisions enshrined within it were at the mercy of the new overlords of Germany. Amongst them was Article 116 – the embargo against retroactive penalisation which, indicative of its indispensability in guaranteeing due process of law, was not one of the seven provisions within the Constitution susceptible to Article 48 suspension at the discretion of the President. Though Article 116 is susceptible to differing translations in English, all encompass the essence of the *nullum crimen, nulla poena sine lege* principle. What appears to attract the greatest degree of commonality of approach is the translation below:

‘An act can only be punished when its punishable character was defined by statute before the action occurred.’<sup>402</sup>

Just as, at one end of the spectrum, the natural law perspective that the liberally-inclined Allies adopted at Nuremberg was able to undercut the *legality* principle in the international realm so, at the other end, the value neutrality positivism of liberalism failed to preserve it in the domestic domain in 1933.<sup>403</sup> But would a positivist stance have fared better in the international arena vis-a-vis preservation of the purported embargo against *ex post facto* penalisation? Perhaps not, for had the Allies instead upheld a more rigorously positivist stance at Nuremberg and had they been unconcerned about the external appearance of legitimacy, they could simply have allowed the Charter to rest on its own inherent validity as an act of sovereign law-making. In short, as an act of sheer legislative fiat, that is, a positively given enactment made by those (self?) authorised to pronounce it, it was unassailable. Irrespective of the positive norms within Nazi Germany to which the defendants had tailored their conduct during the crucial period when their alleged misdeeds had occurred, the Allies could overstep them with a wave of the legislative wand. It was the ‘law’ at the date of the trial that was bound to

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<sup>402</sup> *Supra*: Seitzer *Introduction to Constitutional Theory*, Appendix; the original German version reads as follows: Eine Handlung kann nur dann mit einer Strafe belegt werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Handlung begangen wurde; see in contrast the Avalon materials on Nuremberg accessible online: <<http://www.yale.edu/lawweb/avalon/imt/menu.htm>>. This contains the following translation: An action can only become subject to a punishment when the penalty was legally fixed before the action was begun. In terms of compliance with the *nullum crimen nulla poena sine lege* maxim, this translation renders it more difficult to satisfy since the actual punishment for the alleged crime must have been specified in advance and not merely the overall punishable nature of the act in question.

<sup>403</sup> See Paul Piccone and Gary Ulmen ‘Schmitt’s “Testament” and the Future of Europe’, 3-34, 19, ‘Schmitt describes himself as a *katechon*, ie as a *retarder* or *restrainer* of what he calls the “total functionalisation” of law understood as the deployment of legality as a tool of social and economic policy’.

prevail. If this is all that legal positivism had required of the Allies, it would have accorded them unlimited licence, at Nuremberg, to embark on a path of unconstrained and retrospective crime creation and punishment.

The position is, however, far more complex, for within the positivist tradition lies an assiduous regard for strict observance of ‘due process’. Overlapping the Fullerian concept of the ‘inner morality of law’, even the authoritarian Hobbes insists that all positive law must, in advance, be ‘*written or some way published*’,<sup>404</sup> or ‘*promulgated by voice of man*’.<sup>405</sup> Without such prior, outward manifestation, there is no law. This alone would have sufficed to invalidate those measures of the Nazi regime that failed to comply with the specified criteria of openness and prior publication. *Ad hoc* pronouncements and secret orders authorising or ordering the commission of atrocities, including those associated with the persecution of the Jews, did not, therefore, fulfil the pre-requisites for legitimate law making that Hobbes stipulates.

Allied to, but not identical with this is, for example, the Hartian approach to the status of positive legal norms which, if not compliant with Hart’s self-prescribed ‘rules of recognition’, need not be obeyed.<sup>406</sup> This, for Hobbes, would be a step too far because, subject to the right of a citizen to preserve his or her own life, *all* law must be obeyed. For a citizen to have an entitlement not to comply with sovereign-proclaimed dictates, Hobbes must, therefore, ensure that such edicts never attain the status of valid law. Whether a similar approach would have served to invalidate the Enabling Act 1933 and the Nazis’ 1935 amendment of Sections 2 and 170a of the 1919 German Penal Code<sup>407</sup> - with the attendant introduction of the admissibility of *ex post facto* penalisation - is

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<sup>404</sup> *Supra*: Hobbes *The Leviathan*, XXVI, 144.

<sup>405</sup> See *ibid*: XXXI, 190.

<sup>406</sup> For a detailed account of Hart’s theory see H.L.A. Hart *The Concept of Law* Second edition (Oxford and New York: Oxford University Press, 1994); for his dialogue with Lon Fuller, *inter alia* concerning the validity of the Nazi legal order and the positive norms within it, see H.L.A. Hart ‘Positivism and the Separation of Laws and Morals’ *Harvard Law Review* Vol. 71, (1958), 593.

<sup>407</sup> Reichsgesetzblatt, 1935, 839, ‘Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound public feeling shall be punished, even if his deed is not punishable according to the law.’

‘If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of the penal law.’ See *supra*: Chapter 2 for a more detailed account of the historical background to the Nazi regime and the implications of these provisions to the Nuremberg proceedings in terms of the quasi-estoppel argument the Allies successfully mounted against the German defendants during their Trial (1945-1946).



moot. Because ‘*ignorance of the law is no excuse* [and] ‘*every man is bound to take notice of the laws to which he is subject*’,<sup>408</sup> what Hobbes renders indispensable is that human beings subject to the law have an opportunity beforehand to know its content.<sup>409</sup> How else are state citizens able to obey sovereign dictates?<sup>410</sup> Though ‘*every man is obliged to do his best endeavours to inform himself of all written laws that may concern his own future actions*’,<sup>411</sup> this is not feasible unless the law is readily ascertainable.<sup>412</sup> Unequivocal appears his stipulation that ‘*no law made after a fact done, can make it a crime*’, on the basis that ‘*a positive law cannot be taken notice of before it is made and therefore cannot be obligatory*’.<sup>413</sup>

Hobbes’ insistence on fulsome promulgation of positive legal norms and the positivisation consequent to it, would arguably deprive of the status of ‘law’ the putative *crime of waging aggressive war* for which the Nuremberg defendants were indicted. The more so when conjoined with what he describes as the offence of *lese-majeste* which, like felony, is a transgression of natural law and not civil law.<sup>414</sup> No less a crime because it precedes civil law, a traitor is one who denies his duty ‘*to obey rules simply, absolutely and universally*’.<sup>415</sup> Were this so, and a sovereign prince had to make a civil law in the form, ‘do not rebel’, ‘*he would achieve nothing. For unless the citizens*

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<sup>408</sup> See *supra*: Hobbes *The Leviathan*, XXV, 135

<sup>409</sup> See *supra*: Hobbes *On the Citizen (De Cive)*, XIV, (12), 160 where Hobbes makes it clear that ‘no one can ever plead ignorance of his sovereign authority to make laws for each man knows that he what he himself did’; see also *ibid*: XIV, (1), 154, ‘Since laws are obeyed not for their conduct but because of the will of the instructor ...law is a command of that person (whether men of council) whose instruction is the reason for obedience’.

<sup>410</sup> *Ibid*: XIV, (1), 159, ‘It is necessary to the essence of a law that two things be known between citizens: first what man or council has sovereign power to make laws; second what the law itself says. For he who has never come to know to whom he is obligated or what his obligations are cannot obey and is exactly as if he were not obligated. I do not say that the essence of a law that this or that be continuously known but only that if it has been once known and if a citizen forgets either the legislator’s right or the law itself, that is no bar to his obligation to obey since he could have remembered if he had the will to obey as natural law commands.’

<sup>411</sup> See *supra*: Hobbes *The Leviathan*, XXIV, 146.

<sup>412</sup> See *supra*: Hobbes *On the Citizen (De Cive)*, XIV (14), 160 where Hobbes makes clear that ‘the requisite of written law is not writing but vocal expression (vox); this alone is of its essence; writing is employed to record law’.

<sup>413</sup> See *supra*: Hobbes *The Leviathan*, XXVII, 155; see also *supra*: Thomas Hobbes *On the Citizen (De Cive)*, XIV (13), 160, ‘For a law is a command of a legislator and a command is a declaration of will; there is no law therefore of the will of the legislator has not been declared, and this is done by promulgation’; see also *supra*: Chapter 3 section 5.

<sup>414</sup> *Supra*: Hobbes *On the Citizen (De Cive)*, XIV (20), 164, ‘This evil is more serious than any single sin as constant sinning is more serious than a single sin. And this is the sin called lese-majeste which is a word or deed by the citizen or subject by which he reveals that he no longer intends to obey the man or council to whom the sovereign power in the commonwealth has been committed’.

<sup>415</sup> *Ibid*: XIV (20), 164.

are previously obligated to obedience, that is not to rebel, every law is invalid and an obligation which binds one to do something which one is already obligated to do is superfluous'.<sup>416</sup> This Hobbes particularly relates to a citizen who claims that the sovereign has 'no right to wage war or make peace, settle disputes...fix penalties or anything else that is essential to the existence of the Commonwealth'.<sup>417</sup> Obedience is an unconditional duty and a citizen who disobeys an order from the state sovereign is guilty of treason. Transposed to the scenario of Nazi Germany and the Nuremberg process, how could the defendants make a decision not to wage war at the behest of their national government when the penalty for their non-compliance would be treasonable status and consequential punishment?<sup>418</sup> Reminiscent of the approach Schmitt exhibits towards the same dilemma, 'one cannot rely on an international law duty of a state to justify treason towards a land.'<sup>419</sup>

In terms of the ban on retrospective crime creation is, however, Hobbes' recognition of the natural law offences of treason and felony a double-edged sword? For it is clear that the law of nature, which obliges all subjects without exception, always precedes civil law and neither is ignorance of it an excuse for disobedience.<sup>420</sup> Unlike the civil law where promulgation is essential, natural laws discernible through the voice of nature or natural reason do not require dissemination as a pre-requisite to their acquisition of obligatory status within the commonwealth.<sup>421</sup> Without more, human beings are deemed to know of their existence and content.<sup>422</sup> With this residual allegiance to natural law doctrine, Hobbes would have been forced to concede that the Nazi atrocities were

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<sup>416</sup> *Ibid*: XIV (21), 166.

<sup>417</sup> *Ibid*: XIV (20), 164.

<sup>418</sup> *Ibid*: XIV (22), 166, 'It follows from this that rebels, traitors and others convicted of treason are punished not by civil right but by natural right, that is not as bad citizens but as enemies of the Commonwealth and not by the right of dominion but by the right of war'.

<sup>419</sup> *Supra*: Schmitt *Constitutional Theory*, 121.

<sup>420</sup> *Supra*: Hobbes *The Leviathan*, XXV11, 155.

<sup>421</sup> See *supra*: Hobbes *On the Citizen (De Cive)*, XIV (14), 161, 'For as it is impossible to write down ahead of time universal rules for the judgment of all future cases which are quite possibly infinite, it is understood that in every case overlooked by the written laws, one must follow the law of natural equity which bids us to give equal to equals. And this is by the force of the civil law which also punishes those who by their own actions knowingly and willingly transgress natural laws'.

<sup>422</sup> *Ibid*: XIV (20), 164; also Hobbes *Leviathan*, reprinted from the edition of 1651(Oxford: Clarendon Press, 1909), XLII, 402, 'That part of the scripture which was the first law, was the 10 commandments and delivered by God to Moses. Before that, there was no written law of God, who as yet, not having chosen any people to be his peculiar kingdom, had given no law to man but the law of nature, that is to say, the precepts of natural reason, written in every man's heart'; also see *supra*: Hobbes *The Leviathan*, XXVII, 160, 'Nor shall any man that pretends to reason enough for the government of his affairs want means to know the laws of nature because they are known by that same reason he pretends to; only children and madmen are excused from offences against the natural Law'.

violations of natural law and therefore, presumably, that the embargo he acknowledges against *ex post facto* criminal law was not breached.<sup>423</sup> On this premise, *crimes against humanity* already existed in substance, if not in form, long before enactment of the Nuremberg Charter and the *legality* principle would survive intact. With the abnegation of natural law embedded within Schmitt's legal and political theory, this is one problem that would not have confronted a consistent Schmittian – unlike Hobbes – even had such person advocated a juridical rather than political solution towards the Nazi perpetrators of *crimes against humanity*.

This is not all for, providing the penalty does not exceed that previously stipulated, the natural law aspects of Hobbes' theory also facilitate the *punishment* of those convicted of a crime. If no penalty is specified in advance, prior ignorance of it excuses no-one '*because whoever voluntarily does the action accepts all the known consequences of it*'.<sup>424</sup> Only if the civil law already stipulates the penalty is the delinquent excused from a greater penalty<sup>425</sup> and where the positive law is silent, it is open to the judge to supply an appropriate sentence with the law of nature.<sup>426</sup> Again, the possibility emerges for Hobbes – though not for a consistent Schmittian – that a natural law approach could have addressed the lacunae in sentencing stipulations in, for example, Article 227 of the Treaty of Versailles 1919; the Kellogg-Briand Pact 1928 and to some extent, the Nuremberg Charter itself. If so, would the first two of these international treaties then have furnished more convincing substantive precedent for the last?

On balance, neither *war crimes* in the old sense nor *crimes against humanity* would, for Hobbes, have violated the *legality* principle, the first assertion with more certitude than

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<sup>423</sup> A similar natural law analysis may serve also to vitiate the Nazis' 1935 revocation of the German Criminal Code and the concomitant admissibility of *ex post facto* penalisation. If this were the case, natural law could have been used to justify the restoration of the Article 116 embargo on the use of retrospective criminal law. The relevance of Article 116 for the German people and its possible interrelationship with Schmitt's concrete order thinking is further explored *infra*: towards the end of this chapter.

<sup>424</sup> *Supra*: Hobbes *The Leviathan*, XXVII, 155; also *ibid*: XXVIII, 166, 'He that violates the law where no penalty is specified expects an indeterminate sentence'; see also *supra*: Hobbes *On the Citizen (De Cive)*, XIV (8), 158, 'It follows from this that there is a penalty attached to very civil law, explicitly or implicitly. For where no penalty is prescribed, either in writing or by the example of someone who has previously been punished for breaking the law, there is implied that the penalty is discretionary, that is, it depends on the discretion of the legislator, that is the sovereign; for any law that can be broken with impunity is useless'.

<sup>425</sup> *Ibid*: Hobbes *The Leviathan*, XXVII, 155.

<sup>426</sup> *Ibid*: XXVI, 149; see also *supra*: Thomas Hobbes *On the Citizen (De Cive)*, XIV (6), 157 where Hobbes refers to vindictive civil law as the law by which the penalties to be imposed on those who break the law are prescribed.

the other. Arguably insuperable, however, would have been the remaining substantive component of Article 6 – the positivistically innovative and previously un-promulgated *crimes against peace*. Problematic it would be for Hobbes, as with a still more reluctant Schmitt, to categorise *waging aggressive war* as *malum in se*. Even were a consistent Hobbesian to aspire, in this specific context, to circumvent the *legality* principle, it seems that a natural law approach would not assist. Nor would it surmount Hobbes' resistance to the ascription of individual responsibility or his collateral insistence that individual citizens have no right to gainsay the decision of the sovereign state authority to wage war. Augmented by Hobbes' exhortation to those subject to the law not to act when doubt exists as to the meaning of a law – such as perhaps the Kellogg-Briand Pact 1928 or aspects of the Treaty of Versailles, what is clear is that where positive law is ambiguous, the citizen is well advised not to speculate either as to its import or future interpretation.<sup>427</sup>

Within Hobbes' theoretical arsenal, therefore, are devices both to undermine and buttress observance of the ban on retrospective penalisation. The mechanism best placed to achieve the latter is, perhaps, a positivistic approach but one imbued with the full panoply of all that is traditionally associated with absolute respect for 'due process'. Only then is it tenable to retain the essence of the 'rule of law'. A legal system that adheres to the *inner morality of law* or *procedural* natural law may produce a similar outcome. It is when these notions of due process or procedural natural law are stripped from the reckoning, leaving free rein either for the *command* theory of positively given law (where law – backed by sanctions - is that pronounced by the sovereign and has to be obeyed regardless of its content or the method of its enactment/implementation) or *substantive* natural law, understood in the sense of elastic and malleable concepts, that the *legality* principle appears in jeopardy. No less so when the embargo against retrospective crime creation and punishment is constitutionally inscribed but the same constitution that houses it contains procedures that facilitate the overthrow or suspension of the entire legal order or any of the 'rule of law' type guarantees intrinsic to it. With Schmitt's abnegation of traditional natural law doctrine in the sense of

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<sup>427</sup>See *supra*: Hobbes *On the Citizen (De Cive)*, XIV (23), 167, 'The sense in which the law is to be understood is at the discretion of the holder of the sovereign power. When there is doubt about the meaning of a law, it will be a sin to act because if we do not act we will be certain not to commit a sin, no matter how the law may be interpreted later. For to do something of which you are in doubt, whether it is a sin or not, when you have the freedom to abstain, is a contempt for the laws and so is a sin against natural law'.

universally binding and immutable precepts, does his overall legal and political theory conceal any prospect for salvation of the *legality* principle either in the domestic sphere or beyond?

## **(ii)The demands of decisionism**

Evident from the Chapter 3 analysis of his Weimar-era work is that Schmitt, at that stage, subscribed to a decisionist theory of the state where the sovereign will, whether or not encapsulated or derived from the unified will of a homogeneous people, was paramount. Inescapable, for Schmitt, was that whatever attempts were made in the political arena to camouflage or subsume it, raw power would always emerge as the single non-eradicable component in any vaunted legal order. Because it was not feasible to subsume power-relations within a closed system of norms, the ‘rule of law’ state - so beloved of those of a liberal-minded persuasion – would always remain illusory.

What mattered, to Schmitt, was preservation of the ‘political’ and the related imperative to eradicate the depoliticisations and neutralisations of the state, concomitant with a flawed reservation of individualistically asserted contra-state rights. Included within this category was an entitlement to contest the validity of retrospectively implemented criminal norms. Attenuated by the plethora of indirect forces that inevitably proliferated, the pluralistic state this engendered was the antithesis of the concrete reality where, to Schmitt, the state of exception was ever-present. Triggered by dire threats to the integrity of the state, the exception was instigated by whoever possessed the power to exercise commissarial - if not sovereign dictatorship - to preserve or, perhaps, change the legal-constitutional order for ever. Omnipresent discretion – of a voluntaristic will, of the supremacy of ‘power’ over ‘law’, of *voluntas* over *ratio* and the determination of the *de facto* sovereign entity to wield it – was, for Schmitt, the quintessential criterion for legitimacy.

Adherence to legalistic form was a superfluous luxury no authoritarian sovereign could afford. Epitomised by the liberal-oriented *Rechtsstaat* - as with any legal system predicated on a subjugation of ‘power’ to the ‘rule of law’ – this insistence on *due process* constituted a deficit of the gravest nature. Over-formalisation and technicity denoted a fatally value-neutral ‘legality’ that heralded the downfall of the entire constitutional order. Vital, instead, was legitimacy and, if respect for due process was a sacrifice to this quest, this seemed a price that Schmitt was, ultimately, willing to pay. To what extent, however, do inferences deducible from his Weimar work tally with his explicit approbation of the *nullum crimen nulla poena sine lege* maxim in the

*international* realm? Is it plausible for Schmitt to embrace or even acknowledge the possibility of the ineluctable limitation on state sovereignty that the *legality* principle appears to represent? Is Dyzenhaus correct when he claims first that Schmitt acquiesces in Hobbes' rejection of retrospectivity (even if this somewhat dubious assertion regarding Hobbesian theory is itself accurate) and second that the stance Schmitt adopts is immanently inconsistent, mindful of the disrespect for individualism endemic within Schmittian theory?<sup>428</sup> And is it credible for someone subscribing to a consistent version of this approach to uphold the ban on retrospectivity on grounds that retroactive penalisation infringes the qualities of certainty, predictability and foreseeability, quintessential to a 'legitimate' legal order?

Seldom in the domestic domain does Schmitt afford explicit insights into the esteem or otherwise in which he holds the legitimacy of retrospective penalisation and - as all too familiar - his rare articulation of them tends to be either cryptic or incomplete. Compounded by the brevity and ambiguity of these forays, any tendency towards de-contextualisation is likely to further distort or dilute their interpretation. What is crucial, therefore, is to avoid their detachment from the empirical backdrop that invoked them. During the relative tranquillity of mid-Weimar Germany, Schmitt identifies the ban on *ex post facto* law – stipulated *inter alia* by the English philosopher, John Locke - as a cornerstone of the liberal *Rechtsstaat*.<sup>429</sup> As the putative founder of this classic *Rechtsstaat* formulation of law (unlike Hobbes whom Schmitt defines as a proponent of state absolutism), Locke insists on the generality of legal norms as the foundation of the *legality* principle. If norms are directed at specific individuals (as with Wilhelm II under the Treaty of Versailles 1919), this undermines the embargo on retrospective criminal law and renders it useless.<sup>430</sup> What Schmitt seems to target here – though obscurely - is the failure of liberalism to match the standards supposedly integral to its ideology. Flowing from this is his implicit critique that the ban on retrospective penalisation is all too fragile and readily flouted where the legal system to which it coheres is unable or unwilling to support the buttresses on which it relies for survival.<sup>431</sup>

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<sup>428</sup> See *supra*: Dyzenhaus *Legality and Legitimacy*, 85-97

<sup>429</sup> *Supra*: Schmitt *Constitutional Theory*, 182.

<sup>430</sup> See *ibid*: 195.

<sup>431</sup> See *ibid*: 'Another example of the *Rechtsstaat* principle, '*nulla poena sine lege*' which presupposes a general norm and would thus transform itself into the opposites of *Rechtsstaat* –like protection if, through a majority decision of the legislative body, in the form of a statute, "by law", Mr. X could be condemned to death or thrown in prison.'

As argued above, however, the presidential discretion that Schmitt espouses in his re-interpreted version of Article 48 seems far less able to sustain the *nullum crimen nulla poena* principle than the liberal model he claims to decry.<sup>432</sup> If the executive authority possesses authority to suspend the entire legal order at will and introduce such measures as it deems fit in the interval between the demise – whether temporary or permanent – of one regime and the inauguration of the next, then mandatory adherence to the establishment of legal precedent to satisfy any erstwhile ban on retrospective penalisation must also surely vanish. If, as seems unavoidable, decisionist theory is incompatible with observance of the *legality* principle, what forays does Schmitt make into the legitimacy of retroactive penalisation in the first flutters of the Nazi era when his preoccupation with the primacy of the sovereign decision is on the wane?<sup>433</sup> Doubtless at this stage, Schmitt was conscious of the arbitrariness of the new style of governance within Germany and the expediency of producing legal theory palatable to his capricious overlords. Less certain was the extent to which his ostensible disavowal of the *legality* principle in the intrastate context was reflective of an ongoing obsession to promote sovereign power or a disingenuous attempt to guarantee his personal integrity at all costs.

This said, the first opportunity accorded Schmitt to seek ingratiation with the embryonic regime, was the infamous Van der Lubbe fire attack on the *Reichstag* building in February 1933. Following this incident, the Nazis retrospectively decreed that arson was a capital crime and this, Schmitt, unequivocally endorsed in his *State, Movement, People*, of the same year:

‘The fiction and illusion of a law issued in such a way that all cases and situations can be construed in advance according to the facts of the case and would be subsumable under the law cannot be revived. Today, even the thought of such a gapless codification or normativisation would be unimplementable.’<sup>434</sup>

The implications are clear. What Schmitt postulates here is a categorical denunciation of the ban on retrospective penalisation, with the valorisation of executive intervention to force through legislation that imposes a penalty for a pre-existing offence in excess of

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<sup>432</sup> See discussion of Article 48 *supra*: Chapter 3.

<sup>433</sup> See *supra*: Chapter 4 for an account of the concrete-order thinking he formulates in his *On the Three Types of Juristic Thought*.

<sup>434</sup> Carl Schmitt ‘Staat, Bewegung, Volk: Dreigliederung der politischen Einheit’ (Hamburg: HAVA, 1933).



that in place when the act was committed. All this Hitler achieved in the face of staunch opposing judicial conservatism that Schmitt labels a scandal. Vital instead are new guidelines to mould judicial practice wholly distinct from the norms embedded within the *Rechtsstaat* tradition. The *nullum crimen nulla poena sine lege* principle he firmly consigns to the wreckage of the formalistic bourgeois liberal state.<sup>435</sup> Nor is this the totality of his invective against the non-retrospectivity embargo. One year later, Schmitt comments that it is a requirement of justice to punish crimes and those who opposed the retrospective elevation of punishment following the Van der Lubbe fire ‘*did not place primary importance on the fact that an evil crime found an evil punishment*’.<sup>436</sup>

Nonsensical, in Schmitt’s view is the *Rechtsstaat* principle of ‘*no punishment without law*’, and this must yield accordingly to the weightier requirement of ‘*no crime without punishment*’.<sup>437</sup> Less equivocal still is his stated intention ‘*to pit the Rechtsstaat principle, “nulla poena” against the principle of justice: “nullum crimen sine poena”*’. The discrepancy between the *Rechtsstaat* and the Just State then becomes immediately visible’.<sup>438</sup> As further evidence of the propensity of the Nazi period to ‘*provide formulae to expedite the ad hoc suspension and nullification of legal rules*’,<sup>439</sup> the so-called ‘Night of the Long Knives’ that witnessed the murder of SA Leader Ernst Röhm was followed by an executive edict to retrospectively validate the accompanying mayhem.<sup>440</sup> This, Schmitt endorses in a ‘*shamelessly apologetic*’ tract,<sup>441</sup> ‘*Der Führer schützt das Recht*’ (*The Führer Guards the Law*) (1934),<sup>442</sup> that reserves to the political leader, not the judiciary, the right to legalise or illegalise the actions of state citizens.

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<sup>435</sup> For a discussion of these issues, see *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 191-192, citing Carl Schmitt ‘*Staat, Bewegung, Volk: Dreigliederung der politischen Einheit*’ (Hamburg: HAVA, 1933).

<sup>436</sup> Carl Schmitt ‘*Nationsozialismus und Rechtsstaat*’ *Juristische Wochenschrift* 63, 1934, 713-718 cited *ibid*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 192.

<sup>437</sup> *Ibid*.

<sup>438</sup> *Ibid*.

<sup>439</sup> *Ibid*: 198.

<sup>440</sup> *Law relating to National Emergency Defence Measures 3 July 1934*: *Reichsgesetzblatt*, 1934, 1,529: ‘The measures taken on June 30, July 1 and July 2 to suppress treasonable assaults are legal as acts of self-defence by the State’. Similarly, in 1933, the Nazi Government had retrospectively changed arson from a non-capital crime to a crime invoking the death penalty after the Van der Lubbe Reichstag fire Case.

<sup>441</sup> *Supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 201.

<sup>442</sup> Carl Schmitt ‘*Der Führer schützt das Recht*’ in *Positionen und Begriffe* (Berlin: Duncker Humblot, 1940) cited *ibid*: Balakrishnan, 192; also Carl Schmitt ‘*Der Führer schützt das Recht*’, *Deutsche Juristen-Zeitung*, Jg 39, Heft 15, (August 1, 1934), 945-950.

What Schmitt applauds is the demonstrable capacity of the Führer to distinguish between friend and enemy and, thereby, to safeguard the ‘political’.

After such ultra-fascistic outbursts, does the inauspicious attitude Schmitt exhibited in the early years of the Nazi period later undergo a subtle modification? Perhaps so since his *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (1937) (*Leviathan*) contains Schmitt’s endorsement – though tentative and veiled – of what he perceives to be the Hobbesian veto of retrospective penalisation.<sup>443</sup> Coupled with his apparent approbation of one possible rationale for the *legality* principle, that is, the inability to properly plan one’s life where law is retroactively enforced, Schmitt clearly declares that if law is to have a coercive threat, it cannot be implemented on a purely *post factum* basis.<sup>444</sup> Drawing a somewhat dubious equivalence between Hobbes and Locke, all that Schmitt adds is that ‘*in adjudicating other questions, the sentence, “nullum crimen sine lege” was unremarkable*’.<sup>445</sup>

Citing Anselm Feuerbach as the originator of the ‘nulla poena’ maxim, Schmitt refers without comment – whether declamatory or affirmative – to the decision of Hobbes to adopt the legality principle ‘*not as an aphorism but as a carefully thought through thought in the context of a systematic legal and political philosophy*’.<sup>446</sup> Is this an intended criticism both of Nazi practice and the abrogation of Article 116 it engendered? If so, to what extent is it possible to reconcile this with his earlier invective against the *nullum crimen nulla poena* maxim? Reasonable as it is to surmise that if Schmitt had wished to repudiate the *legality* principle he would have entertained no compunction in openly declaring it, accurate detection of his genuine perspective he further compounds in the Appendix to his *Leviathan*:

‘Some concepts such as *nulla poena* have been so thoroughly thought through that as a convincing formula, it fell some time later like a ripe fruit from a tree.’<sup>447</sup>

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<sup>443</sup> See *supra*: Dyzenhaus *Legality and Legitimacy*, 92, where the author suggests that Schmitt acquiesces in Hobbes’ rejection of retrospectively enacted criminal law.

<sup>444</sup> *Supra*: Schmitt *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, 71.

<sup>445</sup> See *ibid.*

<sup>446</sup> See *ibid.*: 72.

<sup>447</sup> *Supra*: Schmitt *The State as Mechanism in Hobbes and Descartes*.

On this basis, continuing subscription to the now jejune *nulla poena* principle appears misguided and inappropriate. Whether this signifies a revival of a self-interested imperative to placate the political authorities or a candid renunciation of the ban on retrospective penalisation is not easy to determine. What is beyond doubt is that the position Schmitt claims to evince towards the validity and status of the legality principle is determined, in part, by its empirical backdrop. Yet as his Nazi-era offerings bear testament, inconsistencies proliferate even within the same political framework. Far more reliable it is, therefore, to extrapolate his stance towards the unassailability of the maxim not from what he asserts but from the entirety of his scholarly *corpus*. Does this not, on balance, suggest that a *consistent* Schmittian, operating purely within the domestic constitutional domain, would take exception to an embargo on retrospective crime creation, both in recognition of the absoluteness of the ban and the unequivocal need to observe it? To a theorist who – concrete order thinking aside – relentlessly rejects any delimitation of sovereign authority within the nation state, an unexceptionable embrace of the *nullum crimen nulla poena sine lege* principle flouts the very essence of how a legitimate legal-constitutional order is conceptualised.

This explains why Schmitt seeks to vest the sovereign entity – the president within the Weimar Republic – with unrestrained authority to enact whatever measures are, in his absolute discretion, necessary to represent the ‘unified will of the people’. Even when this embraces the prospect of retroactive penalisation, Schmitt does not attempt to constrain the sovereign will, even to the extent that the Article 116 embargo on *ex post facto* crime punishment is, thereby, infringed. Nor do any facets of his Weimar oeuvre provide the requisite ammunition to assail as retroactive the offending enactments and *ad hoc* arbitrary measures that characterised the Nazi regime. Within the domestic domain – and with temporary circumvention of the institutional mode of thinking that primarily attracted Schmitt from his *On Three Types* (1934) onwards – it seems that a *consistent* Schmittian would be hard pressed to uphold the *legality* principle. And were a similar decisionist-oriented theory to be transposed intact to a process akin to the Nuremberg proceedings, would this not ‘legitimise’ any legislative instrument, irrespective of its retrospective components? Within the specific context of the Nuremberg process, is it not implausible in the extreme for an advocate of the command theory of legal positivism, far less, an amoral decisionist of a Schmittian persuasion, to polemicise against Allied strategy as an act of brute power? In short, if decisionism

subverts the *legality* principle in the domestic sphere, how is it feasible for an ostensibly identical theory to culminate in the contra-posed preservation of the same doctrine in the international sphere? And is it feasible to reconcile what appear these diametrically incompatible perspectives?

Viable, perhaps, are the following options and both rest on the rationale underlying the *nullum crimen nulla poena sine lege* principle. What the *legality* principle, in essence, confers upon an individual citizen – that is, the subject of the postulated retroactive norm – is the right to contest the *ex post facto* exercise of the criminal law-making function. Implicit within this is the capacity to mount a challenge to the sovereign authority. At the apex of the hierarchical power structure within the nation state that the decisionist Schmitt conceptualises is the sovereign entity, with the individual at its base. The least diminution in sovereign authority, therefore, Schmitt cannot tolerate. With this emphasis on the impregnability of the sovereign decision within his theoretical skein – with the manifold repercussions it entails,<sup>448</sup> it is hardly unsurprising that the *nullum crimen* principle is the inexorable sacrifice. Notions of clarity, certainty, predictability and stability in the law-making function within this scheme – all arguably indispensable to individualistic autonomy – pale into insignificance. Wholly insignificant to a decisionist mindset is the preservation of autonomy over one's life. This rests on a concomitant recognition that human rights exist and that the citizen in possession of them is able to assert those rights against the state. But for the amoral Schmitt, the question of assertion of putative rights does not emerge, chiefly, because he never concedes that they exist. Within the domestic domain, the subversion of the *legality* principle – even its non-acknowledgment within the state of exception – is, arguably, at one with decisionist theory.

However, the universalised and monopolistic international realm of liberalist conception provokes challenges diametrically opposed to those confronting a national sovereign. What this new international order seeks to do is invert the pyramidal structure that has traditionally characterised the intrastate dimension – and pivotally also the classical European interstate order of the *JPE*. This time, what were formerly proud sovereign states – together with the individual citizens within them – are forced to languish at the

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<sup>448</sup> See *supra*: Chapter 3 for an account of the Schmittian skein.

base of the hierarchy, now subject to the imperialistic instruments of sham cosmopolitanism poised to exert dominion over them. If pseudo-universalistic, politically orchestrated agencies have within their moralistic arsenal the power to create *ex post facto* crimes and enforce punishment without due reference to the pre-established norms of the nation-states they subsume, then this represents what, for Schmitt, is an untenable encroachment on the sovereignty of those states. No longer does his Nuremberg-related evocation of the *legality* principle and the significance accorded its non-impeachability appear incongruous or cynically motivated. From a Schmittian perspective, no juridical incursions above or below the previously sublime tier of sovereign authority within each continental European nation state, must be permitted to impinge upon it.

Pivotal to Schmitt's worldview is the primacy of the nation-state within a dualist conception of what may only loosely be termed international law. Though the sovereignty of the state arguably rests on its recognition by international law, this does not persuade Schmitt to accede to the supremacy of what he deems abstract, universalised and rationalised nebulous norms, far less defer to a closed system of positive rules that pay scant need to the particularistic perspectives of the internal legal orders of each state. Leaving aside his rejection of natural law categories of the type deployed by the Allies at Nuremberg, what his critique of the subversion of the *legality* principle, therefore, represents is part of his wider polemic against a monist concept of international law and the relegation of state sovereignty this connotes.

What this means in the specific context of the *nullum crimen nulla poena* doctrine is that states and more particularly, the individual citizens of them, must be free to contest *ex post facto* legal norms arbitrarily introduced by what Schmitt adjudges a specious international authority. The point when criminal charges against certain individuals are in contemplation is when, for Schmitt, '*the principles of nullum crimen and due process come into play*'.<sup>449</sup> That they do so is, in Schmitt's view, incontrovertible. Why else would the *international* community have ensured that *war crimes* in the old sense were duly enshrined within The Hague and Geneva Conventions, if not to guarantee their positive law status as crimes for which individual responsibility was formally ascribed?

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<sup>449</sup>*Supra*: Schmitt *Nomos*, 277.

And what purpose would have otherwise have been served for their inscription within the domestic law of Continental European states, including Germany?<sup>450</sup> Intended to eliminate infraction of the *legality* principle, what the positivisation of *war crimes* likewise eradicates is any potential normative tension between municipal and international law. Individual citizens know precisely the norms to which they are required to conform. As seen, however, crucial in every sphere other than *war crimes* in the old sense is the possibility that international law will target citizens for putative crimes that their own nation does *not* recognise. Because of its propensity to provoke a dangerous conflict of loyalty, this inevitably weakens the duty of absolute compliance that underpins the preservation of each intrastate legal-constitutional order.<sup>451</sup> It is for this fundamental reason that spurious *international* legal norms must never, in Schmitt's view, retroactively penalise individual state citizens.

The second possibility for reconciliation of Schmitt's ostensibly divergent perspective towards the *legality* principle in the domestic and international sphere hinges on the state of 'exception' and the interrelationship between norm and its antagonist - a condition of empirical and juridical exigency. Is it not feasible for a *consistent* Schmittian to argue that the tribulations of two World Wars, with the intervening turmoil of the internecine period – the Weimar Republic characterised by economic, social political dysfunction and the ensuing perversions of National Socialism – represents a protracted state of exception? If so, the suspension of the Weimar Constitution, the concomitant disregard of the ban on *ex post facto* penalisation inscribed in Article 116 and the repeal of the non-retrospectivity provisions of the pre-existing German Criminal Code would, in each case, be attributed to actions taken by a commissarial dictator. Pursued to its logical conclusion, the 1945 defeat of Nazi Germany would then have heralded the return of normalcy, of 'norm', not to what Schmitt deems the ineffectual value neutrality of Weimar Germany but rather to the constitutional order prior to the onset of the First World War, that is, before the descent of chaos.

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<sup>450</sup> This was accomplished by Article 4 of the Reich Constitution, 1919.

<sup>451</sup> See Carl Schmitt '*The Turn to the Discriminating Concept of War (1937)*', 38-40, 45, 'Schmitt thinks that 'the given rulers of a state no longer have the right to maintain the unity of their state with authority'.

Within the 1871 and 1919 Criminal Codes, Article 2 prohibited punishment unless such punishment had been ‘*prescribed by statute before an act was committed*’,<sup>452</sup> a provision that appeared to embrace both *nullum crimen* and *nulla poena* principles. On this premise, deployment of the concepts of norm and exception salvages the *legality* principle – even for a consistent Schmittian – within the domestic domain. Transposed to the international sphere, the same prolonged disorder (1914-1945) formerly conjectured at intrastate level would once more constitute the ‘exception’, whilst the Nuremberg process would signify restoration of ‘norm’. What the Allies were, therefore, obligated to do was not to exercise their ‘sovereign’ authority, as they did, to instigate innovative *crimes* – in the manner of an imperious sovereign dictator. Rather, such power as they enjoyed, they should have harnessed – as commissarial dictators – to revive the interstate order that represented for the German defendants the genuine condition of ‘normalcy’ in the interstate arena. Even from a decisionist perspective, this would have arguably facilitated, if not mandated, the revival of the legal norms embedded within the *jus publicum europaeum*.

If this analysis fails to convince, however, is a *consistent* Schmittian able to found support of the *legality* principle on a more cogent footing? One neither reliant on the natural law perspectives that Schmitt cannot readily invoke to sustain a ban on retrospective penalisation<sup>453</sup> nor on the rabid decisionism that, like a golden thread, so pervasively infused his Weimar skein. Does the solution instead lie in his 1934 turn to concrete order thinking? If so, what significance might a *consistent* Schmittian attach to classical European international law and how does this sustain the desired embargo on *ex post facto* crime creation in the international sphere?

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<sup>452</sup> German Criminal (Penal) Code of 1871 Article 2, translated and reprinted in *Justice Case* [1948] 3 T.W.C. 177.

<sup>453</sup> As seen, Schmitt can consistently berate the Allies for their utilisation of natural law doctrine at Nuremberg. What he repudiates in theory, he is able to criticise in fact when others seek to rely on it. For this reason, he can critique the natural law arguments the Allies postulated to subvert the *legality* principle but what he is unable to do is use natural law as a basis for his own support of that principle.

## The culmination of concrete-order thinking

To unravel this conundrum first necessitates a brief digression into the evolution of his concrete order thinking in the domestic arena, against the backdrop of Nazi Germany. At first glance, his 1934 diatribe against normativism and positivism appears not to uphold the *legality* principle but to confound it.<sup>454</sup> Decrying the ‘*arbitrary formal-juristic labelling*’ and legalistic formalism that rendered the *Rechtsstaat* a laughing stock, Schmitt likens this to the impact on the liberal ‘rule of law’ state of ‘*the bold and imaginatively endowed criminal with the help of the phrase, nulla poena, in the area of criminal law*’.<sup>455</sup> With the advent of the new regime and the concrete orders within it – the courts and the ethnocentric judiciary which Schmitt sporadically depicts as mindless marionettes suspended from a toxic string - no longer does the legal order need to grapple with an existing body of penal law tantamount to a *Magna Carta* for criminals.<sup>456</sup> Juristic interpretation of legislative ‘general clauses’ in the ‘best interests of the nation’ means that Schmitt does not even pretend to profess support for the *legality* principle.<sup>457</sup> Unlike Hobbes, with his advocacy of clear prose to minimise the risk of legal indeterminacy, never does Schmitt express a similar concern to strip statutes of Latinesque jargon.<sup>458</sup> Use of open-ended, nebulous norms facilitates the consequent change, in reality, of the *Recht* without the attendant need to change a single law.<sup>459</sup>

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<sup>454</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 90; also Christoph Burchard ‘Appreciating Carl Schmitt’s work on International Law as Answers to Dilemmas of his Weimar Political Theory’ *Institute for International Law and Justice Working Paper* 2004/8, ‘Before referring to the *nomos* concept, Schmitt was incapable of following either of the traditional bipolar paradigms: Schmitt was neither willing to accept positivism – a school that fled, for Schmitt, in the theoretical negation of politics and pure procedural thinking and hence was conceptually disabled from enshrining substantive determinations – nor prepared to follow a natural law approach. Natural law, its focus on reason and epistemological objectivity and its search for ontological truth, all seemed outdated in times of the reign of irrational masses’.

<sup>455</sup> See *ibid*: Schmitt, 93.

<sup>456</sup> See *supra*: Schmitt ‘Der Führer schützt das Recht’ in *Positionen und Begriffe* (Berlin: Duncker Humblot, 1940) cited *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 192.

<sup>457</sup> See *supra*: Stirk ‘Carl Schmitt, Crown Jurist of the Third Reich on Pre-emptive War, Military Occupation and World Empire’, 1-143, 103: ‘In the first few years of Nazism, Schmitt had to set aside his old fervour for decisionism in favour of the notion of the law as a concrete order, a notion as elastic as the Kellogg-Briand Pact’.

<sup>458</sup> See *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 192.

<sup>459</sup> See *supra*: Schmitt *On the Three Types of Juristic Thought*, 90; for a brief analysis of the significance of this position see *supra*: Chapter 4.



Whether this fascistic instantiation of concrete order thinking was precipitated by Schmitt's almost fervid desire to appease an increasingly hostile and suspicious governmental regime is open to speculation. But is this ultimately of consequence? Even if this *was* his primary objective, does it expose any immanent inconsistency between an institutional mode of thought in the pure form conceived by Maurice Hauriou on the one hand and, on the other, the theoretical approach that Schmitt employed to buttress the Nazi order? Perhaps not, for both feasibly coincide with the notion – indispensable to concrete order thinking – that accountability before the law is governed not by a universal legal norm but '*according to the standards of the particular concrete order to which one belongs*'.<sup>460</sup> Beyond dispute is that the National Socialist regime did possess an array of arcane institutions, all designed to implement the malign ethos it sought to engender. Epitomised by the Leadership Principle, this system of authoritarian governance and the organisations within it Schmitt seems willing to categorise as concrete orders.

If this were the extent of his concrete order thinking, the potential for a more beneficent application would be remote indeed. But does this encompass the legitimate spirit and essence of his third type of juristic thought? If all artifice intrinsic to his purported theoretical justification for the National Socialist regime is stripped away, what remains? Is not the essential truth implicit within Schmitt's concrete-order thinking that '*legal norms, rules, regulations, and decisions must grow out of the intrinsic way of life within each concrete order and speak to its values and needs*'?<sup>461</sup> On this premise, how do institutions such as the Führer, the Honour Court and so forth that Schmitt purposefully – and strategically – selected to accord credence to the Nazi system of governance, satisfy the criteria vital to qualify them as authentic concrete orders? Did they develop organically from a well-entrenched and empirically discernible lived-in existence – that is, from within or below? Or were they no better than despotically conceived institutions which Hitler unilaterally imposed from above by a sheer act of normatively unconstrained sovereign dictatorship? If so, are not these gossamer-thin institutions undeserving of accreditation as the source of the rules and regulations by which the German people were ostensibly bound? And by marginalising all unsavoury manifestations of concrete order thinking, that is, by de-contextualising it from the

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<sup>460</sup> *Supra*: Bendersky *Introduction to On the Three Types of Juristic Thought*, 20.

<sup>461</sup> *Ibid.*

ultimately ephemeral National Socialist regime with its monstrous, institutional trappings, what elements within *On Three Types* is it feasible to salvage?

Pivotal, here, is that Schmitt does recognise the dilemma before every legislator as well as anyone who applies the law either to accept the concrete orders of the institution or destroy it.<sup>462</sup> One perfect paradigm of an authentic concrete order is, for Schmitt, the family. As long as families exist, the jurist has no option than to apply the law in a manner compatible with the ‘*concrete order notions of the concrete institution of the “family”, instead of the abstract arrangement of a general concept*’.<sup>463</sup> Those engaged in disputes concerning interfamilial relations expect the legislature that creates legal norms and the judges who apply it to act consistently with their reasonable expectations as subjects of the law. Foreseeability in the law-making function is crucial and if the legislature, the judiciary, or both of them in tandem contrive to frustrate it to the manifest detriment of those who rely on the certainty and predictability of law creation and application, this represents a fundamental incursion into the legitimacy of the legal order. Not merely rules, this notion of concrete institutions – orders that transcend any attempt at complete standardisation or *normification* – has no bounds.<sup>464</sup> No longer (if ever the case) does Schmitt perceive ‘law’ either as a closed set of positively-given norms or the product of an un-derived sovereign decision (a theory to which he did once appear to subscribe). Neither statute, rule nor norm, it is now *nomos* that is *Recht* in the sense of norm, decision and, above all, order.<sup>465</sup> It is when ‘*nomos means precisely the concept of Recht encompassing a concrete order*’<sup>466</sup> that *nomos* becomes tantamount to the ‘*true king*’.<sup>467</sup>

With this re-conceptualisation of the birthplace and bedrock of every authentic norm, *nomos* attains a quasi-transcendent quality, not in the manner of the immutable precepts of natural law doctrine but as a supra-personal and context-dependent concrete order.<sup>468</sup>

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<sup>462</sup> See *supra*: Schmitt *On the Three Types of Juristic Thought*, 54.

<sup>463</sup> *Ibid*: 55.

<sup>464</sup> See *ibid*: 50 and 55.

<sup>465</sup> See *supra*: Chapter 4 for a more detailed account of concrete order thinking and its interrelationship with decisionism, normativism and positivism.

<sup>466</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*, 50.

<sup>467</sup> *Ibid*.

<sup>468</sup> Compare *supra*: Balakrishnan *The Enemy: An Intellectual Portrait of Carl Schmitt*, 96 and 194 where the author queries how Schmitt could possibly invoke rights anterior to positive law without invoking the spectre of natural law and posits that concrete order thinking is a reach towards natural law. Balakrishnan

This concept of *nomos* provides Schmitt, for the first time, with a viable solution to the *pouvoir constituant* - the search for the founding moment of a new order that so relentlessly taxes his theoretical ingenuity throughout the Weimar period. Neither a hypothetical postulate as with the Kelsenian *grundnorm*<sup>469</sup> nor the equally elusive myth of the ‘unified will of the people’, *nomos* possesses an ontological dimension that facilitates the creation of an originary and existential source of law.<sup>470</sup> Not purely a figment of legal imagination but a sparkling fountainhead - raw, vibrant and real,<sup>471</sup> the concept of *nomos* achieves its truly sublime manifestation in the international sphere of concrete spatiality.

Providing the ‘*decisive connection between order and orientation*’, it constitutes the ‘*immediate form in which the political and social order of a people becomes spatially visible*’.<sup>472</sup> Rooted in land appropriations<sup>473</sup> – a ‘*primordial disposition over the globe*’,<sup>474</sup> *nomos* originates in an initial allocation of finite space between human beings.<sup>475</sup> As the measure by which the land in a particular order is divided and situated, ‘*it is also the form of political, social and religious order determined by this process*’.<sup>476</sup>

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speculates that Schmitt’s portrayal of this makes it seem that he was groping for a new variant of natural law, having previously dismissed it as an anachronism.

<sup>469</sup> Jan Muller ‘Carl Schmitt’s Method: Between ideology, demonology and myth’ *Journal of Political Ideologies* Vol. 4 (1), (1999), 61-85, 67: ‘Taking law as a science of reality or *Wirklichkeitswissenschaft*, Schmitt was eager to emphasize that his concepts were ‘concrete’, ‘radical’ and ‘realistic’ in contrast to the supposedly ‘abstract’ concepts contained in the ‘normativism’ and ‘universalism’ of Hans Kelsen’s ‘pure theory of law’.

<sup>470</sup> See *supra*: Chapter 3 for an account of Schmitt’s theory of democracy and its interface with the will of the people, conceived in terms of myth as the origin of the legal order.

<sup>471</sup> See Carl Schmitt ‘The Plight of European Jurisprudence’ *TELOS* No. 83, (Spring 1990), 35-70, 57, 59 where Schmitt draws heavily on the theory of Friedrich Carl von Savigny, for whom, ‘source is the true origin and true home of law. It is neither a cistern for a pre-scientific, discretionary system of law (cadi justice) nor a sewage system for schemes without spatial or legal boundaries’. Significantly for Schmitt, ‘Savigny’s idea of “source” is to be understood only in this existential sense and not as a historical science or as a positivism of measures enacted in some way or other’; see also *supra*: Piccone and Ulmen ‘Schmitt’s “Testament” and the Future of Europe’, 25 where the authors refer to Savigny’s theory as ‘the 19<sup>th</sup> century paradigm of the conservatism of jurisprudence’.

<sup>472</sup> *Supra*: Schmitt *Nomos*, 70.

<sup>473</sup> Mitchell Dean ‘Nomos: word and myth’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 242, 245, ‘Schmitt insists on the ‘where’ of power – or rather of law. As he puts it: “Prior to very legal, economic and social order, prior to every legal, economic or social theory, there is this simple question: *Where and how as it appropriated? Where and how was it divided? Where and how was it produced?*” (Schmitt 2003: 327-328). Law is understood as geographically situated and situating’.

<sup>474</sup> *Supra*: Burchard ‘Appreciating Carl Schmitt’s work on International Law as Answers to Dilemmas of his Weimar Political Theory’.

<sup>475</sup> J. Peter Burgess ‘E.U law and the *nomos* of Europe’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 185, 187, ‘*Nomos* refers to both territory and the rationality or discursivity of the order that organises it’.

<sup>476</sup> *Supra*: Schmitt *Nomos*, 70.

Though not a commonplace occurrence, such originary events continue to emerge intermittently as long as world history remains fluid and open:

‘...in other words, as long as human beings and peoples have not only a past but also a future, a new *nomos* will arise in the perpetually new manifestations of world-historical events. Thus, for us, *nomos* is a matter of the fundamental process of apportioning space that is essential to very historical epoch.’<sup>477</sup>

Neither intended to breathe new artificial life into dead myths nor to conjure empty shadows the concept of *nomos* denotes an *ordo ordnans*, that is, an ‘order of ordering’ in a global sense.<sup>478</sup> An existential legal power not mediated by laws, *nomos* ‘is a constitutive historical event – an act of legitimacy whereby the legality of a mere law first is made meaningful’.<sup>479</sup> Incapable of translation as regulation, norm, tradition, custom or contract, Schmitt is adamant that *nomos* does not even equate precisely to ‘law’.<sup>480</sup> Uniquely conceived, *nomos* has no parallel. Seemingly not an attempt to ‘smuggle in decisionist thinking by the back door’,<sup>481</sup> more certain it is that though *nomos* - as rule - is the antithesis of the ‘exception’, it is ‘not a rule imposed on an order but rather is the immediate expression of an order’.<sup>482</sup> What this means is that *nomos* does not hover above the legal order it creates as a putatively supreme foundation of every norm and regulation. Rather, it is embedded within a spatially defined concrete order and is indivisible from it.

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<sup>477</sup> *Ibid.*: 78.

<sup>478</sup> *Ibid.*: 72.

<sup>479</sup> *Ibid.*: 73.

<sup>480</sup> *Supra*: Burgess ‘E.U law and the *nomos* of Europe’, 187, ‘In ancient Greek, *nomos* can be defined as “that which is in habitual practice, use of possession”. It is thus variously translated as “law” in general as well as “ordinance”, “custom” derived from customary behaviour, from the law of God, from the authority of established deities, or simple public ordinance (Liddel and Schott 1940). *Nomos* is also “law” in the sense of rationality, the “reigning” order of things or what we would today call “discourse”. Finally, it derives from the verb *neimo* which means “to deal out” “to distribute” or “to dispense”. It is thus also the distribution of rationality, both physical and metaphysical, the logical organisation of things in space and time. It is the spatialisation of rational order’.

<sup>481</sup> Mika Ojakangas, ‘Carl Schmitt and the Sacred Origins of Law’, *TELOS* No. 147, (Summer 2009), 34-54, 40-41, ‘Has Schmitt become a decisionist without the ethical moment, the moment of personal responsibility, inherent in his early theorising?’ Ojakangas denies this on the basis that every seizure of land is not a *nomos*, although conversely, *nomos*, understood in Schmitt’s sense of the terms, always includes a land-based order and orientation. Finally, if an act of appropriating violence founds a *nomos* as it sometimes does, *nomos* means something more than the mere act of appropriation. It is a “total concept” consisting of “concrete order and the concrete organisation of a community”.

<sup>482</sup> Mika Ojakangas ‘A terrifying world without an exterior’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 205, 214.

Never, in Schmitt's view, is it appropriate to detach *nomos* from its unique legal-historical context for it is this connection to a '*constitutive act of spatial ordering*'<sup>483</sup> that confers upon it the legitimacy that legal positivism lacks. With the specious transformation – or attenuation – of *nomos* into 'law' and 'regulation', jurists regrettably jettison their own '*historical, intellectual and professional presuppositions*'.<sup>484</sup> Crucial, above all else, is that humankind must never permit the concept of *nomos* to degenerate into '*the arbitrary right of the stronger*' or the '*normative power of the given*'<sup>485</sup> – that is, the deterioration of "is" into "ought" in a manner reminiscent of the abstract and unanchored normativism that Schmitt professes to deplore.<sup>486</sup>

With this array of '*ground-breaking conceptual tools*' at his disposal,<sup>487</sup> it is in the development of international law and, in particular, the European classical interstate order of the Westphalian system that Schmitt locates his conceptualisation of *nomos*.<sup>488</sup> Securely entrenched within a land-based order<sup>489</sup> – as opposed to the sea where appropriations and demarcations are impracticable – *nomos* is closely affiliated with physical enclosure, whether as a ring of human bodies to form a defence, a shrine to delineate sacred areas or a fence (wall or border) to divide groups of people.<sup>490</sup> What

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<sup>483</sup> *Supra*: Schmitt *Nomos*, 71.

<sup>484</sup> *Ibid*: 76.

<sup>485</sup> *Ibid*: 73.

<sup>486</sup> See *supra*: Burgess 'E.U law and the *nomos* of Europe', 189, where the author highlights the comparison Schmitt draws between *nomos* and legal positivism. For the positivist, contracts and agreements made between European states have nothing at all distinct in comparison with contracts and agreements made with non-European states. The fact that two European states might enjoy an international agreement as opposed to having one with a non-European state is purely a matter of coincidence; see also Louiza Odysseos, 'Crossing the line? Carl Schmitt on the 'spaceless universalism of cosmopolitanism and the War on Terror in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 124, 129, 'For Schmitt, the era of a 'spaceless universalism' transformed the notion of *nomos* from a spatially concrete constitutive act of order and orientation into the mere enactment of acts in line with the ought, in other words, into a normativism that hesitates to draw distinctions and which is, as a result, unable to humanise war and enable peace despite its reliance on the discursive practices of humanity'.

<sup>487</sup> : Burgess 'E.U law and the *nomos* of Europe', 185.

<sup>488</sup> See *supra*: Dean 'Nomos: word and myth', 242, 243, 'The *Nomos* of the Earth could be read as an ode to the loss of a particular world order, that governed by European international law, the *jus publicum Europaeum*. The story of the term, *nomos* is also presented as a loss'.

<sup>489</sup> See *supra*: Ojakangas 'Carl Schmitt and the Sacred Origins of Law', 35, 'In his works since late 1930s, Schmitt time and time again stresses that the true law has an intimate relationship with soil and land. It is always bound to the earth (*Erde*). To such a law Schmitt gave the ancient Greek name *nomos*, which he believed was originally bound to the earth and more specifically to a concrete enclosed location on the surface of the earth'.

<sup>490</sup> See *supra*: Ojakangas, 'Carl Schmitt and the Sacred Origins of Law', 34-54, where the author highlights Schmitt's emphasis on the visibility of land appropriations and the importance that Schmitt attributes to giving such appropriations a 'name'. This for Ojakangas connotes something sacred. *Ibid*: 48, 'Every genuine order of *nomos* presupposes sanctification and all genuine sanctification concern the

fascinates Schmitt is the ‘*realisation that law and peace originally rested on enclosures in the spatial sense*’<sup>491</sup> and it is this focus on physical boundaries that dovetails with the imperative he discerns to bracket war, that is, to contain it within spatial limits.<sup>492</sup> With the equilibrium of equal sovereign states and the relativisation of enmity embedded within it, the concrete order of the *JPE* harmonises with this ‘*singular interpretation and application of nomos*’.<sup>493</sup> In this way, the original act of land appropriation, division and organisation within the landmass of continental Europe, its *nomos* from 1648 until its dismantlement in the aftermath of two World Wars, is epitomised in the humanisation of conflict and the concomitant super-session of the doctrine of *just war*.<sup>494</sup>

Organically emergent from the concrete order of the *JPE* and entrenched indelibly within classical European interstate relations for its duration are ‘*subsequent regulations of a written or unwritten kind [which] derive their power from the inner measure of an original constitutive act of spatial ordering*’.<sup>495</sup> What these norms reflect is not a dead legal positivism that, by ‘*succumbing to the mere legality of an enactment*’ is liable to lose its dignity as a science.<sup>496</sup> This is, instead, the ‘*positivism of the historical source*’ of the type that Savigny advocates to rescue jurisprudence from the quagmire of neutrality and nihilistic emptiness.<sup>497</sup> It is a spatially grounded, historically oriented positivism that, at the same, is interlinked with the ‘political’ – its awareness of the

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question of origins. And precisely due to its sacredness, *nomos* is capable of endowing men with orientation. The sacred opens up a space, a meaningful world, because it localises and hence fixes a perspective that is beyond subjective vacillation’. The author admits that his article is a contribution to the (in)famous “theological twist” in Schmitt studies; on this postulated theological component in Schmitt’s theory, see *supra*: Gottfried ‘*The Nouvelle Ecole of Carl Schmitt*’, 202-205, where the author refers to the ageing Schmitt whom Gottfried claims, ultimately, believed that modern politics cannot exist independently of a mystical or religious framework, a ‘*corpus mysticum*’ of universals to take the place of the established customs and laws protecting national sovereignty.

<sup>491</sup> *Supra*: Schmitt, *Nomos*, 74.

<sup>492</sup> See *supra*: Hooker *Carl Schmitt’s International Thought Order and Orientation*, 72, ‘It [*nomos*] is the original act of dividing, fencing, distributing and organising the land that makes the creation of order possible...Each epoch – each *Nomos* - has its origins in a distinctive form of land appropriation’.

<sup>493</sup> J. Peter Burgess ‘E.U law and the *nomos* of Europe’ in *The International Political Thought of Carl Schmitt* ed. Louiza Odysseos and Fabio Petito (Abingdon: Routledge Press, 2007), 185.

<sup>494</sup> *Supra*: Ojakangas, ‘Carl Schmitt and the Sacred Origins of Law’, 34-54, 49, ‘*Nomos* is not only spatially localised but also historically evolving and developing to the extent that every *nomos* grows naturally but also dies naturally. At some point, *nomos* withers away when it loses its vitality based on its ties to a divine source’. Again here, Ojakangas alludes, perhaps controversially, to the sacred nature of *nomos*.

<sup>495</sup> *Supra*: Schmitt *Nomos*, 78.

<sup>496</sup> *Supra*: Schmitt ‘The Plight of European Jurisprudence’, 35-70, 65.

<sup>497</sup> *Ibid*: Schmitt ‘The Plight of European Jurisprudence’, 35-70, 65.

'uniqueness of peoples, the orientating effect of blood and soil'<sup>498</sup> and the significance of the *Volk* or as Savigny terms it, *Volkgeist*,<sup>499</sup> the particularistic spirit and essence of the people.<sup>500</sup>

For the 'realist institutionalist' Schmitt,<sup>501</sup> *nomos* is an anti-universalistic concept that alone is able to reconcile the tension in the international realm between diverse heterogeneous groups. Impossible as it is to construct a set of abstract rules for the governance of the entire globe and expect every cultural community to adhere to them, it is entirely feasible to expect specific regulative norms to emerge within each concrete order.<sup>502</sup> This achieves a 'basic level of commonality', a shared understanding that prevails amongst all those within the order as to how to plan their lives and standardise their conduct.<sup>503</sup> Within their spatially constrained and ordered lived-in existence, what every inhabitant within the *nomos* is able to attain is a normalisation of everyday life<sup>504</sup> – an inter-subjectivity of approach that confers the minimum guarantee of certainty and predictability that each craves within the law-making function.<sup>505</sup> Attributable not purely to a set of prescribed legal rules, such qualities are integral to the concrete order

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<sup>498</sup> *Supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 140.

<sup>499</sup> *Supra*: Schmitt 'The Plight of European Jurisprudence' 35-70, 61.

<sup>500</sup> On this point, see *supra*: Hooker *Carl Schmitt's International Thought Order and Orientation*, 141 where the author queries 'why the notion of the "political idea" and its "radiation" in a large space is qualitatively distinct from the state-form that Schmitt regards as obsolete. It is clear that states, as Schmitt understands them, were possessed of a political idea in the sense of a specific orientation, an understanding of their own particularity and their successful functioning in a pluriverse. This imperative to possess a political idea is therefore little more than an amplification of Schmitt's existing theory of the state – the philosophical bolstering of the core component of sovereignty and definitive barrier to the assertion of liberal universalism'.

<sup>501</sup> *Supra*: Colombo 'The realist institutionalism of Carl Schmitt', 21.

<sup>502</sup> *Supra*: Schmitt 'The Plight of European Jurisprudence', 35-70: 'For me, legal philosophy is not the application of a vocabulary of an existing philosophical system to legal questions but the developments of concrete concepts out of the immanence of a concrete, legal and social order'.

<sup>503</sup> *Supra*: Schmitt 'The Age of Neutralisations and Depoliticisations', 130, 134, 'All concepts, including the concept of mind are pluralistic and can only be understood in terms of concrete political existence. Just as every nation has its own concept of nation, and finds the constitutive characteristics of nationality within itself, so every culture and cultural epoch has its own concept of culture. All essential concepts are not normative but existential'.

<sup>504</sup> *Supra*: Schmitt *Nomos*, 327, 'Concretely speaking *Nomos* is, for example, the chicken every peasant living under a good king has in his pot every Sunday; the piece of land he cultivates in front of his property; the car very worker in the US has parked in front of his house'.

<sup>505</sup> *Supra*: Piccone and Ulmen 'Schmitt's "Testament" and the Future of Europe', 3-34, 23 where the authors compare this approach to 'Husserl's phenomenological reduction' which 'is meant to generate an awareness of the constitutive processes which go into producing the world as we, the subjects of European civilisation...experience it in order to re-examine its originally motivating teleology and to recognise the extent to which it has been corrupted'; also *ibid*: 29 as to the value of Husserlian phenomenology; see also *supra*: Schwab *The Challenge of the Exception*, 125 where the author highlights the relevance of the Phenomenological School - in particular in the sphere of criminal law - when seeking to understand Schmitt's reliance on intuition and essence.

and spatially organised parameters that delimit the expectations of the occupants within them.<sup>506</sup> As long as a particular concrete order endures, this entitles all communitarian groupings that comprise it to trust unequivocally in the legal process, that is, the creation and implementation of legal norms in conformity with the standards it represents.<sup>507</sup>

‘Thus, *Nomos* represents a complex mediation between the particular and the universal, through which political groups gain recognition and the ability to project and protect their own concept of collective life.’<sup>508</sup>

Despite this emphasis on collectivity and the concrete co-existence of persons within the *JPE* who order their lives according to the *nomos* from which their norms derive, not once in *Nomos of the Earth* does Schmitt refer to the *JPE* as European customary law. Always either *classical* or *traditional* continental European law, the collection of organically evolving conventions and habituations that flourish within it and bind together the concrete order Schmitt is careful to distinguish from the customary law that in the domestic domain he appears to reject. Relevant again to the nature of sovereignty, it is clear that within the concrete order of the *JPE*, the concept of *nomos* is the origin and source of law; the ensuing ‘customary’ norms merely the instrument of this prior empirical instance - the spatial ordering that is Schmitt’s constant refrain.

Within the legal-constitutional order of a nation state, it is possible to identify ‘*certain important areas of life*’, especially criminal law, where ‘*the permissibility of customary law is still controversial*’ because it acts as a ‘*restrictive reservation working to the disadvantage of the lawmaker*’.<sup>509</sup> Laws, established by custom and practice, in this context, fetter rather than augment or reflect sovereign authority and this dilution of the sovereign will Schmitt is not prepared to concede. This contrasts with the concrete order of classical European law within the *JPE* where derivative customary norms – as the

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<sup>506</sup> See *supra*: Paul Piccone and Gary Ulmen, 26, ‘Schmitt argues that there is a European community predicated on a shared heritage of Roman law that provides a recognised model of juridical thinking and thereby a European common law. The task of European jurisprudence is to recover this common law and contrapose it to bureaucrats and technocrats who reduce it to regulations and procedures’; also *supra*: *Nomos*, 78, ‘Every new age and every new epoch in the coexistence of people, empires and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures and new spatial orders of the earth’.

<sup>507</sup> *Ibid*: Schmitt, 193, ‘The methods of empty normative generalisations are indicative in their deceptive abstractness, because they fundamentally disregard all concrete spatial viewpoints when considering a typical spatial problem such as territorial change’.

<sup>508</sup> *Supra*: Hooker *Carl Schmitt’s International Thought Order and Orientation*, 25.

<sup>509</sup> *Supra*: Schmitt *Legality and Legitimacy*, 17.



actual manifestation of *nomos* - are not only admissible but indispensable. Is this, however, a distinction without a substantive difference? Whilst, as seen, Schmitt flatly denies any direct congruence between *nomos* and custom, the characteristics of each appear at times indistinguishable. If this is so, does this confluence of concepts undermine the latitude that concrete order thinking appears to afford Schmitt in his invective against the subversion of the *legality* principle at Nuremberg?

### **Concrete order thinking in the international realm: expectations and frustrations.**

As Chapter 2 explores, Robert Jackson - at the vanguard of the Allies' initiative to inscribe the *crime of waging aggressive war* within the Nuremberg process, and beyond - relies explicitly on the conceptualisation of international law not as '*a scholarly collection of abstract and immutable principles but an outgrowth of treaties or agreements between nation and of accepted customs*'.<sup>510</sup> No longer is it an impediment to the instillation of offences that unassailable precedent in the form of positive treaties or conventions is absent. Customary norms suffice, without more, to enable what have previously been no more than nebulous stirrings in the international realm to receive permanent status within the new universalistic regime that is henceforth to hold the world in subjugation. Prey to this exploitation of customary law is the *legality* principle.

What custom and practice embed within a legal order, the Allies - ably supported by the Tribunal in its endorsement of the salient elements of the Charter relating to *crimes against peace* and individual responsibility for them - successfully challenge, using parallel arguments no less derived from customary law. For the Allies, the norms that custom and practice propagate constitute a device to encourage dynamism within international law, that is, to produce new strictures upon individual conduct where none before existed. This perception is, to Schmitt, a flagrant and fundamental distortion of so-called customary norms. Contextualised within the *JPE*, the overriding function of customary law - within the constraints of the definition he implicitly prescribes - is to preserve the established order or *nomos* and with it the reasonable expectations of the populace within it. Only then is state sovereignty likely to endure and, with it, the *legality* principle that prevents citizens - compliant with the legal-constitutional norms of their domestic regimes - from suffering the depredations of retrospective penalisation under what are, to Schmitt, unprecedented norms of a specious and monopolistic international law.

Crucial, in contrast, to the existential ordering of the Eurocentric *JPE* and the concrete strictures by which its inhabitants are normatively bound - though not in the empty mechanistic sense of a functionalistic and hollowed-out legal positivism - are all those quintessential elements born of the original land appropriations and spatial delimitations that founded it. Chief of these, as seen, is the institutionalisation of war and the

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<sup>510</sup>Jackson: 2 IMT 147.

consequences tangential to it. Pivotal amongst them is that states alone are the subjects of legal regulation with the corollary that individual citizens of those states are wholly immune from the norms of transnational or supranational law (save to the extent of breaches of the *jus in bello*, that is, *war crimes* in the old sense and acts wholly analogous to them). An individual within the concrete order of the *JPE* is entitled to assume that for any putatively criminal acts lying beyond such pre-defined parameters, accountability before the law is simply beyond the realm of contemplation. Purported imputation of individual responsibility where none previously exists cannot be predicted because never is it feasible to foresee the unforeseeable.

What inhabitants within the *nomos* of the *JPE* also have reason to expect is that never will they be subject to prosecution for alleged violations of any abstractly conceived and universally deployed free-floating norms of so-called international criminal law. Self-evident it is, in particular, that occupants of continental Europe are unable to be held to account for the putative *crime* of *waging aggressive war*. Equally axiomatic is that those who reside within the concrete spatiality of the *JPE* plan their lives on the premise that within the *nomos* circumscribing their communal existence, the *nullum crimen nulla poena sine lege* principle applies without exception. From a European perspective, not only does this absolute embargo on retrospective penalisation prevail throughout continental Europe but, as seen, is satisfied only by prior law in the positive sense of ‘*a written, formally promulgated, penal law issued by the state*’:<sup>511</sup>

‘This interpretation has become so self-evident to the average jurist of the European Continent over the course of the past two centuries that he is, to a man, hardly aware of the possibility of other interpretations.’<sup>512</sup>

Implicit within Schmitt’s critique of the Nuremberg process and most tellingly, of Article 6(a) of the Charter, is the unqualified status of the ban on retrospective crime creation and punishment within classical continental European law.<sup>513</sup> Throughout his 1945 *Gutachten*, the polemic he launches against the innovatory category of *crimes against peace* rests on the premise that the *nullum crimen nulla poena sine lege* doctrine was indelibly entrenched within the normative traditions of the *JPE*. Put simply, if the

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<sup>511</sup> *Supra*: Schmitt ‘The International Crime of the War of Aggression’, 131.

<sup>512</sup> *Ibid.*

<sup>513</sup> See *supra*: for Schmitt’s interpretation of the Versailles process and the Kellogg-Briand Pact 1928, both of which demonstrate that the *nullum crimen nulla poena sine lege* principle was firmly embedded in the law of the *JPE*.

*legality* principle had not previously attained indisputable status as an unconditional embargo, superfluous it would have been for Schmitt even to contemplate the *ex post facto* characteristics of *waging aggressive war* and the ramifications consequent upon them. What was to be achieved by contesting the validity of an ostensibly retroactive *crime*, without steadfast belief in the prior, common understanding amongst all within its potential remit that *post factum* penalisation constituted flagrant transgression of the norms that bound them? Within what Schmitt describes as ‘*a very strong European legal community*’, ‘*the comity of nations in the practical international law of the jus publicum europaeum*’, and ‘*a specific and typically European juridical standard in codification, legislation and justice*’<sup>514</sup> unequivocally nestled the absolute ban on retrospective crime creation and punishment to which all ‘*civilised nations*’<sup>515</sup> - including France and pre-Nazi Germany - subscribed. It was the concrete spatiality of the *JPE* - as *nomos* - that forged this existential expectation of every inhabitant of continental Europe over an epoch of over two hundred years.

To summarise Schmitt’s perspective, occupants of the *JPE* were able to order their lives on the following fundamental empirical and normative assumptions:

- The sovereignty of the nation state was unassailable
- International law in the sense of an overarching universalistic set of supranational norms did not, therefore, exist save to the extent that such norms had been expressly and consensually incorporated into the domestic law of each nation state
- States alone were recognised as subjects of interstate or international law
- The decision to wage war lay within the sole determination of the state
- Individuals had no right to resist such decision of their state to wage war
- Having demonstrated the requisite obligation to the state to bear arms, individual citizens were then entitled to unconditional protection from the state to which they had pledged their allegiance
- The defences of *superior orders* and *acts of state* were impregnable save to the specific extent to which each nation state had previously acceded
- At no time had precedent been established either for the criminalisation of aggressive war or the imputation of individual criminal responsibility for it
- Purported ascription of individual responsibility for the alleged *crime of waging aggressive war*, therefore, violated the *legality* principle and represented an exercise of arbitrary law-making in flagrant breach of the norms of classical continental European international law
- Never was it legitimate for *supra-national* ‘norms’ to criminalise individuals on an *ex post facto* basis for acts which were legal at the date of commission or for which liability rested purely with their states

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<sup>514</sup> *Supra*: Schmitt ‘The Plight of European Jurisprudence’, 35-70, 37.

<sup>515</sup> *Ibid.*

For Schmitt, the impeachment of the *legality* principle at Nuremberg was, therefore, unspeakable. Not only was this subversion of the embargo on *ex post facto* penalisation causative of a normative disruption but was also instrumental in the wholesale destruction of the particularistic and state-centric *JPE*.<sup>516</sup> Once contravention of classical continental European law occurred, this inflicted a mortal wound upon the old *nomos* of the *earth*, especially poignant when no viable *nomos* emerged, capable of taking its place. Value-neutral legal positivism and natural law perspectives - the polarised dichotomy of liberal ideology - were the destroyers of the *jus publicum europaeum* as surely as each, in turn, fatefully undermined the *legality* principle, the first in the death throes of the Weimar Republic and the other during the Allies' evisceration of it at Nuremberg. Correlative to the havoc this wrought to the *nullum crimen, nulla poena* doctrine, neither of these modes of juristic thought - legal positivism and natural law doctrine - convincingly avails a *consistent* Schmittian committed to the inverse position, that is, an outright ban on retrospective penalisation in the international realm. Nor somewhat fortuitously does this model require recourse to either of them to salvage the *legality* principle. Apposite, instead, is the reconfigured and authentically deployed brand of concrete-order thinking that Schmitt synthesises in the international dimension and locates within the *nomos* of the *JPE*.

The perceived attributes of concrete order thinking notwithstanding, an institutional mode of thought contains deficits that both imperil its utility in founding a viable critique of the Nuremberg process and its capacity to furnish a credible basis on which to uphold an outright embargo on *ex post facto* crime creation and punishment. Without overly-taxing the imagination, it is not difficult to '*conjure up a counter-position to Schmitt's which points to the ever changing character of words and concepts, and their dependence on specific discursive and social-political formations*'.<sup>517</sup> In short, never does Schmitt formulate a set of clear and comprehensive criteria as a pre-requisite to qualification as a *concrete order*. Nor does he provide any insight into the precise moment or prevailing circumstances when a legal order that once fulfilled the tacit pre-conditions for classification as a concrete order forfeits this status. Credible though it

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<sup>516</sup> *Supra*: Dean 'Nomos: word and myth', 242, 246, 'Schmitt is above all concerned with humankind's necessarily telluric or earthbound character; the philology of *nomos* reveals not the primacy of appropriation but the concrete existence of human communities in their occupancy of the earth and orientation on it. He contests liberalism in its many guises but he attacks it through its base in the abstract privatised individual which is not simply a deterritorialised being but an uprooted and disoriented one'.

<sup>517</sup> *Ibid*: 245.

seems for Schmitt to treat as a concrete order the *jus publicum europaeum* - a *nomos* of almost three hundred years duration - less compelling is the argument he advances in relation to the embryonic and untested institutions of Nazi Germany.<sup>518</sup>

If post-1933 Germany was the measure of a concrete order and the norms emanating from it - however *ad hoc* and arbitrary - indicative of a commonality of understanding amongst all its citizens, how is a consistent Schmittian to reconcile the embrace of retroactive penalisation within this purported 'order' with the invective his namesake launches against the Allies' subversion of the same principle in 1945? Did not all those institutions that the Nazis conceived and coalesced to form the putative 'concrete order' of the National Socialist regime - with its flagrant amendment of Article 2 of the pre-existing German Criminal Code and its suspension of Article 116 of the Weimar Constitution – transform the perspectives of those enmeshed within it? Was not subjugation to norms of criminal law no more retroactive than those extant within *their* domestic concrete order the only guarantee they were, thereafter, entitled to expect? On this premise, *ex post facto* penalisation, within the municipal regime to which they pledged allegiance, fatally compromised their capacity to rely on objective conceptions of due process.

More drastic still was the impact this inflicted upon their capacity to rely on the *legality* principle that held sway and, until then, accorded them protection in the sphere of *interstate* relations. Though arguably operative in distinct domains, what the new concrete order *within* Nazi Germany did was to insinuate into the lived-in existence of those affected, the displacement of the ubiquitous ban on *ex post facto* penalisation not only in the domestic context but also within the concrete order of the *JPE*. Irrelevant on this premise became both the *non-retrospectivity norm* of the *JPE* in the international sphere and, in the domestic domain, the original Article 2 of the pre-existing German Criminal Code and the suspended Article 116 of the 1919 Reich Constitution.<sup>519</sup>

*Interstate* law was, for Schmitt, the consensual extension of aspects of the municipal laws of the nation states that subscribed to it. Once the domestic law of Germany - one

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<sup>518</sup> *Supra*: Schmitt *On the Three Types of Juristic Thought*.

<sup>519</sup> See *supra*: Chapter 2 for discussion of the quasi-estoppel arguments raised during the Nuremberg proceedings.

of the key players of the Continental European *JPE* – underwent fundamental transformation, this effected a commensurate disruption of *interstate* norms. Never was it feasible for state citizenry to grope beyond their frontiers for protection more potent than the municipal regime that demanded their primary allegiance. If citizens were to expect immunity from individual responsibility under what were professedly universalistic, international criminal norms – on grounds of their subjective non-recognition of supranational law - they were debarred from seeking equivalent safeguards from that self-same source when their domestic legal-constitutional regime failed them.

Against this, was it not properly concomitant with the defendants’ expectations that no norms, save those embedded within classical *interstate* (not *intrastate* law) – not least of which was the *legality* principle itself - would comprise the governing provisions at Nuremberg? The more so, when the indictments the Allies drafted and implemented against the defendants arraigned them before what professed to be an *international* Tribunal. If the Allies demanded accountability of the ‘Nazi War Criminals’ before a forum charged with enforcement of *international* criminal norms – laws that putatively transcended the municipal regime to which the defendants had subscribed - this entitled the alleged perpetrators to rely on the *legality* principle entrenched within the *interstate JPE*. No longer were they constrained by the Nazis’ abrogation of the *nullum crimen nulla poena* doctrine within the post-1933 German legal-constitutional system. Irrespective of violation of the ban on *ex post facto* penalisation within Germany, what continued to avail the Defendants was the concrete order of the *jus publicum europaeum*; the paradigmatic concrete order singularised by the *legality* principle that Schmitt claims was embedded within it. Schmitt’s ostensible rapprochement with the Nazis, and the consequential readiness he evinced to treat as concrete orders the perverted institutions they installed, was born purely from opportunism or fear. Unlike the ephemeral and volatile National Socialist regime destined to engender chaos and disaster, it was the *JPE* alone that attracted the status of a concrete order capable of regulating the lives of those within it over an enduring period of comparative normalcy and stability.<sup>520</sup> The exemplar of an authentic concrete order, the *JPE* was the *nomos* to

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<sup>520</sup> See *supra*: Chapter 4 for elucidation of Schmitt’s linkage of concrete order thinking to conditions of stability rather than flux.

which the Allies and the Tribunal were mandated to defer at Nuremberg in concert with the unimpeachable *legality* principle enshrined within it.

Applied to the Chapter 2 typography, does concrete order thinking enable an adherent to an internally harmonised Schmittian perspective to repudiate each of the retrospective strands it seeks to identify? Had Schmitt advocated a juridical disposition of the defendants at Nuremberg for *crimes against humanity*, reconciliation of *ultratemporal*, *jurisdictional and locational* retrospectivity with his overall theoretical position would have been problematic. *Ex post facto* prosecution for acts perpetrated against one's compatriots during peacetime and legal under the *lex loci*, that is, the positive law of the place of perpetration were key aspects of *crimes against humanity*. Common to these components was intervention into the internal jurisdiction of another sovereign state, and this infringement of national sovereignty was always anathema to Schmitt.

Also antithetical to a consistent approach were the defences of *acts of state* and *superior orders* that the Allies sought to nullify to differing extents in Articles 7 and 8 of the Charter. What his *Gutachten* explicitly vetoed was the availability of the defence of *superior orders* for the commission of atrocities. Repudiation of this defence Schmitt appeared to rest upon the same substantive precepts of natural law that he generally refused to embrace. Had not Schmitt preferred a *political* solution to dispose of the defendants indicted under Article 6(c), the feasibility of outright rejection of *descutarial retrospectivity* would, therefore, have been open to question.<sup>521</sup> Conceded also in the same *Gutachten* was the possibility that Heads of State and those within the inner enclave of power were synonymous with the legal personality of the state and liable to prosecution for decisions, including the act of *waging aggressive war*, nominally made by the state. If this were so, defendants formerly ensconced at that level of governance could no longer rely on the *acts of state* defence. At variance with Schmitt's persistent and all-pervasive valorisation of sovereignty authority within the nation state, this

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<sup>521</sup>*Supra*: Schmitt 'The International Crime of the War of Aggression', 187, 'The dominant view and praxis in all states of the earth stand in opposition to it – namely that the individual is obliged, in the event of war, to loyalty and obedience to his national government, and that the decision about the justice and injustice of a war is to be put not to the individual but to the national government. Here too, one must note that this does not concern taking part in atrocities, in barbarities, but rather the question of the international crime of war as such'.



surprising divergence is primarily explicable by the purpose of his legal opinion, that is, the provision of a potential defence for the industrialist, Flick.<sup>522</sup>

These anomalies aside, what of Article 6(a) of the Charter – the innovatory *crime of waging aggressive war* that formed the centrepiece of Allied strategy at Nuremberg? For this aspect of the entire process Schmitt reserves the brunt of his polemic and it is in this context that utilisation of a *consistent* Schmittian (CS) interpretative model - based on concrete order thinking - evokes rejection of each of the shades of retrospectivity within the Chapter 2 typography pertaining to *crimes against peace* and *conspiracy* to commit them.<sup>523</sup> How the remaining Charter offences interact with this typography of retrospectivity is also briefly highlighted in the same Table. Exploitation of these diverse shades of retrospectivity, the Allies employed without compunction to ensure that the Nuremberg defendants, the culpability of whom they arguably pre-judged, would not go free.<sup>524</sup>

Save to the extent that the precise ambit and application of the Charter was modified – for example, in the specific context of *conspiracy, crimes against humanity and organisational guilt* - the Tribunal did compound the Allies' subversion of the *legality* principle. From a Schmittian perspective – founded on concrete-order thinking – it was incumbent on the Members to exercise their judicial function in accordance with the pre-existing norms embedded within European international law. A properly considered interpretation of the established order, and the implementation of their discretion consequent upon it, would have educed rejection of the Charter as an arbitrary act of legislative fiat. Inexorable also would have been repudiation of prosecution arguments founded on disingenuous distortion of substantive natural law precepts. Concordant with the secularised interstate order of the *JPE*, where positivisation and nationalisation were synonymous, the Members were bound to refute pre-eminence of the chimerical norms of natural law doctrine – as manipulated to serve the Allies' agenda - over the positive law of each sovereign state within it. This mandated the Tribunal to abnegate the catalogue of innovatory *crimes* and *processes* that the Allies inveigled into the proceedings, all in contravention of the *nomos* governing the communal existence of all continental Europeans throughout the period when the Allies claimed the violations of

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<sup>522</sup> See *supra*: Schmitt 'The International Crime of the War of Aggression', 178-183.

<sup>523</sup> See Appendix 3; the only possible exception is restitutorial retrospectivity.

<sup>524</sup> As Chapter 2 explains, in this the Allies were not wholly successful, in light of acquittal of three of the Defendants.

international law to have occurred. To the extent that the Members facilitated the instantiation of retrospective penalisation, their decision at Nuremberg was, to a *consistent* Schmittian, fatally flawed.

Armed with the array of jurisprudential devices at their disposal, the Allies and the International Military Tribunal at Nuremberg subjugated the *legality* principle to the juridical process they respectively engineered and enforced just as surely as the Allied Forces compelled the Nazis to succumb in battle. Juxtaposed with this circumvention, if not wholesale transgression of the embargo on retrospective penalisation, a *consistent* Schmittian could have done no worse. Whatever the underlying motivation for the polemic Schmitt sought to muster against the violation of the *nullum crimen nulla poena sine lege* principle that pervaded the proceedings; however susceptible to criticism his brand of reconfigured concrete order thinking may be, it is difficult to conjecture how it would have guaranteed the integrity of the ban on retrospective penalisation any *less* effectively than either the value neutral positivism or natural law precepts that proved its downfall.

What each of these jurisprudential perspectives - natural law and legal positivism - entailed was the final dismantling not only of the *jus publicum europaeum* but also the *legality* principle on which its inhabitants had come to depend. Capable of selective extrapolation from Schmitt's work, in contrast, is an interpretative model that provides ample ammunition not only to retrospectively justify the sanctity of the embargo on *ex post facto* crime creation and punishment – ruthlessly overstepped at Nuremberg - but, perhaps, also to safeguard the *legality* principle for posterity. For whenever juridical processes depart from entrenched expectations of certainty, predictability and foreseeability in the enactment and application of criminal law norms, does this not inevitably compromise the integrity of the legal order that seeks to deploy them? However ironic it is that insights garnered from the authoritarian Schmitt promise more for the future of the *nullum crimen nulla poena sine lege* principle in the international sphere, than the ideological perspectives of mainstream liberalism, it is this that constitutes the Schmittian legacy to the Nuremberg-centric debate on the relative theoretical and empirical pre-eminence of 'law' and 'power'.

## **CHAPTER 6**

### **CONCLUSION: EMERGING FROM THE VORTEX**

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What the foregoing chapters have sequentially endeavoured to explore and elucidate is the doctrinal basis for the Nuremberg Trial of the Major Nazi War Criminals; next the legal and political theory of their Crown Jurist and contemporary analyst, Carl Schmitt, during the period 1912 to 1950 and, finally, the legal legitimacy of the Nuremberg process from a Schmittian perspective. Pivotal to this evaluative journey has been the pre-World War II status of the *legality* principle and the validity of the juridical disposition of the Nazi defendants that the Allies conceived and implemented, in part, through the abrogation of the putative ban on retrospective penalisation. As revealed, crucial to the debate this continues to engender is the abiding jurisprudential tension between legal positivism and its natural law counterpart.

Reliant as it was on an intriguing blend of doctrinal sources, what transpired at Nuremberg has evoked an abundance of critical comment, not least prompted by the ostensible novelty of the London Agreement 1945 and the controversial treatment of the *nullum crimen, nulla poena sine lege* principle concomitant with it. More than a Trial, the Nuremberg proceedings were vaunted by the four nations, which emerged victorious from the conflagration of the Second World War, both as the revitalisation of the rule of law and its supreme vindication. From the perspective of those indicted, the inverse was true. At the mercy of a novel forum instantiated in the International Military Tribunal and an array of innovatory evidential and procedural techniques, the Nuremberg defendants felt the full force of subjection to what were, from a positivistic standpoint, newly conceived and, therefore, retrospective criminal norms. Invidious enough this would have been if implemented before a domestic tribunal, the introduction of a ‘universalistic’ international law - though one perversely formulated and enforced only against alleged perpetrators from the Axis nations - grossly compounded the intrinsic newness of the process. Accompanied by effectual nullification of the pre-existing defences of *acts of state* and *superior orders*, the Charter offences of *conspiracy*, *waging aggressive war* and *organisational guilt* lacked foundation in *lex scripta*, the written law familiar to continental Europeans. To a lesser extent susceptible to a similar

criticism, was the indictment of the defendants for aspects of the offence of *crimes against humanity*.

Undaunted by such doctrinal lacuna, however, the Allies educed precedent, in part, from customary legal norms. These, they claimed comprised the bedrock, if not also the catalyst for a burgeoning system of progressive and all-embracing international law. And when positive law in all its manifestations - a designation that encompassed *lex scripta* and also, where expedient, customary norms - provided insufficient substantive foundation for the Charter that the Allies, as victors, had unilaterally formulated and deployed, they prevailed upon natural law doctrine to provide the requisite authentication. Readily applicable to the Article 6(c) offence of *crimes against humanity* - where the Nazis ought surely to have foreseen that heinous acts contrary to a transcendent moral code would reap commensurate punitive sanction before the law - the chimerical norms of natural law were to impinge upon facets of the Charter where their influence was less predictable. Exacerbating the Allies' determination to insinuate a manipulated variant of natural law into the Nuremberg process was the category of *crimes against peace*. As Chapters 2 and 5 demonstrate, it was the contention of the victors - chiefly the Americans - that waging aggressive war was an affront to morality no less than the other atrocious acts that characterised the Nazi regime. Critical to this strategy was the ability of its proponents to dredge legitimacy for the Charter from a complex amalgam of natural law doctrine, customary legal norms and positive doctrinal sources (on the rare occasions where available). All, at intervals, malleable instruments of the Allies' resolution to transform the international legal order, they enabled the Nuremberg process to leave an indelible imprint on the development of the universalistic norms that regulate the conduct of nation states - and the citizenry within them - to the present day.

No longer were defendants permitted to evade criminal liability on grounds that states alone were subjects of international law. Those responsible for violation of international legal norms were accountable as common criminals, no less that had they infringed the law of the nation states of which they were citizens. Though individuals were generally bound in loyalty to the legal-constitutional order of their domestic regimes, a higher duty prevailed. This was the fealty of every human being to the norms of international law. If this quest for instillation of a reconfigured global order entailed either breach or disregard of the *nullum crimen nulla poena sine lege* maxim, this was a price that the

Allies clearly felt they were entitled to exact. For the victors of WWII, the ends *did* justify the means. Reliance on the precepts of natural law the Allies thus employed, first to interpret the status of the *legality* principle within international law and, then, to subvert it. For the victors and the Tribunal, the putative embargo on retrospective crime creation and punishment always hovered in a purely contingent condition. Never more than a principle of reason and justice, it remained susceptible to the demands of a countervailing justice that those who wished to controvert it adjudged superior. It was precisely the need to exact retribution against the perpetrators of the vilest acts of inhumanity ever, at that point, committed either during peacetime or war, and to deter future generations from comparable monstrosities that mandated this level of exceptional response.

More crucially, within the momentous challenges that confronted the Allies – and the Tribunal – in the immediate aftermath of World War II, the *legality* principle was, in their view, an expendable sacrifice to an overriding impetus to galvanise a new world order. Had the Members honoured the categorical ban on retrospective crime creation and punishment that the *legality* principle appeared to prescribe, doubtless they would have been constrained at the outset to accede to the Motion of Defence Counsel contesting the inherent validity of the Charter.<sup>1</sup> Once stymied by this pre-emptive decision, never would the more contentious aspects of the proceedings have been aired. Consequent to this would have been a commensurate diminution in the normative impact of the Nuremberg process upon the future of international law. What these landmark proceedings signified, however, was to prove the reverse. International law underwent a fundamental transformation at the fleeting expense of the *legality* principle that, for the scintilla of time the Trial occupied, the Allies and Tribunal in varying degrees, transgressed. The fate of the *nullum crimen* doctrine this transiently engendered mirrored the permanent demise of the *JPE* that succumbed first to the value neutral positivism that liberals sporadically advocated at one end of their oscillating theoretical spectrum. Next, to the tyranny of values that at the opposing end they sought to promulgate. What the liberal-minded creators of the *Rechtsstaat* of Weimar Germany and the implementers of the Constitution at its spine failed to safeguard by omission or

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<sup>1</sup> See Motion adopted by all Defence Counsel 19<sup>th</sup> November 1945 1 IMT 48 available online at <<http://www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm>>. This is discussed *supra*: Chapter 2. Throughout this volume and thesis, where short quotations from published works appear in the body of the text, these have been uniformly italicised for emphasis but are not italicised in the originals from which they have been transcribed.

lack of prescience within the *domestic* context, the liberal-inclined Allies (certainly the Anglo-American contingent) contrived by design to undermine in the *international* sphere.

Though the jurisprudential deficits of the Trial were palpable, the more so from the perspective of a stringent positivist who searched, in vain, for substantive precedent to validate a plenitude of elements within the Charter, what of the amoral and, frequently, decisionist Schmitt? As seen in the Chapter 3 exposition of his theoretical skein, scant evidence emerges from his work to support an assertion that Schmitt subscribes to traditional natural law doctrine. Feasible it, therefore, seems for a consistent Schmittian to sustain a critique of the Nuremberg proceedings and the attendant subversion of the *legality* principle, founded on vilification of the Allies' exploitation of natural law precepts. But the same immutable and rationally discernible concepts are, conversely, unavailable in his quest to uphold an outright ban on retrospective crime creation and punishment. Imperative it, therefore, becomes to locate an alternative rationale.

Adherence to the decisionist theory that Schmitt espouses with varying degrees of intensity and consistency during the Weimar Republic appears to undermine the efforts of a consistent Schmittian to condemn the Charter as an act of pure legislative fiat on the part of the Allies. Flouting both precedent and concrete orders as stabilising institutions within the state, decisionism permits the sovereign authority, that is, the entity with power to wield it, to suspend the entire legal order in the *exception* for a period of potentially indefinite duration. This notwithstanding, the esoteric construal of norm and exception in Chapter 5 - applied to the historical sequence of events from the years preceding the inauguration of the Weimar Republic until 1945 – accords the decisionist Schmittian some vestige of theoretical artillery with which to assail the Charter and remain consistent with his self-vaunted agenda. Plausible to this extent to reconcile a critique of the Nuremberg process directed at the decisionist nature of the Charter, with the overall tenor of Schmitt's Weimar productions such enterprise, however, remains tenuous at best.<sup>2</sup>

Still on a decisionist theme, more persuasive is what Schmitt implicitly deems the dualistic essence of sovereignty in domestic and international arenas, his intention being to promote the integrity of the sovereign state from threats both within and beyond its

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<sup>2</sup> See Chapter 5 for a fuller evaluation of this point.

confines. As discussed in Chapters 3 and 5, a pluralism of indirect interests undermines sovereignty within the state, whilst an overarching monopolistic universalism destroys the *pluriverse* that Schmitt demands in the international realm. Elimination of the political, and all it entails, is as injurious to the integrity of the nation state within the entrenched Eurocentric order that Schmitt reveres, as neutralisation is to the sanctity of sovereign authority within the legal-constitutional domestic arena. Only with valorisation of state sovereignty is it possible to preserve the legal order in both an empirical and normative sense. What the Nuremberg process represents, for Schmitt, is a wholesale eradication of ‘the political’ strangely, on this occasion, consequent upon the Allies’ puissant exercise of political authority and not its attenuation. The irony of this realisation could not have escaped Schmitt.

Hardly surprising it is, therefore, that the polemic Schmitt launches against the Nuremberg process acuminates in the purported criminalisation of war that Article 6(a) inscribes. Not only does this fatefully transformed concept of the established legal institution of war disregard the innate predisposition of human beings towards conflict but also threatens to transform war between nations into a global civil war. A misguided repression of enmity and the attendant negation of the right of each sovereign state to self-determine when and why to wage war culminate in a lamentable depoliticisation that threatens to engulf the entire world within its suffocating shroud. These and other facets of his Weimar work Schmitt does not seek to displace even as, in 1934, he appears to diverge from the decisionist theory that characterised his pre-Nazi phase: the natural proclivity of human beings towards violence; the indispensability of the ‘political’; the duty of unconditional obedience to the state authority; the survival of the ‘people’ as a communitarian essence; the abnegation of individualistically asserted contra-state rights; repudiation of liberal perspectives whether manifested as value neutral legal positivism or natural law tended ideology. All continue to infuse the institutional mode of thought with which Schmitt toys after the demise of the Weimar Republic, as his search for a sustainable legal order persists.

Even if somehow practicable for a decisionist to sustain a valid critique of the Nuremberg process and the Allies’ strategy within it, less viable it is for unadulterated decisionism to successfully uphold the *legality* principle either in the domestic context or beyond. Compounded, as seen, by the unavailability, to Schmitt, of substantive natural law precepts to preserve the embargo on retrospective penalisation, where a



consistent Schmittian approach appears to fare best is in a reconfigured version of concrete order thinking. Explored in Chapters 4 and 5, this theoretical excursus Schmitt initially unveiled in the early years of the Nazi regime. With the perversions of National Socialism stripped from this model and augmented by the concept of *nomos*, as instantiated in the *jus publicum europeaeum*, this third type of juristic thought enables a consistent Schmittian to assert that what the Allies did, at Nuremberg, flew in the face of three hundred years of entrenched tradition. Criminalisation of war - until then a legal institution - conflated with ascription of individual responsibility for it, contravened the commonality of understanding that underpinned the co-existence of every nation state within continental Europe and, by extension, the citizenry within them. So ingrained as to be indivisible from the *nomos* of the *JPE*, the norms that gave expression to this concrete lived-in existence of its occupants – whether categorised as *traditional/classical* (in Schmitt's terminology) or *customary* from an Allied standpoint – were irrefutable.

Though *nomos* and custom, for Schmitt, lacked direct equivalence, the divergence between the conceptual distinctions he posited and the opposing view resting on a purely semantic differentiation was, perhaps, ultimately of marginal consequence. Arguably more significant was the Allies' interpretation and exploitation of customary norms as instruments of a newly invigorated and dynamic international law; this, in contrast with Schmitt, for whom *nomos* comprised a stabilising, if not static incarnation of an enduring, even irreplaceable concrete order. What the *jus publicum europaeum* embodied was a 'glorious' institution endowed with manifold components that dovetailed seamlessly with the attributes quintessential, in Schmitt's view, to an efficacious international order. Within this concrete order was an embedded abhorrence of *ex post facto* crime creation and punishment that, for Schmitt, had attained the status of a categorical embargo. Attendant upon this was the primacy of due process, that is, a minimum guarantee of certainty and predictability vis-a-vis the instillation and enforcement of criminal legal norms. To flout this ban and this expectation – as did the Allies at Nuremberg – was the antithesis of valid law-making, just as the decision of the Tribunal Members to authenticate numerous aspects of the Charter, not least the *crime of waging aggressive war* comprised, for a consistent Schmittian, a lamentable abuse of judicial discretion.

Preferable, it was for Schmitt to preserve what were, in his view, the established legal norms of classical European interstate law - amongst them the *legality* principle - than to manipulate or overstep them for ignoble ends. For this, the Allies were culpable. Not only did the Allies formulate the Charter in terms that violated the ban on retrospective penalisation but also perverted the quintessential status of the *legality* principle by their expedient relativisation of it. This dual-pronged onslaught against the putative embargo on *ex post facto* crime creation and punishment they achieved by what Schmitt regarded as their abuse of natural law doctrine and misuse of customary law. Strategic conceptualisation of so-called customary norms and the selective application of them, conjoined with a disingenuous distortion of natural law doctrine - epitomised as it was by the Allies' self-serving appropriation of the moral and humanitarian precepts it generated – culminated in an ultra-pragmatic transgression of the *legality* principle.

What a *consistent* Schmittian still needs, however, to confront are the implications of a *nomos* – a putative fount of customary legal norms – that (unlike Schmitt's construal of the *JPE*) embraces concepts incompatible with due process, procedural natural law or the inner morality of law. If the populace within the *jus publicum europaeum* had not come to rely on an embargo on retrospective crime creation but was instead inured to an arbitrary system of *ad hoc* law-making that left them vulnerable to *ex post facto* penalisation, the Nuremberg Charter would, from their perspective, have been beyond reproach. Would this not create a perpetually renewable nightmare for those forced to endure it? Further, if Schmitt's polemic against the Nuremberg process was, ultimately, directed towards the Allies' exercise of the empirical and normative dominance which, as victors, they enjoyed, how was this either unforeseeable or objectionable to an arch-authoritarian, supremely versed in the brokerage of power relations?

Against these and other deficits of a Schmittian interpretative model explored in Chapter 5, is the recognition that any system of law and the normative regulation it generates appear all too often the servant of power and not its master. This is the stark consequence of the Nuremberg experience that a consistent Schmittian, however unwittingly, would urge humanity to accept as an undeniable truth. Foolhardy it is, in the first instance, to wage war against an enemy whose conceptualisation of legitimacy in relation to the synthesis of law *and* its enforcement fails to conform to a common standard of substantive and procedural due process, to which both belligerent parties are prepared to subscribe. As the Nuremberg experience so profoundly demonstrates,

however, not even a circumspect choice of opponent provides the party defeated in war with a categorical guarantee that the juridical aftermath to conflict will witness stringent adherence to the demands the rule of law imposes. Whatever residual protection appears to accrue to the party vanquished in war evaporates whenever the victors – in violation of the politico-legal tradition to which they pledge their allegiance - proceed to contravene pre-existing legal norms or fabricate them afresh with retrospective effect. If the Allies' strategy at Nuremberg serves as a paradigm, the adversary who emerges exultant from war is free to formulate and implement an array of sanctions with scant adherence to normative constraints. Analogous to what occurred in the wake of WWII, still more chilling is the realisation that states purporting to comply staunchly with the rigours of due process are as likely to flout them as those which claim no such conformity. To the exercise of power, the *legality* principle was and remains dangerously susceptible, no less so when the parties who controvert it seek to conceal what a consistent Schmittian would deem a duplicitous agenda within a self-justifying and seductive cloak of moral and humanitarian categories.

From a Schmittian perspective, what the Nuremberg Trial of the Major War Criminals represented was the triumph of Anglo-American natural law jurisprudence over the entrenched secular positivist traditions of Continental Europeans; more insidiously, the instillation of malleable universalistic norms of an American-propagated sham cosmopolitanism over the Eurocentric particularistic order of the *jus publicum europaeum*. When Robert Jackson hailed the Nuremberg process as '*one of the most significant tributes that Power has ever paid to Reason*',<sup>3</sup> this, for Schmitt, was as divorced from concrete reality as it was possible to surmise. Even where victors of war appear to concede the subordination of Power to Reason and claim that what they represent is the triumph of Right over Might, tarnished and imperfect is any conquest that collaterally witnesses a surreptitious degeneration of Right into Might. The more so, Schmitt claims, when the proponents of Right appropriate the arbitral entitlement not only to determine the substance of legal norms and their application but, on occasions, the nature of law itself.

Invidious, above all, to a consistent Schmittian is self-serving abjuration of the normative regime of any concrete order that, as with the *nomos* of the *jus publicum*

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<sup>3</sup> 2 IMT 99.

*europaeum*, enshrines the *legality* principle at its core. What the Nuremberg process heralded was the dawn of a new era but not as the Allies sought to propound. No longer was Reason an immutable and unimpeachable standard but a concept wholly at the service of those who claimed to uphold it. Just as the *legality* principle succumbed to this perceived artifice at Nuremberg, a Schmittian critique requires those charged with preservation of due process to contemplate how a categorical ban on retrospective crime creation and punishment may ever withstand capricious enactment of disingenuously motivated, universalistic provisions that seek to transgress it. Astonishing though these insights may be when set against the backdrop of his Weimar decisionism, the inferences deducible from his ostensible shift from decisionist theory to an institutional mode of thought – especially in the international sphere – are less easy to refute.

Abundantly clear is that once Power is unleashed, however furtively, it is scarcely possible to constrain it. Is it not inevitable, therefore, that interpretation of legal doctrine will be for ever at the mercy of those who brandish Power to maximal effect? Disquieting though this may be, and however ironic the source from which such revelation emanates, a Schmittian interpretative model of the Nuremberg experience – centring chiefly on the subversion of the *legality* principle inextricable from it – demonstrates this to devastating effect. Against this, however, is it not implicit in Schmitt's polemic against the strategy of the Allies and Tribunal Members embroiled in the Nuremberg proceedings that what he seeks to denigrate is not the unilateral distortion of Reason *per se* but what he adjudges the deplorable ramifications of it? Had the empirical and normative outcome of the Trial process harmonised with the thematic strands that typify Schmittian legal and political theory – or rather the primary agenda that propelled it – would Schmitt have protested so vociferously and would it have evoked surprise if he had not?

From an empirical perspective, what occurred at Nuremberg was, perhaps, undeserving of censure. Nineteen defendants received what most neutral observers deemed their just deserts.<sup>4</sup> Besmirched by their merciless extermination of millions of human beings and the blatant abrogation of the rule of law that accompanied it, the Nazi perpetrators arguably received a far higher measure of juridical consideration than their appalling

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<sup>4</sup> This raises the question, for example, whether Julius Streicher was deserving of the death penalty for what amounted to incitement of others (primarily via his publication of a viciously anti-Jewish newspaper) to commit crimes against humanity.

acts merited. The poison they spewed will haunt humankind for ever. From a purely normative perspective, however, were not the Allies' lips stained – if by comparison to their adversaries only faintly - by the sip they imbibed from a toxic chalice that enabled them to overstep the ban on retrospective penalisation, in abnegation of the established norms of continental European interstate law? That Schmitt, at intervals throughout his Weimar and Nazi-era career, drank of a similar tainted tincture that coloured his abstruse conceptualisation of supra-normative legitimacy in the domestic context – one that implicitly embraced an expedient violation of the *nullum crimen nulla poena* doctrine - is a suspicion not lightly dispelled. Whether this infused his evaluation of the Nuremberg process is, perhaps, more equivocal. And of the ambiguous legacy the Allies bequeathed, prophetic indeed was the rhetoric of Robert Jackson when he predicted that *'the record on which we judge these Defendants today is the record on which history will judge us tomorrow. To pass these Defendants a poisoned chalice is to put it to our own lips as well.'*<sup>5</sup>

Laden, however, with the latent irony that – with the benefit of retrospective insight - now froths from the goblet where all protagonists arguably partook, not even Jackson could have predicted the profound controversies the Nuremberg process continues to engender. It is these that have reverberated through the years since the Nazi Defendants confronted their post-World War II juridical nemesis. Whether the Nuremberg experience was ultimately, for Carl Schmitt, an ephemeral, though perhaps, unwitting epiphany, or a moment of supreme self-vindication of his onetime belief that the *norm* is discernible only through the *exception*, is likely to remain entombed with him for ever.

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<sup>5</sup>Jackson: 2 IMT 101.

## **APPENDICES**

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## Appendix 1

### A Survey of the relevant Treaties and declarations upon which the prosecution case for waging aggressive war was founded

Date of Treaty	Treaty/ Other Declaration	Essential elements of the Treaty or Declaration	Substantive precedent/customary law or neither
29 <sup>th</sup> July 1899	Hague Convention for the Pacific Settlement of International Disputes	Invited the parties to settle their disputes by pacific means before waging war	Not a substantive precedent. In his opening address, Shawcross deemed its provisions to be merely precatory. It is arguable that it may have rendered acceptable the notion that it was no longer within the aegis of sovereign States to wage war at will and without justification and that such 'rights' were able to be abrogated by inter-party obligations.
1906	Article 28 of Geneva Convention	Amelioration of the condition of the wounded and the sick in armies in the field	Not a substantive precedent
18 <sup>th</sup> October 1907	Hague Convention Part I, III, IV and V	<p>Part I – Pacific Settlement of international disputes. The contracting Powers agreed to use their best endeavours to ensure the pacific settlement of differences and to have recourse as far as circumstances would allow to mediation of one or more friendly powers. Such mediation was to have the character of advice and was never to have binding force.</p> <p>Part III – opening of hostilities. The contracting Powers recognised that hostilities were not to be commenced without a previous explicit warning in the form of a reasoned declaration of war or of an ultimatum with a conditional declaration of war.</p> <p>Part IV – concerned the laws and customs by which war was to be fought following an outbreak of warfare.</p> <p>Part V – prescribed the right of nations to assert their neutrality in the face of threatened belligerency and the duties of other States towards such 'neutral' nations</p>	Not a substantive precedent. Shawcross stated that he considered the Convention to be of precatory effect only, 'I shall certainly not ask the tribunal to say that any crime was committed for breach of those Conventions.' <sup>1</sup>

<sup>1</sup> Shawcross 3 IMT 95

29 <sup>th</sup> March 1919	Report of Commission of Fifteen leading to the Treaty of Versailles	<p>The US Delegates Lansing and Scott stated that, 'a nation engaging in a war of aggression commits a crime' but stressed that such an act was not a crime either under American or international law.</p> <p>The Commission also designated over thirty categories of 'conventional' war crimes</p>	Not a substantive precedent since it would appear that the terminology of 'crime' was being used in the sense of an offence against morality.
1919	Treaty of Versailles	Part I comprised the Covenant of the League of Nations whilst Part III contained guarantees by Germany in respect of territoriality of other regions	The Treaty signified a desire on the part of the victorious nations to establish a foundation for lasting peace. However, it was in no sense a precedent for the crime of waging aggressive war.
1919 and 1920	Treaties of Saint Germain and Neuilly	Reaffirmed the concept of war crimes in international law and formulated terms for the repression of such conduct	Not a substantive precedent nor did it establish any customary practice in respect of the initiation of war being concerned with the conduct of belligerents within warfare (ius in bello)
1923	Draft Treaty of Mutual Assistance	Article 1 declared that, 'aggressive war is an international crime, and that the Contracting parties would 'undertake that no one of them will be guilty of its commission.'	The treaty was never ratified although half of the States who were potential signatories indicated their basic approbation of the underlying spirit of the treaty; the difficulties appeared to lie in the lack of definition of the term 'aggressive.' The discussions preceding the draft treaty were accorded significance by the prosecution at Nuremberg for rendering acceptable the notion of the illegality of aggressive war.
1924	The Preamble to the League of Nations' Protocol for the Pacific Settlement of International Disputes (the 'Geneva Protocol')	References were made to the 'international community' and their recognition that 'a war of aggression constitutes a violation of its solidarity and an international crime.'	The Protocol was recommended for acceptance as a resolution of the League of Nations but never legally came into force. It thus did not gain the force of substantive precedent although arguably reinforced the willingness within the international community to accede to the concept of aggressive war as a crime.



16 <sup>th</sup> October 1925	Treaty of Mutual Guarantee (the 'Locarno Pact') between Germany and Belgium, France, Great Britain and Italy respectively. Arbitration conventions were also made between Germany and Poland and between Germany and Czechoslovakia.	The contracting parties agreed 'to refer matters of dispute for decision by the arbitral tribunal of the Permanent Court of International Justice.'	Not substantive precedent. Possibly added to the general impetus in favour of the preservation of world peace by highlighting the importance of resolving disputes by methods other than open warfare.
20 <sup>th</sup> May 1926	Treaty of Arbitration between Germany and the Netherlands and between Germany and Denmark	Contained similar provisions to the Locarno Pact	Not a substantive precedent but supported the idea of mediation rather than warfare as a resolution dispute mechanism.
10 <sup>th</sup> September 1926	Germany became a Member of the League of Nations	Germany was thus bound by the resolutions of the League	Not applicable
24 <sup>th</sup> September 1927	Eighth Assembly of the League of Nations	48 nations unanimously declared that wars of aggression were international crimes. It was recorded in the Preamble that, 'a war of aggression constitutes a crime against the human species.' The Resolution of the assembly declared that, 'all wars of aggression are and shall always be prohibited' and that, 'a war of aggression can never serve as a means of settling international disputes and is in consequence an international crime.'	Neither this nor any other resolution of the League of Nations specified that criminal liability would attach to breach of any treaty obligations including breach of the Kellogg-Briand Pact itself. The Polish representative commented that the declaration of the League of Nations was not a legal instrument but only an act of moral and educational importance. The resolution did not comprise substantive precedent although again manifested the opposition of the international community towards the waging of aggressive war.
1927	Treaty between USSR and Persia	The parties undertook to refrain from acts of aggression	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement.

18 <sup>th</sup> February 1928	Sixth Pan-American Conference attended by 21 American Republics	The Resolution of the participants declared that, 'wars of aggression are international crimes against the human species' The signatories abstained from defining aggression and declined to decree any punishment for violation of the agreed terms.	Not a substantive precedent but of persuasive weight
15 <sup>th</sup> March 1928	Report of Speech made by the US Secretary of State Kellogg <sup>2</sup>	Kellogg was opposed to any attempt to define aggression in the forthcoming Pact and reinforced his opinion by reference to the words of Sir Austen Chamberlain when opposing at Geneva any attempt by the League of Nations to define aggression, 'I believe that any such definition would be a trap for the innocent and a signpost for the guilty.'	Not applicable
27 <sup>th</sup> August 1928	Kellogg-Briand Pact	The Preamble to the Kellogg- Briand Pact comprised a universal renunciation of war. Article I contained a declaration that the parties condemned recourse to war. This reaffirmed the repudiation of war, as an instrument of national policy. Finally, Article II recorded that the sole mechanism available for dispute resolution, lay in pacific means.	<p>During the 1930s Japan attacked China and Manchuria, the USSR attacked Finland, Italy attacked Abyssinia and Paraguay was embroiled in the Gran Chaco Conflict but no action was taken by the remaining signatories to the Pact and indeed diplomatic relations with the aggressors was maintained. The League of Nations in 1931 contented itself merely with a declaration that the Japanese action against Manchuria was contrary to the Covenant of the League of Nations and thus the resulting situation should not be recognised.</p> <p>The US Senate stated when ratifying the Pact that, 'the Pact of Paris does not provide sanctions, express or implied. Should it be violated, there is no obligation to engage in punitive or coercive measures. It is (merely) a voluntary pledge.'<sup>3</sup> A member of the Senate described the pact as 'an international kiss.'</p> <p>The issue of whether the Pact comprised substantive precedent or whether customary law</p>

<sup>2</sup>American Journal of International Law Vol. XXII, 259

<sup>3</sup>Congressional Record Vol. LXX , 1730 US Senate

			enabled it to be purposively interpreted is the subject of the previous discussion.
11 <sup>th</sup> September 1929	Treaty of Arbitration between Germany and Luxembourg	The parties undertook to refrain from acts of aggression	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement
27 <sup>th</sup> July 1929	Geneva Convention (the USSR was not a signatory)	Related to the treatment of prisoners of war	Not substantive precedent nor relevant to the establishment of a body of customary law in relation to the initiation of war
1930	London Naval Agreement between Germany and Great Britain	Regulated military developments in the sphere of sea warfare	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement
1932	Declaration by Henry Stimson US Secretary of State <sup>4</sup>	<p>‘War between nations was renounced by the signatories of the Kellogg- Briand Treaty. This means that it has become, practically throughout the entire world, an illegal thing. Hereafter, when nations engage in armed conflict, either one of both of them must be termed violators of this general treaty law. We no longer draw a circle about them and treat them with the punctilios of the duellist’s code. We denounce them as law breakers.’</p> <p>Stimson also articulated that territorial advantages achieved through force should not be recognised under international law, a stance which became known as the ‘Stimson Doctrine.’</p> <p>In 1929, Stimson had remarked that ‘the pact contains no covenant similar to that in the Covenant of the League of Nations providing for joint forceful action by the various signatories against an aggressor. Its efficacy depends solely upon the public opinion of the world and upon the conscience of those nations who sign it.’<sup>5</sup></p>	<p>Stimson was giving voice to his own interpretation of the Kellogg-Briand Pact which he evidently believed had the support of the world community possibly lending credence to the view that customary law was evolving which supported the illegality of aggressive war. Nonetheless, Stimson did not strive to criminalise aggressive war and his reference to the denunciation of perpetrators of such conduct is some way distant from deeming it appropriate to try and execute those convicted of the said illegal acts.</p> <p>The Declaration clearly was not intended to comprise substantive precedent but was advisory only.</p>
3 <sup>rd</sup> July 1933	Convention for the Definition of Aggression	The Convention was made between some Eastern European nations excluding the USSR and comprised an abortive attempt to define aggression	Neither substantive precedent nor customary law

<sup>4</sup> The declaration is cited in Justice Jackson’s *Report to the President on Atrocities and War Crimes*; 7<sup>th</sup> June 1945: available online at <<<http://www.yale.edu/lawweb/avalon/imt/jack01.htm>>>

<sup>5</sup> Statement of Henry Stimson made public December 30, 1929, printed in AJIL Vol.25 (1931), 89-90

10 <sup>th</sup> October 1933	Anti-War Treaty of Non Aggression and Conciliation	25 American States attended a conference at Rio de Janeiro and ratified the Treaty by which they 'condemned wars of aggression in their mutual relations or in other States.' The Preamble mentions that the parties intended to condemn wars of aggression and territorial acquisitions obtained by armed conflict making such wars impossible and establishing their invalidity.	The Treaty condemned rather than criminally illegalised wars of aggression. It was not substantive precedent although did add to the prevailing climate which leaned towards the denunciation of aggressive war.
October 1933	The German Reich left the League of Nations	This unilateral act should have signified to the other members that Germany was no longer committed to the ideals established by the League of Nations Covenant	Not applicable
26 <sup>th</sup> January 1934	Non Aggression Pact between Germany and Poland	The parties undertook to refrain from acts of aggression	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement
6 <sup>th</sup> – 10 <sup>th</sup> September 1934	International Law Conference at Budapest: the Budapest Articles of interpretation	<p>The Articles were drafted by a number of reputable and distinguished juristic consultants and were intended to assist in the interpretation of the Kellogg-Briand Pact. Article 5 endorsed the Stimson doctrine but failed to provide for the criminalisation of aggressive war either in the context of State or individual liability. Article 6 did mention that a violating State had to make financial reparation to an aggrieved State.</p> <p>In 1936, Sir Arnold Mc. Nair, a newly appointed Judge of the Permanent Court of International Justice stated, 'it is a reasonable view, though I cannot assert it to be an established opinion, that a breach of the Pact is a legal wrong.'<sup>6</sup></p>	The Articles did not provide substantive precedent for the 'crime' of aggressive war and clearly demonstrated that in the view of those responsible for drafting the Articles, the Pact did not constitute a penal Statute.
18 <sup>th</sup> June 1935	Naval Agreement between Germany and Great Britain (denounced by Hitler on 28 <sup>th</sup> April 1939)	The parties undertook to refrain from acts of aggression and agreed to regulate their capacity to wage a naval war	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement
1935	US Neutrality Act	It could be argued with some degree of cogency that had aggressive wars indeed been criminally illegal, there would have been no justification for any nation to remain neutral	The US declaration of neutrality could be interpreted as an indication that the Kellogg-Briand Pact was not regarded as binding international law in the sense of criminalising the waging of aggressive war
1936	London Protocol between Germany and Great Britain	Regulated the conduct of submarine warfare	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement

<sup>6</sup>*British Year Book of International Law* Vol. XVII, 157

7 <sup>th</sup> March 1936	Germany denounced the Treaty of Locarno	The German action in reoccupying the demilitarised Rhineland was in violation of the Locarno Pact and also the 1919 Treaty of Versailles	No action was taken by the other signatories to the Kellogg-Briand Pact thereby casting doubt upon its credibility as a binding instrument upon which world peace was founded.
11 <sup>th</sup> July 1936	German Austrian Agreement	Article 1 recognised the sovereignty of Austria	There is no ostensible reason as to why such an assurance would have been required had the Kellogg-Briand Pact had the force of binding precedent, breach of which would have attracted criminal sanctions. The Agreement between Germany and Austria was not substantive precedent for the criminal illegality of aggressive war.
26 <sup>th</sup> September 1938	Assurances given by Germany to Czechoslovakia respecting the boundaries of the latter State	Germany undertook to refrain from acts of aggression	Not substantive precedent.
29 <sup>th</sup> September 1938	The Munich Pact	France and Great Britain entered into an agreement with Germany by which Czechoslovakia was forced to acquiesce in the cession of the Sudetenland to Germany thus rendering the remainder of Czechoslovakia indefensible	Not substantive precedent nor indicative of a body of customary law against the waging of aggressive war
May 1939	German-Italian Alliance	This was to be the basis of the Axis alliance during the War	No action was taken by the remaining signatories to the Kellogg-Briand Pact despite the fact that the entente between these 2 nations, when placed against the background of Nazi expansionism should perhaps have been perceived as a further potentially hostile act
31 <sup>st</sup> May 1939	Non Aggression Pact between Germany and Denmark	The parties undertook to refrain from acts of aggression	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement
23 <sup>rd</sup> August 1939	Non Aggression Pact between Germany and the USSR	The parties undertook to refrain from acts of aggression paving the way for the partition of Poland between the signatories	Not substantive precedent. The Treaty contained such terms as were consistent with an inter-State agreement.

4 November 1939	US Neutrality Act	<p>It could be argued with some degree of cogency that had aggressive wars indeed been criminally illegal, there would have been no justification for any nation to remain neutral</p> <p>This was evidenced by a message sent by President Roosevelt to the US Congress on 21 September 1939, after war in Europe had been precipitated by Germany's invasion of Poland. In this, he requested a return to 'historic foreign policy' based upon 'age-old doctrines of international law' 'on the solid footing of real and traditional neutrality.'<sup>7</sup></p> <p>US neutrality was finally revoked by the Lend-Lease Act March, 11, 1941</p>	The US declaration of neutrality could be interpreted as an indication that the Kellogg-Briand Pact was not regarded as binding international law in the sense of criminalising the waging of aggressive war. When the US ultimately declared war against Germany, no mention was made of the existence or violation of the Kellogg-Briand Pact 1928 <sup>8</sup> nor did the US then cite the Pact as the basis upon which criminal sanctions would subsequently be deployed either against Germany or its nationals. All attempts to implement the provisions of the Kellogg-Briand Pact, by incorporation into the domestic law of the US, had failed and indeed had culminated in the strengthening of the US commitment to neutrality.
6 <sup>th</sup> October 1939	German Assurances to respect the Neutrality and Territorial Integrity of Yugoslavia, Norway, Netherlands and Belgium.	Germany undertook to refrain from acts of aggression against the other nations	Not substantive precedent.
1941	Professor Winfield, the holder of the English Chair at Cambridge University devoted a short passage in his book <sup>9</sup> to the Kellogg-Briand Pact	'The Pact is like a law which forbids two men to settle a dispute by fighting but does not tell them how they are to settle it.'	Comments such as those of Winfield are devoid of precedent but illustrate the opinion of some academic commentators after 1939 towards the 'offence' of waging aggressive war.

<sup>7</sup> *Congressional Record*, Vol. 85, Part I, 10-12: AJIL Vol. 34 (1940), 37-38

<sup>8</sup> J.H. Morgan *The Great Assize* (London: John Murray, 1948), 29: 'I have searched in vain in all the voluminous publications relating to the outbreak of war with Germany of these three Great powers and have been unable to find any invocation therein against the aggressor, Germany, of the Pact of Paris, still less any denunciation of that country for having violated it.'

<sup>9</sup> Winfield *The Foundations and Future of International Law* (Cambridge: Cambridge University Press, 1941) 44

1941	Robert Jackson, then Attorney General of the United States	<p>He insisted that ‘it is the declared determination of the Government to avoid entry into the war as a belligerent.’<sup>10</sup></p> <p>The ostensible neutrality of the US was therefore to be maintained despite the fact that the US Government had agreed to render all assistance possible to Britain, ‘short of war.’</p>	Finch points out that, ‘this was 18 months after what the Nuremberg Tribunal says was the “supreme international crime” had been consummated.’ <sup>11</sup>
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<sup>10</sup> Address before the Inter-American Bar Association, Havana, Cuba, March 27, 1941: *AJIL* Vol. 35 (1941), 348-359

<sup>11</sup> G.A. Finch ‘The Nuremberg Trials and International Law’, *AJIL* Vol. 41 (1947), 20, 31

## Appendix 2

### A Survey of the correlation between the categories of *retrospectivity* and their utilisation at the Trial of the Major Nazi War Criminals at Nuremberg<sup>12</sup>

The offence prescribed by the Charter	<i>Conspiracy:</i> Article 6	<i>Crimes against peace:</i> Article 6 (a)	<i>War crimes:</i> Article 6 (b)	<i>Crimes against humanity:</i> Article 6 (c)	<i>Organisational guilt:</i> Articles 9 and 10 (The Indictments charged six groups [seven if the SS and SD are treated separately] with all four of the Article 6 'offences')
Classification of retrospectivity					
<b>Cardinal retrospectivity</b>	Yes, in that no precedent existed under <i>international</i> law for this 'offence'	Yes, in that, arguably, no unequivocal precedent existed under <i>international</i> law for this 'offence.' Tenuous precedent could perhaps be located in the Kellogg-Briand Pact 1928 and in the customary law of nations <sup>13</sup>	No: <i>war crimes</i> were recognised as a criminal 'offence' by <i>international</i> law. Precedent was comprised in The Hague Convention 1907 and The Geneva Convention 1929, as well as the customary law of nations	Yes, in that no precedent existed under <i>international</i> law for this 'offence,' save to the extent that they could be deemed wholly analogous to war crimes under Article 6 (b).	Yes, in that no precedent existed under <i>international</i> law for the notion of <i>organisational guilt</i> as a criminal 'offence.' <sup>14</sup>
<b>Restitutive retrospectivity</b>	Yes, insofar as: (i) an offence of <i>conspiracy</i> , as defined by the civil law of Germany was recognised by the Weimar regime but allowed to be committed with	No: there was no 'offence' of <i>crimes against peace</i> , recognised by Weimar Germany which	Yes: <i>war crimes</i> had been previously recognised by and incorporated into German domestic law by Article 4 of	No: insofar as there was no 'offence' of <i>crimes against humanity</i> , recognised by	No: there was no 'offence' of <i>organisational guilt</i> , recognised by Weimar Germany which had been either

<sup>12</sup> This Table is based upon the dual suppositions that 'law' cannot be recognised as such unless derived from positive provisions and that those requisite substantive laws are located either in legislative instruments or long-standing custom. Conversely, were a 'natural law' type stance to be adopted, (more specifically within the Nuremberg context, the argument that law was an evolutionary reflection of the 'conscience of mankind'), a case could perhaps be made for the pre-existence of an overarching moral imperative which demanded that some, if not all, the 'offences' charged at Nuremberg were pre-existing prior to the date of the Charter. In the parlance of the Prosecution during the Trial of the Major Nazi War Criminals, the 'offences' with which the Defendants were indicted were 'recognised as crimes by all civilised nations.' In essence therefore, the relevant acts were of such an intrinsically evil nature that they were an affront to every civilised code; they offended common standards of decency and morality. Some had been criminal offences since the dawn of time; others were born of that selfsame moral code but had developed to meet the ever - changing face of civilisation.

<sup>13</sup> The section of the Judgment dealing with *crimes against peace*, delivered by the US Member, Francis Biddle, represented the only real attempt by the IMT to engage with the relevance of the doctrine of *nullum crimen, nulla poena sine lege*, and the legal precedent, purportedly underpinning the decision.

<sup>14</sup> The only weak analogies in *domestic* law were found in enactments, such as the British India Act No. 30, enacted on 14<sup>th</sup> November 1836, section 1 of which provided: 'It is hereby enacted that whoever shall be proved to have belonged either before or after the passing of this Act to any gang of thugs either within or without the territories of the East India Company shall be punished with imprisonment for life with hard labour.' In a similar vein, the Prosecution cited the US Smith Act 1940, the British Sedition Acts 1817 and 1846, the British Public Order Act 1936 and the German Criminal Code 1871.



	impunity during the Nazi era and (ii) the definitional basis for the <i>conspiracy</i> charge in the Indictment at Nuremberg harmonised, if at all, with the pre-Nazi civil law within Germany.	had been either repealed by the Nazi regime or disregarded during their tenure in office	the Reich Constitution 1919. <sup>15</sup> By the Enabling Act 1933 enacted by the Nazis at the onset of their regime, the entire Constitution was suspended, including Article 4. Had it not been for this peremptory measure, the prohibition against war crimes in the old sense would have been part of German law at the date of commission of the Nazi atrocities against non-German victims. From the perspective of the perpetrators, Article 6(b) of the Charter was retrospective but only because of the abrogation of the Reich Constitution for which they were responsible	Weimar Germany which had been either repealed by the Nazi regime or disregarded during their tenure in office  But: yes insofar as <i>crimes against humanity</i> were wholly analogous to <i>war crimes</i> in the old sense	repealed by the Nazi regime or disregarded during their tenure in office
<b>Conceptual retrospectivity</b>	Yes, insofar as the conceptual basis for the <i>conspiracy</i> charge in the Indictment at Nuremberg was at variance with the contemporaneous concept of <i>conspiracy</i> within German domestic law during the Nazi era	Yes insofar as precedent did not lie in the Kellogg-Briand Pact or customary law. The idea of the unacceptability of aggressive war had unquestionably been canvassed but arguably the final and vital stage of its conversion into a criminal offence was still incomplete	No	Yes, save to the extent that that they could be deemed wholly analogous to war crimes under Article 6 (b)	Yes
<b>Aggravated conceptual retrospectivity</b>	Yes, insofar as the conceptual basis for the <i>conspiracy</i> charge in the Indictment at Nuremberg was at variance with the concept of <i>conspiracy</i> within the established	No	No	No	Yes, insofar as putative precedent was elicited from legislative enactments within the common law tradition

<sup>15</sup> If any lingering doubts existed upon this issue, they were allayed by the German Army Field Manual which regulated the conduct of the Wehrmacht at the outset of the War, and the German Military Code of Justice 1940

	parameters of the pre-Nazi civil law tradition within Germany				
<b>Egregious conceptual retrospectivity</b>	Yes, insofar as the conceptual basis for the <i>conspiracy</i> charge in the Indictment at Nuremberg was at variance with the concept of <i>conspiracy</i> or <i>common plan</i> as understood within the common law tradition. It had arguably never before been juridically formulated, within the definitional ambit, stipulated by the Charter	No	No	No	Yes, insofar as the principles, derived from legislative enactments existing within the common law tradition, were distorted in an effort to find precedent, however dubious in nature, for the ‘offence’ of <i>organisational guilt</i>
<b>Ultratemporal retrospectivity</b>	Possibly, insofar as pre-war conspiracy was contemplated	No, since the ‘offence’ was inextricably linked to a state of ongoing warfare	No, since the ‘offence’ was inextricably linked to a state of ongoing warfare	Yes, insofar as related to pre-war atrocities rather than confined to acts committed during a state of ongoing warfare	Yes, insofar as related to pre-war atrocities rather than confined to acts committed during a state of ongoing warfare
<b>Locational retrospectivity</b>	Yes, unless <i>conspiracy</i> , in the exact form specified in Count One of the Indictment, was a pre-existing offence under the relevant <i>lex loci</i> , at the date of commission, in relation to each and every act of <i>conspiracy</i> , charged against the Defendants	Yes, unless possible under international law, to invoke <i>universal jurisdiction</i> due to the intrinsically heinous nature of the ‘offence’ by analogy, for example to piracy. <sup>16</sup>	No. This point did not arise because <i>war crimes</i> had already been contemporaneously recognised as criminal offences under the law of Germany and elsewhere (see also <i>latent retrospectivity</i> )	Yes, unless possible under international law to invoke <i>universal jurisdiction</i>	Yes, unless possible under international law to invoke <i>universal jurisdiction</i>

<sup>16</sup> This is predicated upon the dual assumptions that international law was binding upon individual States and that in the event of conflict between domestic and international law, the latter would be deemed pre-eminent. If, therefore, any given ‘offence’ was of a type to which ‘universal jurisdiction’ was applicable, either directly or by analogy, the issue of *locational* retrospectivity would not arise, irrespective of any lack of recognition of the principle of ‘universal jurisdiction’ under the *lex loci*. However, in such circumstances, and if the purported offence was not contemporaneously recognised as an ‘offence’ under the *lex loci*, the issues of *conceptual* or *restitutional* retrospectivity would still potentially arise, as also would *cardinal* retrospectivity, were the act in question not previously established as an ‘offence’ under international law.

<b><i>Jurisdictional Retrospectivity</i></b>	Possibly, insofar as the target of the conspiratorial act involved other German nationals	No. The targets of war-making were other States and by extension, the nationals of those States.	No. This point did not arise because the victims of <i>war crimes</i> were stipulated to be <i>civilian populations of or in occupied territory or prisoners of war</i> .	Yes, insofar as the acts were perpetrated against other German nationals	Yes, insofar as the acts were perpetrated against other German nationals
<b><i>Compound retrospectivity</i></b>	Yes, since this satisfies at least two conceptual components. (the 'offence' being conceptually retrospective <i>per se</i> , and also being within the categories of <i>aggravated</i> and/or <i>egregious</i> retrospectivity)	No, since this depends on the involvement of at least two conceptual components (being conceptually retrospective <i>per se</i> , and also lying within the categories of <i>aggravated</i> or <i>egregious</i> retrospectivity)	No, since this depends on the involvement of at least two conceptual components (being conceptually retrospective <i>per se</i> , and also lying within the categories of <i>aggravated</i> or <i>egregious</i> retrospectivity)	No, since this depends on the involvement of at least two conceptual components (being conceptually retrospective <i>per se</i> , and also lying within the categories of <i>aggravated</i> or <i>egregious</i> retrospectivity)	Yes, since this satisfies at least two conceptual components (the 'offence' being conceptually retrospective <i>per se</i> , and also lying within the categories of <i>aggravated</i> and/or <i>egregious</i> retrospectivity)
<b><i>Descutarial retrospectivity</i></b>	Yes, insofar as the Defendants were denied the facility of any defences subsisting at the date of commission of those acts with which they were subsequently charged	Yes, insofar as the Defendants were denied the facility of any defences subsisting at the date of commission of those acts with which they were subsequently charged	Yes, insofar as the Defendants were denied the facility of any defences subsisting at the date of commission of those acts with which they were subsequently charged	Yes, insofar as the Defendants were denied the facility of any defences subsisting at the date of commission of those acts with which they were subsequently charged	Yes, insofar as the Defendants were denied the facility of any defences subsisting at the date of commission of those acts with which they were subsequently charged
<b><i>Ascriptive retrospectivity</i></b>	Yes, inasmuch as the Defendants were held individually responsible for violations of <i>international law</i>	Yes, inasmuch as the Defendants were held individually responsible for violations of <i>international law</i>	No	Yes, inasmuch as the Defendants were held individually responsible for violations of <i>international law</i> . A caveat to this exists, only to the extent that crimes against	Yes, inasmuch as the Defendants were held individually responsible for violations of <i>international law</i>

				humanity, were wholly analogous to war crimes	
<b><i>Transpositive retrospectivity</i></b>	No. By the nature of the offence, conspiracy was capable of commission by individuals, rather than the State of which they were nationals	Yes, in that <i>waging aggressive war</i> historically lay within the domain and remit of a nation State and not the individual national of such State	No	Yes, to the extent that acts of persecution, for, example could be deemed 'state- sponsored'	Yes, to the extent that acts of persecution, for, example could be deemed 'state- sponsored'
<b><i>Derivative retrospectivity</i></b>	No	No	No	No	Yes, in that the individual responsibility of an individual was derived from the Group or organisation of which he was, or has been a member
<b><i>Procedural retrospectivity</i></b>	Only insofar as the IMT was itself procedurally innovative	Only insofar as the IMT was itself procedurally innovative	Only insofar as the IMT was itself procedurally innovative <sup>17</sup>	Only insofar as the IMT was itself procedurally innovative	Yes, in that the 'offence' would in practice, have been unworkable had not relevant innovatory procedural and administrative devices been integral to it
<b><i>Evidential retrospectivity</i></b>	Yes, in relation to evidential devices deployed by the IMT	Yes, in relation to evidential devices deployed by the IMT	Yes, in relation to evidential devices deployed by the IMT	Yes, in relation to evidential devices deployed by the IMT	Yes, in that the 'offence' would in practice, have been unworkable had not relevant innovatory evidential devices been integral to it

<sup>17</sup> Although individual responsibility was previously established for *war crimes*, as exemplified by the cases of *Llandovery Castle*, H.M.S.O. Cmd. 450 and *Ex parte Quirin*, 317 U.S. 1, the forum for disposition of alleged perpetrators, had been the domestic court of the aggrieved State and not an international Tribunal, especially established on an *ad hoc* basis for dealing with the alleged offenders.

<b><i>Inchoate</i> retrospectivity</b>	Yes, insofar as the Tribunal Members confined the ambit of conspiracy to a <i>conspiracy or common plan to commit crimes against peace</i> . This decision necessarily excluded any culpability for participation in a <i>conspiracy or common plan to commit war crimes, crimes against humanity or organisational guilt</i>	Yes (and for a sub-strand of <i>inchoate</i> retrospectivity, see <i>latent</i> retrospectivity below)	Yes (and for a sub-strand of <i>inchoate</i> retrospectivity, see <i>latent</i> retrospectivity below)	Yes, insofar as the Tribunal Members confined the ambit of <i>crimes against humanity</i> to acts, committed in association with other <i>crimes</i> lying within the jurisdiction of the Tribunal. Peacetime violations were therefore effectively excluded. <sup>18</sup>	Yes, insofar as the Tribunal Members: (i) Confined the ambit of <i>crimes against humanity</i> to acts committed in association with other <i>crimes</i> lying within the jurisdiction of the Tribunal. Peacetime violations were therefore effectively excluded. <sup>19</sup> (ii) Confined the ambit of <i>conspiracy</i> , to a conspiracy or common plan to commit crimes against peace.
<b><i>Latent</i> retrospectivity</b>	No	Yes – prior Treaties putatively comprised substantive precedent but arguably failed to do so	Yes – the Hague and Geneva Conventions comprised substantive precedent only where all the belligerents had been subscribing parties to the respective Conventions	No	No <sup>20</sup>

The delimitation of *crimes against humanity* has also to be read in conjunction with the restrictive interpretation of the Charter in relation to *conspiracy*. Since the Defendants were able only to be convicted of conspiracy to commit *crimes against peace*, the IMT were then confined to atrocities, perpetrated in connection with that specific conspiracy. These were found to have commenced in 1937 but there was no evidence to suggest a direct link between those pre-war acts of *conspiracy* to wage aggressive war and the commission of *crimes against humanity*. This meant that the only relevant crimes lying within the jurisdiction of the Tribunal from the perspective of *crimes against humanity* were *war crimes* (obviously perpetrated within wartime) and *crimes against peace* (also synonymous with ongoing warfare). Accordingly, the Defendants were unable to be punished for any *crimes against humanity* committed during peacetime.

<sup>19</sup> *Ibid*, n. 7

<sup>20</sup> The Prosecution, in particular Jackson, sought to rely upon a number of prior domestic legislative provisions in support of his argument that prior precedent did exist for the ‘offence’ of *organisational guilt*. However, these are not recited on the face of Appendix B to the Indictments, in which the specific allegations laid against the indicted organisations are pleaded.

<b><i>Composite retrospectivity</i></b>	Depends upon the involvement of at least one other <i>retrospective</i> component, save where both or all of the categories of retrospectivity are <i>conceptual</i>	Depends upon the involvement of at least one other <i>retrospective</i> component, save where both or all of the categories of retrospectivity are <i>conceptual</i>	Depends upon the involvement of at least one other <i>retrospective</i> component, save where both or all of the categories of retrospectivity are <i>conceptual</i>	Depends upon the involvement of at least one other <i>retrospective</i> component, save where both or all of the categories of retrospectivity are <i>conceptual</i>	Depends upon the involvement of at least one other <i>retrospective</i> component, save where both or all of the categories of retrospectivity are <i>conceptual</i>
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### Appendix 3

The strands of retrospectivity identified within the Chapter 2 typography through the lens of a consistent Schmittian perspective

	Crimes against peace	Conspiracy	Crimes against humanity	War crimes	Organisational guilt
<b>Cardinal</b>	X  International law in the sense of overarching universalistic free-floating norms that would potentially bind the European occupants of the <i>JPE</i> was, to a <i>CS</i> , non-existent.	X  Same basic objection as with <i>CAP</i>	X  Same basic objection as with <i>CAP</i>	Not problematic  A <i>CS</i> would not take issue with this: already established within the <i>JPE</i> and incorporated into the domestic law of Germany	X  Same basic objection as with <i>CAP</i> , <i>CAH</i> and conspiracy
<b>Restitutional</b>		Aspects of conspiracy would be restitutionally retrospective only if (i) the yardstick for the law by which the Nazis were bound at the date of commission was taken to be the law of Nazi Germany rather than the law prior to the Nazi assumption of power  (ii) the domestic criminal law in Germany pre-dating the Nazi era harmonised with the	Same – no fundamental issue of restitutional retrospectivity would arise for a <i>CS</i> (would only be relevant in any event to the extent that <i>crimes against humanity</i> were wholly analogous to <i>war crimes in the old sense</i>	Same - no fundamental issue of restitutional retrospectivity would arise for a <i>CS</i>	

		<p>definitional basis of the <i>conspiracy</i> charge in the indictment at Nuremberg</p> <p>Because the concept of concrete order thinking would be applied by a <i>CS</i> to the Weimar regime or even the pre-Weimar regime rather than the Nazi regime (which a <i>CS</i> should arguably deem not to be a concrete order at all), this would not for a <i>CS</i> produce an example of restitutive retrospectivity. A <i>CS</i> would disregard contravening 'legal norms' of the Nazi regime</p>			
<b>Conceptual</b>	<p>X</p> <p>No pre-existing offence of waging aggressive war had been established in German domestic law and this affected the expectations of those potentially affected</p>	<p>X</p> <p>Same basic objection – the offence of conspiracy had not been established in German law</p>	<p>X</p> <p>A <i>CS</i> should have rejected this on the basis that <i>CAH</i> had not, as such been established in German law, save to the extent of being analogous to war crimes in the old sense. This was sidestepped by Schmitt in his advocacy of a political rather than juridical solution to those deemed</p>		<p>X</p> <p>Same basic objection – the offence of organisational guilt had not been established in German law</p>



			guilty of atrocities		
<b>Aggravated</b>		<p>X</p> <p>Anathema to a <i>CS</i> on grounds that the <i>JPE</i> did not even recognise the Anglo-American concept of conspiracy within Article 6</p>			<p>X</p> <p>Anathema to a <i>CS</i> on grounds that the <i>JPE</i> did not even recognise the concept of organisational guilt within Articles 9 and 10</p>
<b>Egregious</b>		<p>X</p> <p>Still more antithetical to a <i>CS</i> because the notion of a <i>common plan</i> was not even fully conceived within the Anglo-American jurisprudential tradition and hence was wholly beyond the contemplation of Europeans within the <i>JPE</i></p>			<p>X</p> <p>Same basic objection</p>
<b>Ultratemporal</b>		<p>X</p> <p>The <i>JPE</i> did not recognise the illegality of war, far less the notion that individuals were liable for conspiracy to commit aggressive war in peacetime</p>	<p>X</p> <p>The <i>JPE</i> did not recognise the criminal liability under international law of those who committed acts within the confines of a nation state during peacetime</p>		<p>X</p> <p>The <i>JPE</i> did not recognise the criminal liability under international law of those who committed acts within the confines of a nation state during peacetime</p>

<b>Locational</b>	<p>X</p> <p>The notion of parity of sovereign states enshrined within the <i>JPE</i> with none superior to another and no overarching higher authority superior to any, rendered impregnable, For a <i>CS</i>, the internal law of each sovereign state. What mattered was the <i>lex loci</i> at the date of perpetration of the alleged offence; waging aggressive war was not illegal under the legal-constitutional order of Germany, either during the Weimar regime or post-Nazi assumption of power and Germany had not disregarded universal jurisdiction in declaring war on other states within Europe. Waging aggressive war was not a <i>scelus infandum</i> or <i>malum in se</i>. Because universal jurisdiction did not extend to</p>	<p>X</p> <p>Same basic objection</p>	<p>X</p> <p>Same basic objection</p>		<p>X</p> <p>Same basic objection</p>

	the political act of waging war, German nationals could not be treated as pirates and hauled before the domestic courts of other nation state				
<b>Jurisdictional</b>		<p>X</p> <p>How a sovereign state treated its citizens within the confines of its domestic legal constitutional regime lay entirely within the domain of the national government. Because it was the hallmark of the <i>JPE</i> that all states within it were equal, a <i>CS</i> would never accept the inevitable impingement on state sovereignty by holding one state (or its citizens) criminally accountable for acts committed within the confines of that state against its own citizens or denationalised residents still within the geographical and political control of the</p>	<p>X</p> <p>Same basic objection</p>		<p>X</p> <p>Same basic objection</p>

		state in question			
<b>Compound</b>		X  A CS would reject all three of the conceptually based shades of retrospectivity			X  Same
<b>Descutarial</b>	X  Subject to the caveat mentioned above, the defences of superior orders and acts of state are non-negotiable to a CS. Because the allegiance of every citizen to the legal norms of his or her sovereign state was unequivocal, the correlative guarantees the state accorded were the defences the Allies sought to nullify. No right of resistance availed the individual confronted with the decision of a national government to engage in a specific act of war. No state was able to function efficaciously without the categorical obedience of	X  Same as <i>CAP</i>	X  Save to the extent that these were wholly analogous to <i>war crimes in the old sense</i> , the nullification of the defences would have been problematic to a CS had not Schmitt advocated a political rather than a juridical solution.  (On this point, note that, in his 1945 <i>Gutachten</i> , Schmitt explicitly disavows the defence of <i>superior orders</i> in the context of the commission of atrocities. This stance is inconsistent with the overall tenor of his	Qualified objection  As explained in Chapter 2, the defence of superior orders was already modified in the context of war crimes in the old sense. A CS would not take issue with this in that it was the accepted position both within the <i>JPE</i> and the concrete order of the legal constitutional order within Germany prior to the Nazi era.  To the extent that Article 8 of the Charter exceeded the pre-existing interpretation of the defence of <i>superior orders</i> , a CS would have objected to it	X  Same as <i>CAP</i>

	each and every citizen		theoretical position)		
<b>Ascriptive</b>	<p>X</p> <p>Save as specifically agreed by each sovereign state (such as occurred with <i>war crimes</i> in the old sense), embedded within the <i>JPE</i> was the unwavering assurance that states alone were subjects of ‘international’ law. To a <i>CS</i>, therefore, attribution of individual responsibility was the antithesis of what the occupants of the <i>JPE</i> had come to expect</p>	<p>X</p> <p>Save as specifically agreed by each sovereign state (such as occurred with <i>war crimes</i> in the old sense), embedded within the <i>JPE</i> was the unwavering assurance that states alone were subjects of ‘international’ law. To a <i>CS</i>, therefore, attribution of individual responsibility was the antithesis of what the occupants of the <i>JPE</i> had come to expect</p>	<p>X</p> <p>A <i>CS</i> should not recognise individual responsibility save to the extent that they are analogous to war crimes in the old sense.</p> <p>Schmitt sidestepped this by advocating a political rather than juridical solution</p>		<p>X</p> <p>To the extent that individual were ultimately susceptible to prosecution once the organisation of which they had been members were found guilty, this ran counter to the traditions embedded within the <i>JPE</i> in relation to states alone being subject to international law</p>
<b>Transpositive</b>	<p>X</p> <p>As above, since states alone are liable under international law, it is unsound to seek to transpose criminal accountability from the state to the citizens of the state. This would evoke a conflict of loyalty for the individual who would not know whether to obey international or</p>		<p>X</p> <p>Had not Schmitt recommended a political rather than juridical solution, a <i>CS</i> would have objected to this on grounds that states act politically and the transposition of liability would also mean that the individual</p>		<p>X</p> <p>As above, since states alone are liable under international law, it is unsound to seek to transpose criminal accountability from the state to the citizens of the state. This would evoke a conflict of loyalty for the individual who would not know</p>

	domestic law. This, a CS, would not countenance on the basis that it would undermine the sovereignty of the state by provoking possible insurrection of state citizenry against the municipal authority		was acting politically. Hence the piracy analogy for the attribution of individual responsibility would not operate since the hallmark of piracy is that pirates act for their personal gain		whether to obey international or domestic law. This, a CS, would not countenance on the basis that it would undermine the sovereignty of the state by provoking possible insurrection of state citizenry against the municipal authority
<b>Derivative</b>					X Given that a CS would not even recognise the liability of the organisations, it would be impossible to derive individual accountability from the primary criminal responsibility of those organisations. This would once again also raise the spectre of individual responsibility <i>per se</i> which a CS would reject on grounds that it would flaunt the entrenched position within the <i>JPE</i>
<b>Procedural</b>	X  Establishment of an international	X  Same	X  Same	X  Same	X  Objections pertinent to procedural

	forum to adjudicate on innovatory offences was not within the reasonable contemplation of those within the <i>JPE</i> at the date of commission of the alleged wrongdoings. Infringement of the established norms of the <i>JPE</i> and the consequential disruption of the <i>nomos</i> of the earth signalled an empirical and normative transformation that a <i>CS</i> would find insupportable				retrospectivity are especially relevant here (see Chapter 2)
<b>Evidential</b>	X  Objections pertinent to procedural retrospectivity are equally relevant here	X  Same	X  Same	X  Same	X  Objections pertinent to evidential retrospectivity are especially relevant here (see Chapter 2)
<b>Inchoate</b>	X  In the absence of substantive precedent for <i>crimes against peace</i> , a <i>CS</i> would not countenance any incipient initiative to prosecute defendants for violation of	X  In the absence of substantive precedent for <i>conspiracy</i> , a <i>CS</i> would not countenance any incipient initiative to prosecute defendants for violation of them	X  In the absence of substantive precedent for <i>crimes against humanity</i> , a <i>CS</i> would not countenance any incipient initiative to prosecute defendants for violation of		X  In the absence of substantive precedent for <i>organisational guilt</i> , a <i>CS</i> would not countenance any incipient initiative to prosecute defendants for violation of them

	them		them		
<b>Latent</b>	<p>X</p> <p>To utilise spurious substantive precedent to justify breach of the non-retrospectivity norm embedded within the <i>JPE</i> and to disappoint the reasonable expectations of those potentially affected by retrospective penalisation would be, to a CS, untenable</p>			<p>X</p> <p>Same</p>	
<b>Composite</b>	<p>X</p> <p>Containing at least two of any of the above categories, rejected <i>a fortiori</i></p>	<p>X</p> <p>Same</p>	<p>X</p> <p>Same</p>	<p>X</p> <p>Same</p>	<p>X</p> <p>Same</p>



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## Chapter 2

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