Pirates in Suits: Carl Schmitt, ‘Ordinary Businessmen’ and Crimes of Aggression

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Abstract

The article critically appraises Carl Schmitt’s 1945 expert opinion on *The International Crime of the War of Aggression and the Principle ‘nullum crimen, nulla poena sine lege’*. Each element of Carl Schmitt’s expert opinion is subjected to close scrutiny and contextualised with references, where appropriate, to the ICC’s recently acquired jurisdiction to try crimes of aggression. It is shown that Schmitt’s legal arguments are on the whole tenable but that the expert opinion’s assumptions about the position of the ability of ‘ordinary’ citizens to assess their own actions are very problematic.

Keywords

crimes of aggression – Nuremberg Trials – international criminal law – *nullum crimen* – corporate liability

1 Introduction

On 12 November 2018, the judges of the International Criminal Court (‘ICC’) amended the Court’s Regulations¹ to implement a final set of provisions concerning the ICC’s newly acquired jurisdiction over the crime of aggression.² These amendments represent the final step of a long quest to create an

1 International Criminal Court, *Regulations of the Court* (amended 12 November 2018, entry into force 15 November 2018) ICC-BD/01-05-16.

2 International Criminal Court, *ICC Judges Amend the Regulations of the Court in Connection with the Activation of Jurisdiction over the Crime of Aggression* (ICC-CPI-20181115-PR1417), <<https://www.icc-cpi.int>>, visited on 22 November 2018.

international legal regime of individual responsibility for crimes of aggression. An early, but rarely studied, treatment of the issues concerning an individual's responsibility for acts of aggression is Carl Schmitt's 1945 expert opinion on *The International Crime of the War of Aggression and the Principle 'Nullum crimen, nulla poena sine lege'*.³ Schmitt originally prepared the expert opinion for the legal defence team of Friedrich Flick.⁴ Friedrich Flick (1883–1972), once described as one of "Hitler's biggest industrial backers",⁵ 'employed' up to 100,000 forced labourers in various factories in the course of the Second World War.⁶ The working and living conditions of these labourers were of such inhumane nature that even inspectors of the German regime found them worthy of critique.⁷ Following the end of the war, Flick was arrested by the US-American occupying forces in Germany on 13 June 1945.

Flick's legal team tasked Carl Schmitt, one of Germany's most prominent international lawyers at the time, with preparing an expert opinion on the responsibility of civilians for crimes of aggression. In response, Schmitt produced an expert opinion whose content has, predictably, divided commentators. From an international lawyer's point of view, the opinion is for the most part "ordinary",⁸ "conventional"⁹ and unremarkable. It is certainly neither "brilliant"¹⁰ nor "perfect".¹¹ However, the opinion's arguments are a helpful

- 3 C. Schmitt, *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz 'Nullum Crimen, Nulla Poena Sine Lege'* (Helmut Quaritsch ed., Duncker & Humblot, Berlin, 1994). Timothy Nunan has prepared an English translation of the expert opinion that, as a result of being very true to the original German text, however, at times imperfectly accounts for some of the nuances of Schmitt's arguments. C. Schmitt, 'The International Crime of the War of Aggression and the Principle "Nullum Crimen, Nulla Poena Sine Lege"', in T. Nunan (ed.), *Writings on War* (T. Nunan (tr.), Polity, Cambridge 2011).
- 4 H. Quaritsch, 'Ein Gutachten für die Nachwelt', in Quaritsch (ed.), *ibid.*, p. 137.
- 5 'Friedrich Flick Is Dead at 89; Industrialist Who Aided Hitler', *The New York Times* (22 July 1972), <https://www.nytimes.com/1972/07/22/archives/friedrich-flick-is-dead-at-89-industrialist-who-aided-hitler-served.html>, visited on 22 November 2018.
- 6 A. Drecol, 'Zwangsarbeit im Flick-Konzern', in J. Bähr et al. (eds.), *Der Flick-Konzern im Dritten Reich* (Oldenbourg Verlag, Munich, 2008) p. 531.
- 7 *Ibid.*, p. 550.
- 8 N. Paech, 'Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum Crimen, Nulla Poena Sine Lege" [Review]', 29 *Kritische Justiz* (1996) p. 251.
- 9 O.A. Hathaway and S. J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon and Schuster, New York, 2017) p. 272.
- 10 T. Nunan, 'Translator's Introduction', in C. Schmitt, *Writings on War* (Polity, Cambridge, 2011) p. 21.
- 11 H. Quaritsch, 'Über Eigenart und Erkenntniswert des Gutachtens', *supra* note 3, p. 148.

point of departure for problematising the liability of 'ordinary businessmen', as Schmitt calls them,¹² for crimes of aggression in particular and for violations of international law in general.

In a nutshell, Schmitt's 1945 argument in defence of the innocence of 'ordinary businessmen' for crimes of aggression unfolds in four parts: First, in 1939 the crime of aggression did not exist. Second, to hold ordinary businessmen accountable under such circumstances would violate the principle *nullum crimen sine lege*. Third, even if the crime of aggression existed, Schmitt argues that responsibility could be attributed only to a very small circle of politicians and that, fourth, it would be inappropriate to extend responsibility beyond that circle and to 'ordinary businessmen'.

The article subjects these arguments to close scrutiny on their own terms. References are made, at times and where applicable, to contemporary debates concerning the liability of corporate actors for crimes of aggression. The article begins by identifying precisely which question the expert opinion sought to answer (section 2) before tracing and engaging Schmitt's four arguments (sections 3–6) in favour of the innocence of 'ordinary businessmen' for war crimes. In the conclusion, the opinion's legacy and importance for on-going debates concerning corporate responsibility for violations of international law will be considered.

2 The Opinion

Schmitt's expert opinion consists of five parts¹³ that are framed by an introduction and by a conclusion. At the end, Schmitt appended a very short English summary.¹⁴

12 The term 'ordinary businessmen' will be used in quotation marks throughout the text since Schmitt does not explain in which sense businessmen like Friedrich Flick should be considered to be ordinary.

13 The five parts are: 1. The practical meaning of the principle: "nullum crimen, nulla poena sine lege", 2. War crimes and war guilt in the Treaty of Versailles, 3. Development of the prohibition of aggression from 1919–1939 in international law, 4. Principals and accessories of the international crime of aggression and 5. The position of the individual citizen, especially that of the economically active, ordinary business-man.

14 Quartisch suggests that the English summary might not have been written by Schmitt himself, but possibly by Karl von Lewinski, a German lawyer who advised the Allied Powers with respect to the Nuremberg Trials. See H. Quaritsch, 'Zur Entstehung des Gutachtens 1945', in Quaritsch (ed.), *supra* note 3, p. 129 (fn. 18).

In the introduction, Schmitt narrows down the subject matter of his opinion by distinguishing three kinds of crimes committed in the context of war: violations of the *jus in bello*, “actual atrocities” or *mala in se* and, the crime of aggression. Schmitt defines violations of the *jus in bello* as “violations of the rules and customs of war...committed by the members of a warring State’s armed forces”.¹⁵ Provisions concerning violations of this kind can be derived from, for example, the Hague Conventions of 1899 and 1907 and the “laws governing the treatment of prisoners of war”.¹⁶ Since Schmitt perceives international law to be settled with respect to violations of the *jus in bello*, he excludes them from the scope of his expert opinion.

Similarly, Schmitt also excludes “actual atrocities” or *mala in se* which he defines as “premeditated killings and inhumane atrocities [*Grausamkeiten*] whose victims were defenceless humans”.¹⁷ In the short English note at the end of the expert opinion Schmitt further elaborates that these acts, as *mala in se* “cannot be classified in their real essence by the rules and categories of the usual positive law”.¹⁸ With respect to the legal classification of these acts, Schmitt argues that perpetrators must be given a sentence that is “solemn in its form” and “striking in its effect”,¹⁹ that perpetrators of such crimes must be “ostracised by being placed outside of law’s purview and become outlaws”.²⁰ He continues that it cannot and must not be debated that acts of this kind constitute “abnormal atrocities”²¹ [*abnorme Untaten*]. Accordingly, Schmitt also excludes these “actual atrocities” from the scope of his expert opinion.

Having briefly dismissed these two kinds of war crimes, Schmitt then proceeds to focus on the crime of aggression. Compared to violations of the *jus in bello* and “actual atrocities”, the crime of aggression is, according to Schmitt, “not merely something new but something fundamentally novel”²² since it “used to be accepted beyond doubt that every sovereign state possessed a *jus ad bellum*”²³ without reference to a war being aggressive or defensive. The idea of a crime of aggression, Schmitt argues, arose after the end of World War I and subsequently gained traction in the inter-war period. That is why Schmitt

15 Schmitt, *supra* note 3, p. 15 [all translations by the author unless otherwise specified].

16 *Ibid.*

17 *Ibid.*, p. 16.

18 *Ibid.*, p. 81 [Schmitt writing in English].

19 *Ibid.*

20 *Ibid.*, p. 16.

21 *Ibid.*

22 *Ibid.*, p. 17.

23 *Ibid.*

determines that the essential question for the purposes of his expert opinion is “whether the crime of aggression was not merely a postulate or a programme ... but rather a crime recognised by international law”.²⁴ If the crime of aggression did not exist in 1939, charges with respect to the events of 1939 cannot be brought without violating the principle *nullum crimen, nulla poena sine lege*.

The remainder of the expert opinion is consequently dedicated to the argument that this question must be answered in the negative. The article proceeds by scrutinising these arguments on their own terms and by relating them to contemporary debates on the responsibility of ‘ordinary businessmen’ for crimes of aggression.

3 *Nullum Crimen, Nulla Poena Sine Lege*

Schmitt commences his argument in favour of the innocence of ordinary businessmen with a general observation concerning the principle *nullum crimen, nulla poena sine lege*. The principle entails the “unequivocal prohibition to impose a criminal penalty with respect to an act that was not subject to a criminal sanction at the time of the act’s commission”.²⁵ Schmitt claims that the principle is generally recognised but that its application varies “to an extraordinary extent”²⁶ across the “Continental-European”,²⁷ English and American legal traditions. The difference between the European and the English understanding of the principle concerns the meaning of the term ‘lex’. While European lawyers construe ‘lex’ to refer exclusively to written, positive law,²⁸ the Anglo-American understanding of the term ‘lex’ is not limited merely to written law but refers, in the context of criminal law, to two kinds of legal sources: statute law and customary or common law. According to Schmitt, the principle *nullum crimen, nulla poena sine lege* in the Anglo-American context is applicable only to *mala prohibita* – crimes that derive from statutes. The principle is, however, not applicable to crimes that are *mala in se* – crimes that derive from common law and that “include all breaches of the public peace or order, injuries to person or property, outrages upon public decency or good morals and wilful and corrupt breaches of official duty”.²⁹ From Schmitt’s point of view, the

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 18.

²⁶ *Ibid.*, p. 19.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ H.R. Brill, *Encyclopedia of Criminal Law* (1922) p. 852 (as cited by Schmitt, *supra* note 3, p. 21).

recognition of crimes deriving from common law constitutes a “conflation” of moral and legal issues that is particularly pronounced in American jurisprudence.³⁰ The difference in approach between these three legal orders means that “the inhibitory effects of the ‘*nullum crimen sine lege*’ principle”³¹ are more limited in the Anglo-American legal context compared to the European context.

To common lawyers the differences that Schmitt claims to have identified between the European, English and American legal systems might appear to be slightly exaggerated.³² But overall, Schmitt’s observations concerning the prohibition of retroactive proceedings were as accurate then as they are today. Article 22(1) of the 1998 Rome Statute of the International Criminal Court (‘ICC Statute’) now explicitly limits the ICC’s jurisdiction to conduct that was a crime “at the time it [took] place”.³³ Similarly, the ICC Statute provides that “[n]o person shall be criminally liable” for conduct that took place before the Statute’s entry into force.³⁴ What is interesting then about this first argument are not the strictly legal arguments, but three tangential observations.

3.1 *The Structure of Argument*

The first observation relates to Schmitt’s decision to begin the expert opinion with the *nullum crimen* argument. From an operational point of view, it seems as if it would have been more expedient to begin the expert opinion with the argument that the crime of which ‘ordinary businessmen’ are accused simply does not exist or rather did not exist at the time the alleged conduct took place. The prohibition of *nullum crimen sine lege* was uncontroversial at the time and widely accepted by international lawyers including Hersch Lauterpacht,³⁵

30 Schmitt characterises the American and the English understanding of the principle *nullum crimen* essentially in the same terms (with the exception that the principle’s utility in the American context is even more limited). See Schmitt, *supra* note 3, p. 23.

31 Schmitt, *supra* note 3, p. 23.

32 For a comprehensive introduction to the principle’s history and function, see A. Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 26 *Statute Law Review* (2005) pp. 41–47.

33 Rome Statute of the International Criminal Court (‘ICC Statute’) (adopted 17 July 1989, entered into force 1 July 2002) 2187 UNTS 90. For additional contemporary prohibitions of retroactive proceedings, see also, for example: International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 15; Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 222, Art. 7.

34 ICC Statute, *supra* note 33, Art. 24(1).

35 H. Lauterpacht, ‘The Law of Nations and the Punishment of War Crimes’, 21 *British Year Book of International Law* (1944) pp. 89–90.

Quincy Wright³⁶ and Georg Schwarzenberger.³⁷ Hans Kelsen even dedicated an entire memorandum to the question of retroactivity in the context of the Nuremberg trials.³⁸ Each of them either distinguished the *nullum crimen* maxim on grounds of law or fact (Kelsen, Lauterpacht, Wright)³⁹ or simply argued that those who, like the accused in Nuremberg, “indiscriminately flout every rule of international law as well as all standards of civilization or humanity ... become outlaws”⁴⁰ undeserving of the benefit the *nullum crimen* maxim.⁴¹ However, on the whole and with very few exceptions,⁴² the validity of the *nullum crimen* maxim was undisputed.

Thus, the arguments in favour of charging the defendants in question could have been disposed of with a mere reference to the fact that the defendants could not be responsible for conduct that was not criminal at the time at which the conduct was committed. The *nullum crimen sine lege* argument could then have been invoked as a subsequent, supporting argument. However, the decision to begin with *nullum crimen sine lege* might be attributable to Schmitt's acute awareness and explicit concern that the prosecutors at Nuremberg might be determined to establish a “creative precedent”.⁴³ In light of that concern, the decision to commence the expert opinion with a firm reminder of the importance of the prohibition of retroactive proceedings might seem sensible.

3.2 Nullum Crimen, Sine Poena

The second observation concerns the fact that Schmitt himself was a heavy critic of the *nullum crimen sine lege* principle only a few years earlier. Writing in 1934, Schmitt strongly rejected arguments based on *nullum crimen sine lege* that foreign commentators had advanced in connection with the van der Lubbe trial. Marinus van der Lubbe had been accused of setting fire to the Reichstag

36 Q. Wright, ‘The Law of the Nuremberg Trial’, 41 *American Journal of International Law* (1947) pp. 58–59.

37 G. Schwarzenberger, ‘Judgment of Nuremberg’, 21 *Tulane Law Review* (1946) pp. 348–349.

38 H. Kelsen, ‘The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals’, 2 *The Judge Advocate Journal* (1945) p. 8.

39 See also A.I. Poltorak, ‘The Nuremberg Trials and the Question of Responsibility for Aggression’, in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford University Press, Oxford, 2008) p. 448.

40 Schwarzenberger, *supra* note 37, p. 351.

41 Ultimately, Kelsen made a similar argument by submitting that those who violate the principle of non-retroactivity might forfeit their right to benefit from it. See Kelsen, *supra* note 38, p. 46.

42 For a rare example, see H. Donnedieu de Vabres, ‘The Nuremberg Trial and the Modern Principles of International Criminal Law’, in Mettraux (ed.), *supra* note 39, pp. 225–226.

43 Schmitt, *supra* note 3, p. 23.

on 27 February 1933. Subsequently, van der Lubbe had been sentenced to death based on the provisions of an executive order⁴⁴ that allowed for the imposition of the death penalty for arson.⁴⁵ However, that executive order had been passed on 28 February 1933 – one day after van der Lubbe was accused to have set fire to the Reichstag. Thus, by means of a second law, passed on 29 March 1933, the provisions of the executive order from 28 February 1933 were then equipped with retroactive force⁴⁶ so that van der Lubbe's alleged actions could attract the death penalty. In response to criticism directed towards this way of enabling van der Lubbe to be sentenced to death, Schmitt wrote that it is "obvious to everyone that it is a demand of justice to atone crimes"⁴⁷ and that the international commentators are not after justice but rather after the rule-of-law principle *nullum crimen sine lege* which has the potential of achieving the opposite of justice.⁴⁸ Schmitt rejects this principle in favour of the maxim *nullum crimen sine poena*⁴⁹ – the principle that no crime should go unpunished. He prefers *nullum crimen sine poena* to *nullum crimen sine lege* since the latter conceals "substantial justice" by means of "various formal methods, principles, norms and institutions that aim not for justice but mostly for legal certainty".⁵⁰ Only "liberal" and "typical proponents of the rule-of-law"⁵¹ could defend the principle of non-retroactivity when faced with obvious injustice.

Thus, compared to his 1934 arguments, Schmitt's strong support of *nullum crimen sine lege* in 1945 represents a complete shift of position. One could argue that Schmitt's opportunistic change of heart might be attributable merely to the fact that he was expected to argue in favour of *nullum crimen sine lege* since he was writing in 1945 as the advisor of an alleged war criminal. However, Schmitt's diary entries and his support of a general amnesty for acts

44 Verordnung des Reichspräsidenten zum Schutz von Volk und Staat, Reichsgesetzblatt (Teil 1) p. 83 (28 February 1933).

45 On 6 December 2007, the German Public Prosecutor General determined that the conviction of Marinus van der Lubbe had been annulled in light of the provisions of the Gesetz zur Aufhebung nationalsozialistischer Unrechtsurteile in der Strafrechtspflege, Bundesgesetzblatt (Teil 1) p. 2501 (25 August 1998).

46 Gesetz über Verhängung und Vollzug der Todesstrafe, Reichsgesetzblatt (Teil 1) p. 151 (29 March 1933).

47 C. Schmitt, 'Nationalsozialismus und Rechtsstaat', *Juristische Wochenschrift* (1934) p. 713. Schmitt advanced a similar argument, in C. Schmitt, 'Der Führer schützt das Recht. Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934', *Deutsche Juristen-Zeitung* (1934) p. 948.

48 Schmitt, 'Nationalsozialismus und Rechtsstaat', *supra* note 47, p. 714.

49 *Ibid.*

50 *Ibid.*

51 *Ibid.* Schmitt was referring here to the typical 'Rechtsstaatler' Gustav Radbruch.

committed before 1945 suggest that Schmitt's change of mind was also based on his very own, personal conviction that, in principle,⁵² nobody, including explicitly himself,⁵³ should retrospectively be held accountable for their conduct before the end of the war. In his diary, Schmitt remarked, for example, that "a civil war can only end with an amnesty not with the judgments of a political judiciary".⁵⁴ Amnesty, he writes elsewhere, "means to forget and not only to forget but also the strict prohibition to dig around in the past in search of acts of revenge or grounds for compensation".⁵⁵ In hindsight, "[n]obody may be punished for having stood on the wrong side".⁵⁶ More explicitly, Schmitt remarks that by trying defendants based on criminal laws that the judges at Nuremberg created themselves, they have "made forgetting impossible without which earthly life is impossible".⁵⁷ While these kinds of arguments relate to the *nullum crimen sine lege* principle, they go much further, and could even suggest that Schmitt would have been opposed to any kind of international criminal jurisdiction as it exists today.

3.3 *Undisturbed by Lack of Precedent*

Notably, and this is the third observation concerning Schmitt's first argument, many of the defendants at Nuremberg were eventually convicted based on retroactive legal instruments in accordance with the argument that Schmitt himself had advanced in 1934.⁵⁸ American counsel for the prosecution, Telford Taylor, for example, submitted that

[o]nly the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of an aggressive war is a crime.⁵⁹

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- 52 Presumably, Schmitt might have excluded those guilty of "actual atrocities" from the scope of his amnesty argument.
 - 53 C. Schmitt, *Glossarium: Aufzeichnungen aus den Jahren 1947 bis 1958* (G. Giesler and M. Tielke (eds.), 2nd edn., Duncker & Humblot, Berlin, 2015) p. 173 (entry on 4 April 1949).
 - 54 *Ibid.*, entry on 14 July 1949.
 - 55 C. Schmitt, 'Amnestie oder die Kraft des Vergessens', in G. Maschke (ed.), *Staat, Großraum, Nomos – Arbeiten aus den Jahren 1916–1969* (Duncker & Humblot, Berlin, 1995) p. 218.
 - 56 *Ibid.*, p. 219.
 - 57 Schmitt, *supra* note 53, p. 173 (entry on 4 April 1949).
 - 58 For a concise explication of the rationale employed by the IMT, see B. Van Schaack, 'Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals', 97 *Georgetown Law Journal* (2008) pp. 126–127.
 - 59 T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Knopf Doubleday, New York, 1992) p. 51.

Similarly, the American chief prosecutor, Robert H. Jackson, reported to the American president that “we act on the juridical principle that aggressive war-making is illegal and criminal” and that in doing so he (Jackson) was “not disturbed by the lack of precedent for the inquiry we propose to conduct”.⁶⁰ The International Military Tribunal (‘IMT’) itself avoided dealing with the *nullum crimen sine lege* principle directly by distinguishing it on the ground that the IMT was called upon to apply the law of the IMT’s Charter which granted it the jurisdiction to try crimes of aggression.⁶¹ However, it went on to observe that the assertion that the retroactive jurisdiction of the IMT would lead to unjust results is “obviously untrue”.⁶² On the contrary, under the circumstances, “the attacker must [have known] that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if this wrong were allowed to go unpunished”⁶³ – a classic *nullum crimen sine poena* argument.

Schmitt explicitly⁶⁴ anticipated this line of reasoning and thus determined that mere references to *nullum crimen sine lege* would be insufficient to dispose of the charges against ‘ordinary businessmen’. Instead, he proceeded to “develop the inner complex of problems related to this new crime”⁶⁵ in an attempt to show that it would be inappropriate to hold ‘ordinary businessmen’ responsible for crimes of aggression.

4 Aggression Was Not Unlawful in 1939

Schmitt attempts to establish that war on aggression was not unlawful in 1939 in two steps: first, he evaluates the Peace Treaty of Versailles⁶⁶ and, second, he analyses a select number of developments and instruments between

60 R.H. Jackson, ‘Report to the President from Justice Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals’, 39 *American Journal of International Law* (1945) p. 187.

61 Charter of the International Military Tribunal at Nuremberg, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 UNTS 279, Art. 6(a).

62 IMT, *Trial of the Major War Criminals before the International Military Tribunal*, vol 22 (International Military Tribunal at Nuremberg 1948) p. 462.

63 *Ibid.*

64 Schmitt, *supra* note 3, p. 23.

65 *Ibid.*

66 Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) (1919) 225 CTS 188.

1919–1939. Ultimately, Schmitt concludes that a prohibition of aggression cannot be derived from these documents.

With respect to the Peace Treaty of Versailles Schmitt identifies two relevant articles: Articles 227 and 231. Article 227 concerns the arraignment of William II for a “supreme offence against international morality and the sanctity of treaties”.⁶⁷ Schmitt argues this article cannot be invoked in support of the contention that a war of aggression was declared to be illegal for at least two reasons. First, the article’s personal scope is limited to William II.⁶⁸ Thus one cannot draw any general conclusions from it. Second, after William II had fled to the Netherlands, the Netherlands refused to extradite him which appears to have been accepted by the Allied Powers so that even if Article 227 were designed to criminalise aggression, it did not have a “sustainable effect” in Europe.⁶⁹ Moreover, the United States did not ratify the Peace Treaty of Versailles but concluded a separate agreement with Germany. That agreement⁷⁰ does not include any provision that reflects the content of Article 227 of the Peace Treaty of Versailles. This further undermines the precedential value of Article 227. With respect to Article 231 of the Peace Treaty of Versailles Schmitt concedes that it might be possible to construe that article in favour of a criminalisation of a war of aggression since the provision refers to Germany’s responsibility to pay reparations for damages caused by “the aggression of Germany”. However, Schmitt quickly dismisses such an interpretation as inadmissible because the Article was concerned exclusively with questions of reparations and not with criminal responsibility.⁷¹ Thus, Schmitt determines it is not possible to conclude that the Peace Treaty of Versailles criminalised aggression. He reaches the same conclusion with respect to subsequent legal developments.

As representative examples of the development of international law’s qualification of aggression between 1919 and 1939, Schmitt decides to focus on the Geneva Protocol, the Kellog-Briand Pact, Piracy, the Italian Invasion of Ethiopia

67 Schmitt, *supra* note 3, p. 40. For a contemporary analysis of the attempt to bring the German emperor to trial, see W.A. Schabas, *The Trial of the Kaiser* (Oxford University Press, Oxford, 2018).

68 Schmitt, *supra* note 3, p. 24.

69 *Ibid.*, p. 26.

70 Treaty concerning the re-establishment of Peace between Germany and the United States (signed 25 August 1921, ratified 11 November 1921) (1921) 12 LNTS 192 (signed 25 August 1921, ratified 11 November 1921).

71 Schmitt, *supra* note 3, pp. 30–31.

in 1935–36, and the custom of states claiming neutrality.⁷² With respect to each of these developments Schmitt seeks to answer the question whether “the attempts between 1919–1939 to outlaw war have convinced a citizen, who did not belong to the political elite but who went about his economic, industrial or other business, that a new international order emerged?”⁷³

According to Schmitt, the Geneva Protocol of 2 October 1924⁷⁴ on the Pacific Settlement of International Disputes is unlikely to have had that effect. While the Protocol’s third preambular paragraph asserts that “a war of aggression constitutes ... an international crime”, no state except Czechoslovakia ratified the Protocol which subsequently never entered into force. Similarly, Schmitt dismisses the 1928 Kellogg-Briand Pact.⁷⁵ Article 1 of the Kellogg-Briand Pact provides that the state parties “condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another”. Yet, Schmitt argues, there are at least three reasons why it cannot be assumed that this treaty failed to convince European citizens that war had been outlawed. First, the word “*Ächtung*” (outlawry) does not appear in the Kellogg-Pact.⁷⁶ Second, the pact fails to spell out in sufficiently specific terms the details concerning the actual *actus reus* of the supposed new crime of aggression, it lacks information concerning the identification of perpetrators of such acts and it lacks an enforcement mechanism.⁷⁷ Moreover, “moral condemnation” by the public is the pact’s only envisioned sanction and various states registered wide-ranging reservations regarding the pact’s scope.⁷⁸ It follows for Schmitt that it is all but obvious that the pact criminalised aggression.⁷⁹ To the contrary, he argues, that, if anything, the pact confirms the lawfulness of just wars.⁸⁰

72 Briefly, Schmitt also considers the question of an international jurisdiction, but he merely points out that no international tribunal with criminal jurisdiction exists and that the prohibition of ex-post laws entails a prohibition of ex-post criminal tribunals. See *ibid.*, pp. 54–56.

73 *Ibid.*, p. 32.

74 Geneva Protocol for the Pacific Settlement of International Disputes (adopted 2 October 1924, did not enter into force) 23 *League of Nations OJ Special Supplement* (1924), pp. 498–502.

75 General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 1929) 94 LNTS 57.

76 Schmitt, *supra* note 3, p. 44.

77 *Ibid.*

78 *Ibid.*, p. 47.

79 *Ibid.*, pp. 49–50.

80 *Ibid.*

Next, Schmitt notes “that the concept of piracy is a place of departure for the international criminalisation and prohibition of war”⁸¹ since various comparisons have been made between piracy and sub-marine warfare against merchant ships *inter alia* in the 1922 Submarine Treaty⁸² or in the final act of the Conference on Piracy in Nyon on 14 September 1937.⁸³ But Schmitt notes that there are various differences between the position of pirates and those engaged in acts of war. For example, while piracy is a *malum in se* and as such always prohibited, defensive wars are permitted and, if at all, it is only aggressive wars that are unlawful.⁸⁴ Moreover, piracy is, at least according to the “traditional understanding” unpolitical⁸⁵ and driven exclusively by greed.⁸⁶ War, on the other hand, has both domestic and international political connotations.⁸⁷ And even if one were to insist on equating pirates with those accused of the commission of war crimes, that equation would be permissible only with respect to those “actual atrocities” that violate the “*conscience universelle*”. Thus, Schmitt concludes that despite similarities between pirates and (alleged) war criminals, the significant differences between the two mean that the criminalisation of a war of aggression cannot be established by analogising it with piracy.

Schmitt concludes his review of the positive law as it existed at the time with two brief sections on the League of Nation’s response to Italy’s invasion of Ethiopia and Switzerland’s claim to neutrality. With respect to the Second Italy-Ethiopian War (1935–1937) Schmitt notes that League Members condemned Italy’s action at least initially, but that none of the Members characterised Italy’s conduct “as an international offence in a criminal sense”.⁸⁸ Further support for his argument Schmitt draws from Switzerland’s decision to claim the status of a neutral state. That the League accepted Switzerland’s decision and that the League did not expect Switzerland to participate in the implementation of sanctions shows that the traditional international legal order that did not distinguish between aggressive and defensive wars had, by 1939, not been replaced by a novel legal regime.⁸⁹

81 *Ibid.*, p. 53.

82 Treaty relating to the Use of Submarines and Noxious Gases in Warfare (1922) 25 LNTS 202.

83 Nyon Agreement (entered into force 14 September 1937) 181 LNTS 137.

84 Schmitt, *supra* note 3, p. 53.

85 *Ibid.*, pp. 53–54.

86 *Ibid.*, p. 54.

87 *Ibid.*, pp. 53–54.

88 *Ibid.*, p. 56.

89 *Ibid.*, p. 58.

Again, the legal aspects of Schmitt's analysis of the status of a war of aggression are unremarkable. Writing during the war, Sheldon Glueck doubted the illegality of a war of aggression.⁹⁰ Similarly, the authors of the Harvard Draft Convention on Rights and Duties of States in Case of Aggression were proposing rules for regulating aggression explicitly *de lege ferenda*.⁹¹ Kelsen submitted that "according to existing International Law, resorting to war ... is, although illegal, not a 'crime' in the true sense of the term",⁹² and even in light of the Nuremberg Trials, Pompe submitted in the 1950s that "the period from 1919 till to-day still has the character of a transitory period in which both the old and the new motion of war ... play a role".⁹³ The IMT did of course adopt the opposite of Schmitt's position. However, the IMT's attempt to find support for its claim that a war of aggression was not only illegal but also criminal does more to strengthen the counter-argument than to support its own conclusion. For example, acknowledging the imperfections of the Kellogg-Briand Pact, the IMT sought to establish the pact's binding force by referring to The Hague Conventions.⁹⁴ The Hague Conventions, however, regulate the *ius in bello*, not the *ius ad bellum*. And in any event, the renunciation of war on an international level certainly does not "necessarily"⁹⁵ mean that such an act becomes a crime for an individual.⁹⁶ The IMT also sought to draw support from other legal instruments that existed either only in draft form,⁹⁷ were never ratified,⁹⁸ or the

90 S. Glueck, *War Criminals: Their Prosecution and Punishment* (Knopf, New York, 1944) p. 155. After the war, Glueck changed his position slightly. In 1946, he argued that there was evidence supporting the "existence of a widely prevalent juristic climate which has energized a spreading *custom* among civilized peoples to regard a war of aggression as not simply 'unjust' or 'illegal' but downright *criminal*". S. Glueck, 'The Nuernberg Trial and Aggressive War', 59 *Harvard Law Review* (1946) p. 412 [emphasis in original]. See also G.A. Finch, 'The Nuremberg Trial and International Law', 41 *The American Journal of International Law* (1947) p. 24.

91 'Rights and Duties of States in Case of Aggression: Introductory Comment', 33 *American Journal of International Law* (1939) p. 824.

92 Kelsen, *supra* note 38, p. 10.

93 C.A. Pompe, *Aggressive War: An International Crime* (Nijhoff, The Hague, 1953) pp. 40–41.

94 IMT, *supra* note 62, p. 463.

95 *Ibid.*

96 Although it should be noted that these observations were made not in the context of adjudicating upon the acts of 'ordinary businessmen' but with respect to the actions of Nazi Germany's most senior political elite.

97 The 1923 draft of a Treaty of Mutual Assistance, see IMT, *supra* note 62, p. 464.

98 Geneva Protocol for the Pacific Settlement of International Disputes (adopted 2 October 1924, did not enter into force) 23 *League of Nations Of Special Supplement* (1924) pp. 498–502. See IMT, *supra* note 62, p. 464.

provisions of the Treaty of Versailles that concerned the individual liability of the German emperor⁹⁹ or violations of the *ius in bello* rather than the *ius ad bellum*.¹⁰⁰ So Schmitt's analysis of the law existing at the time is not particularly noteworthy. From a contemporary perspective, in light of the ICC's recent acquisition of the competence to try crimes of aggression, many of the expert opinion's substantive arguments in this regard are now moot. However, there are at least three observations which this part of the opinion invites.

4.1 *The Focus on the Crime of Aggression*

The first observation relates to Schmitt's decision to focus his entire opinion, written in defence of 'ordinary businessmen', on the crime of aggression. While the Report of American Prosecutor Jackson¹⁰¹ proposed that selected Germans should be held accountable for committing the crime of aggression, crimes of aggression formed only one (the last) of three charges that he suggested could be brought. The additional two charges concerned "(a) Atrocities and offenses against persons or property constituting violations of International Law ... including ill treatment of prisoners of war ... and ill treatment of inhabitants in occupied territory"¹⁰² and "(b) Atrocities and offenses, including atrocities and persecutions on racial or religious grounds, committed since 1933".¹⁰³ Considering what 'ordinary businessmen' ordinarily do, it would have been much more reasonable to expect that they would face charges under (a) and (b). And indeed, Flick and several co-defendants were ultimately not charged with having committed "[c]rimes against peace" (Article 2(1)(a), Control Council Law No. 10) that would have encompassed crimes of aggression.¹⁰⁴ Instead, proceedings were initiated, in accordance with Article 2(b) of Control Council Law No. 10 concerning War Crimes. Specifically, Flick *et al.* were *inter alia*¹⁰⁵ accused to have been:

99 IMT, *supra* note 62, p. 465.

100 *Ibid.*

101 Jackson, *supra* note 60.

102 *Ibid.*, p. 186.

103 *Ibid.*

104 Control Council Law No. 10 (adopted 20 December 1945) Nuremberg Trials Final Report Appendix D.

105 Additional charges were brought based on Art. 2(1)(c) (Crimes against Humanity) and Art. 2(1)(d) (Membership in Criminal Groups or Organizations) – but none of those charges concerned 'Crimes against the Peace' as such (Control Council Law No. 10, Art. 2(1)(a)).

principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: enslavement and deportation to slave labor on a gigantic scale of members of the civilian populations of countries and territories under the belligerent occupation of, or otherwise controlled by, Germany; enslavement of concentration camp inmates including German national; and the use of prisoners of war in war operations and work having a direct relation with war operations, including the manufacture and transportation of armaments and munitions.¹⁰⁶

Especially in light of Schmitt's extremely clear understanding of what the prosecutors at Nuremberg would set out to do, it is thus surprising that he wrote an extensive opinion on the crime of aggression even though he can reasonably be expected to have known that the 'ordinary businessmen', whose status he had been asked to consider, were unlikely to face charges of this kind. However, by focusing on the crime of aggression and by showing that businessmen cannot be responsible for it, Schmitt creates the impression that 'ordinary businessmen' really are not to be held responsible for the conduct during the war at all. He creates that impression by means of the distinction between the three different war crimes at the beginning of the opinion. Schmitt acknowledges that there are violations of the *ius in bello* and 'actual atrocities' and explains that crimes of aggression belong to neither of those categories. This outsourcing implies that 'ordinary businessmen' could not be responsible for acts falling into those two categories. This is implicit only because at no point in the expert opinion does Schmitt actually problematise which kind of conduct 'ordinary businessmen' might have engaged in. In any event, the opinion's start creates the impression that, if at all, 'ordinary businessmen' could be responsible for crimes of aggression and when Schmitt subsequently, and with relative (though entirely predictable) ease, shows that it is difficult to charge businessmen with a crime of aggression, one appears to be justified in concluding that businessmen might not be liable for anything at all.

Since Schmitt never actually makes it explicit that the establishment of businessmen's non-responsibility for crimes of aggression means that they cannot be responsible for the more serious crimes, some, at the time, might have feared that Schmitt's expert opinion could actually assist the prosecution in the subsequent trials against German industrialists. Anyone who would

106 Office of Military Government for Germany (US), *Case No. 5: The United States of America against Friedrich Flick et al*, (1947) p. 5.

have called the legal status of Control Council Law No. 10 into question could have been confronted with Schmitt's argument that it cannot and must not be debated that any of the listed crimes (Crimes against Peace, War Crimes, Crimes against Humanity...) constitute "abnormal atrocities".¹⁰⁷ It has been argued that this concern might have been one reason why Schmitt's opinion was never utilised in the subsequent trials.¹⁰⁸ The same commentator is quick to point out, however, that this interpretation (that Schmitt would have thought that ordinary businessmen could have been responsible for committing "actual atrocities" or violations of the *ius in bello*) would "naturally" not have been what Schmitt had in mind.¹⁰⁹ But if Schmitt did not think that forced labour and the exploitation of the civilian population in occupied territories could fall under one of the two other categories (*mala in se* and *ius in bello* violations) and if he argues that the businessmen cannot be responsible for the crime of aggression, it is unavoidable to conclude that he must have thought that the conduct of these 'ordinary businessmen' was, at least legally, completely unproblematic.

Again, one could object by pointing out that Schmitt was merely authoring an expert opinion for a particular defendant and that he could not be expected to offer a comprehensive treatment of the question or even to make arguments that would hurt his client. However, it is important to keep in mind that Schmitt was asked to write a *Gutachten* – a document that is characterised by the independence of its author and which is supposed to offer an objective assessment of a given issue.¹¹⁰ And one should also keep in mind that it is up to the author of the *Gutachten* to decide which arguments to emphasise. Schmitt's decision to focus entirely and exclusively on the crime of aggression made it easy for him to argue that 'ordinary businessmen' should not be held accountable for their conduct during the war.

4.2 *The Subjective State of Mind of 'Ordinary Businessmen'*

This effect of Schmitt's decision begins to become even more apparent, and this is the second observation, with respect to his argument that it matters not only whether international law might have prohibited wars of aggression in 1939 but whether the individual 'ordinary businessmen' actually knew or could have been expected to know that aggression was unlawful. At the very beginning of this section of the opinion Schmitt argues that the crucial question is

¹⁰⁷ Schmitt, *supra* note 3, p. 16.

¹⁰⁸ Quaritsch, *supra* note 4, p. 141.

¹⁰⁹ *Ibid.*

¹¹⁰ Quaritsch, *supra* note 14, p. 125.

whether the attempts to outlaw war were of such a nature that “the ordinary businessman of any European State must have been convinced that aggression ... had become an actual, criminal offence by means of a new, legally binding international norm”.¹¹¹ He specifies, “[o]nly when the individual citizen must have been of this conviction can one now hold him responsible as a principal or accessory of the new international crime of war”.¹¹² Schmitt continues to stipulate throughout the opinion that it is the subjective awareness and conviction of the individual, of the ‘ordinary businessman’, that matters.¹¹³ By arguing that the successful emergence of a novel crime of aggression depends on the corresponding *opinio iuris* of a private individual, Schmitt transforms to his advantage the conflation of domestic and international law that he goes subsequently on to criticise in the final part of his argument (see below). The continuous references to the subjective state of mind of an individual are surprising since, from international law’s point of view, the *opinio iuris* of an individual is, in principle, not relevant for the purposes of establishing the validity of a rule of international law¹¹⁴ and was not relevant even at the time. The contemporary position is also reflected in the ICC’s statute which precludes defences based on mistakes of law (unless the mistake “negates the mental element required” by a given crime).¹¹⁵ Given that mistakes of law – or a given defendant’s unawareness of the existence of laws making what the defendant did unlawful – were no defence in international or domestic law at the time, Schmitt’s continued emphasis on the subjective state of mind of ‘ordinary businessmen’ is out of place. The only benefit of proposing such a test for identifying the emergence of a prohibition of the war of aggression is that it is a test that is very difficult to satisfy, which ultimately serves the interests of those who tasked Schmitt with writing the opinion.

4.3 *Pirates in Suits*

Before moving on to consider the third part of Schmitt’s argument a final comment should be made concerning Schmitt’s attempt to distinguish war criminals from pirates. As we have seen, Schmitt argues that piracy and war can be distinguished on essentially two grounds: piracy is a *malum in se* whereas a war is not, and piracy is driven by greed and unpolitical whereas wars are always

¹¹¹ Schmitt, *supra* note 3, p. 32.

¹¹² *Ibid.*

¹¹³ See, for example, *ibid.*, pp. 40, 44, 47, 74, 78.

¹¹⁴ One might add that the *opinio iuris* of an individual is also, generally, irrelevant for the purposes of establishing the existence of a rule of domestic law.

¹¹⁵ ICC Statute, *supra* note 33, Art. 32(2).

political. With respect to this comparison, it should be noted that the mere observation that the established crime of piracy is a *malum in se* is not a particularly convincing argument with respect to the legal status of a novel crime whose status is the very thing that is being discussed. Furthermore, the political character of war might explain why it is more challenging to try war-related activities in international or domestic courts, but a war's political character does not preclude the possibility that the activities that take place in connection with it might not be piracy-like. Schmitt states a distinguishing feature of pirates is their "*animus furandi*".¹¹⁶ But it is by no means obvious, especially in the context of the Second World War, that those who waged the war of aggression might not have possessed exactly the same kind of intent to steal. In any event, in the context of an expert opinion written for the defence team of Friedrich Flick, it would seem more appropriate to compare not war and piracy but the activities of 'ordinary businessmen' and piracy. And here the distinction becomes even more difficult.

Both pirates and businessmen are driven by an interest to optimise their profits. Both, but especially the latter, would argue that their activities are not driven by political objectives. If it is deemed possible to argue that submarine commanders who execute military orders in a theatre of war could be equated with pirates,¹¹⁷ then it is difficult to avoid the conclusion that Nazi-Germany's unpolitical 'ordinary businessmen' were nothing else but pirates in suits since they, like pirates, engaged in opportunistic, profit-driven abuse of defenceless others. Surprisingly, Schmitt even appears to accept¹¹⁸ that the trajectories of acts of war and acts of piracy could intersect at the extreme end of the legal spectrum that "actual atrocities" and acts that violate the "conscience universelle" occupy. However, the fact that he does not think it problematic to include this last observation in an expert opinion written for the Flick defence team either means that he accepted that it would be possible to charge businessmen like Flick for their war-time conduct (but it is clear from the entire opinion that Schmitt was convinced of the lawfulness of Flick *et al.*'s activities), that he did not actually know what Flick *et al.* did during the war (and thus *per se* excluded the possibility that their acts could constitute actual atrocities) or that he did know what Flick *et al.* did but concluded that those acts were not sufficiently serious to characterise them as conduct that violated the "conscience universelle".

¹¹⁶ Schmitt, *supra* note 3, p. 54.

¹¹⁷ Schmitt himself acknowledges that such arguments could be tenable, *ibid.*, pp. 52–53.

¹¹⁸ *Ibid.*, p. 54.

In any event, it can be concluded that Schmitt's analysis of the status of the crime of aggression in 1939 was on the whole accurate. However, it should also have become apparent that, keeping in mind that Schmitt was tasked to clarify the status of 'ordinary businessmen', his choice to focus on aggression, to link the status of that crime to the *opinio iuris* of 'ordinary businessmen' and his attempt to distinguish acts of piracy from acts of 'ordinary businessmen' are each, and especially taken together, very problematic.

5 Individual Responsibility for a Collective Act

In parts IV and V Schmitt advances what appear to be two sides of the same alternative argument. Namely, that even if a crime of aggression existed,¹¹⁹ 'ordinary businessmen' could not be responsible for it. In part IV Schmitt develops this argument by emphasising that the attempt to criminalise a war of aggression must address the problem of assigning responsibility for an aggressive war that is, by nature, a collective activity¹²⁰ while guilt and responsibility are, in accordance with modern criminal law, ascribed to specific individuals. Schmitt's starting point is the conventional truth that only states are subjects of international law.¹²¹ However, since Schmitt anticipates that the proponents of an international crime of a war of aggression are determined to pierce the sovereign veil,¹²² he goes on to consider two alternatives to holding a state accountable.

The first alternative is to hold the entire people accountable for the actions of its state if the people agreed to the war in a democratic regime.¹²³ However, he quickly dismisses such an approach of collective punishment as "primitive".¹²⁴ He also rejects the idea of collective accountability since collective guilt avoids that those who are "actually guilty and responsible" are punished.¹²⁵

¹¹⁹ Schmitt does not make the alternative nature of the latter two arguments explicit, but their alternative character is certainly implied and they have also been treated as such by other commentators, see, for example: Hathaway and Shapiro, *supra* note 9, p. 272; Nunan, *supra* note 10, p. 18.

¹²⁰ Schmitt, *supra* note 3, p. 63.

¹²¹ *Ibid.*, p. 59.

¹²² *Ibid.*, p. 63.

¹²³ *Ibid.* It does not become apparent why Schmitt excludes situations where a people in a non-democratic regime agrees with its government's decision to go to war.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, p. 64.

The second alternative, preferred by Schmitt, is to identify those individuals that are actually responsible for the decision to wage a war of aggression. Given that war is a “highly-political process both in domestic and international terms”, it must be primarily the political decision-makers who should be held accountable. “Specifically,” Schmitt argues, “it is the head of state who declares a war of aggression” who is responsible.¹²⁶ In addition to the head of state, certain ministers of the government that declared war might be responsible as well as parliamentarians (if they had been involved in the decision-making process leading up to the declaration of war).¹²⁷ Applying this alternative way of assigning responsibility to Nazi Germany, Schmitt determines that it is first and foremost Adolf Hitler who is to be held responsible for starting a war of aggression. Beyond Hitler himself, only people who belonged to Hitler’s most “inner circle” [*verschworene Gemeinschaft*] should be identified as bearers of responsibility in the context of an international crime of war.¹²⁸ Just how small that inner circle should be becomes apparent when Schmitt makes it clear that members of Hitler’s cabinet could not, without more, be assumed to be responsible for the government’s decision since many of them lacked direct access to Hitler himself.¹²⁹

For Schmitt, it is crucially important to identify with absolute precision those individuals who would have been responsible for starting a war of aggression. The failure to do so would not only be an “ordinary error of law”.¹³⁰ The failure to do so would result in the “tragic disappointment” of the world public’s expectation of a criminal trial of the Hitler regime.¹³¹ Ultimately, however, Schmitt writes, that the “injustice and wrong of such a failure [to identify those actually responsible] would be of the same magnitude as the world-crime for whose atonement these proceedings were commenced”.¹³² At least two things are noteworthy with respect to this part of Schmitt’s argument.

5.1 *Exclusive Responsibility of the Head of State*

The first observation relates to Schmitt’s test for identifying those who should be responsible for the commission of a crime of aggression. Schmitt limits the class of responsible agents to political decision-makers. The ICC’s Statute, by

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 65.

¹²⁹ *Ibid.*, p. 66.

¹³⁰ *Ibid.*, p. 68.

¹³¹ *Ibid.*, p. 65.

¹³² *Ibid.*, p. 68.

comparison, adopts an 'effective control' test and thereby allows for the possibility of anyone who "is in a position effectively to exercise control over or to direct the political or military action of a State"¹³³ to be held responsible for committing a crime of aggression. The African Union's Malabo Protocol even goes beyond¹³⁴ the ICC's 'effective control' test by expanding liability to those who "materially support" conflict parties,¹³⁵ which could include corporate actors. As explained above, Schmitt not only adopts a more restrictive approach, but he also argues that, if applied to Nazi Germany, his test means that Adolf Hitler alone (and his very inner circle) would be responsible. Schmitt's argument presupposes that Adolf Hitler (and his inner circle) was the only autonomous political agent within Germany. Everyone else is necessarily transformed into mere instruments of Hitler's will. One may or may not find that interpretation convincing, but it might be sufficient to observe that wars (of aggression) are rarely waged by one man and his inner circle. Even if one argued that only few, or even very few, exercised effective control over the German armed forces, countless decision-makers were in a position to decide whether and how to implement the orders they had been given.

5.2 *Equating the Prohibition on Retroactivity with the Prohibition on Genocide*

The other noteworthy aspect of this element of Schmitt's argument is his position that the potential wrong of adopting a too broad test for identifying those responsible for waging a war of aggression is as serious as the crimes the Nuremberg trials sought to address. In other words, the severity of the rule of law violations which the ex-post trial of an 'ordinary businessman' (who 'employed' up to 100,000 forced labourers and who profited from an aggressive war) entails is to be considered as serious as the unlawfulness which Nazi Germany's crimes against the peace, war crimes and crimes against humanity entailed. More concretely still, Schmitt effectively argues that the potentially unlawful imprisonment of a major industrialist is as unjust as the genocide of six million Jews. Three years later, in 1948, Schmitt goes even further. Now he writes: "Hitler has committed great crimes, but for the greatest crimes the

133 ICC Statute, *supra* note 33, Art. 8bis(1).

134 K. Ambos, 'Genocide (Article 28B), Crimes Against Humanity (Article 28C), War Crimes (Article 28D), and the Crime of Aggression', in G. Werle and M. Vormbaum (eds.), *The African Criminal Court: A Commentary on the Malabo Protocol* (Springer, Heidelberg, 2016) p. 51.

135 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force) Assembly/AU/Dec 427 (XIX).

world spirit has reserved instruments other than this Hitler. For the nuclear bomb and the ex-post-criminalisation of aggressive war Hitler is out of the question [as a defendant].”¹³⁶

Schmitt’s opinion has been praised for being informed by a “relaxed, serious and polite”¹³⁷ tone. In light of the passages just quoted, and if compared to legal opinions authored by other leading international lawyers at the time,¹³⁸ such a characterisation appears to be unwarranted. And there are various other tendentious paragraphs. Schmitt suggests, for example, that those who equate the acts of the German regime with those of pirates would essentially blame Germany for not having developed the nuclear bomb sooner (since the conduct of pirates is attributable to their scientific backwardness).¹³⁹ And that one could hold the United States of America responsible as an accessory to the criminal acts of the German regime since the United States initially declared that they would want to remain neutral. It is passages like these that justify calling Schmitt’s opinion “a [rhetorical] disaster”.¹⁴⁰

6 Ordinary Businessmen Are Neither Principal nor Accessory Perpetrators of This Unlawful Act

Further elaborating on his argument in favour of assigning responsibility for starting a war of aggression, Schmitt then turns to consider the position of ‘ordinary businessmen’. He begins by noting that, “normally”, it would be out of the question that individual citizens could be responsible as principals or accessories for the crime of aggression.¹⁴¹ Schmitt contrasts this position with the view that individuals could be directly responsible for the commission of the crime of aggression since “individuals are obliged not to comply with the orders of a government that wages an unjust war and to refuse military service” in such a regime.¹⁴² Schmitt argues that it is untenable to expect citizens to actively resist their governments since citizens are *de jure* and *de facto* incompetent to determine whether or not a given war is a war of aggression or not. With respect to a citizen’s legal competence *vis-à-vis* a domestic government,

136 Schmitt, *supra* note 53, p. 144 (entry on 18 August 1948).

137 Quaritsch, *supra* note 11, p. 148.

138 See, e.g., Kelsen, *supra* note 38.

139 Schmitt, *supra* note 3, p. 54.

140 Hathaway and Shapiro, *supra* note 9, p. 275.

141 Schmitt, *supra* note 3, p. 70.

142 *Ibid.*

Schmitt observes that every state “in the world has [reserved] the decision concerning the justness or injustice of a war to itself”.¹⁴³ This means that a citizen’s refusal to cooperate at times of war or any attempt to sabotage a country’s war efforts would attract the “heaviest criminal sanctions”.¹⁴⁴ In support of his contention, Schmitt claims that this position corresponds to moral and religious tradition. He points out¹⁴⁵ that Kant rejected a right to resist one’s government and proclaimed the duty of a people to tolerate even the unjust state authorities.¹⁴⁶ Schmitt also invokes the Bible’s Romans 13:1¹⁴⁷ in support of the contention that obedience of state authorities was particularly prevalent amongst German Lutherans.¹⁴⁸

On the other hand, Schmitt does accept that some of the Scholastics (Victoria and Suarez) did allow for an individual’s right to resist against an unjust worldly authority.¹⁴⁹ However, he dismisses such arguments based on the fact that the scholastics presupposed the existence of a spiritual, “supernational”¹⁵⁰ counter-authority to the state which could support and guide an individual when determining whether a given war is or is not just. Individuals in a modern, secular context, by contrast, operate within a normative vacuum and would need to rely on their “individual judgment”¹⁵¹ when considering the justness of a given war.

This lack of a divine counter-authority also means, according to Schmitt, that individual subjects are *de facto* incompetent to determine whether or not their resistance is justified. With respect to an individual’s position in Nazi Germany, Schmitt argues that ordinary citizens were not able to acquire independent information about current affairs.¹⁵² Indeed, since states reserved the *de jure* competence to decide such questions to themselves, any attempt to access information abroad that would enable citizens to make a “moral and legal assessment” of a given situation would lead to criminal punishment.¹⁵³ As a result, citizens would be expected to take the risk of taking an independent,

143 *Ibid.*, p. 75.

144 *Ibid.*

145 *Ibid.*

146 I. Kant, *Die Metaphysik der Sitten* (Königlich Preußische Akademie der Wissenschaften, Berlin, 1907) p. 319.

147 “Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God” (Romans 13:1, King James Version).

148 Schmitt, *supra* note 3, p. 75.

149 *Ibid.*, p. 72.

150 *Ibid.*

151 *Ibid.*

152 *Ibid.*, p. 74.

153 *Ibid.*, p. 75.

though uninformed, decision “against their country and nation” with “unforeseeable consequences”.¹⁵⁴

It would be particularly inappropriate to expect individual citizens to make such determinations in light of the fact there are no international institutions that could provide protection in situations of this kind.¹⁵⁵ Indeed, Schmitt argues, that it is a fundamental rule of law and morality that an authority that imposes an obligation must protect the individuals that comply with the obligations imposed upon them.¹⁵⁶

Ultimately, the expectation to resist an unjust regime leads, according to Schmitt, to a situation where a citizen is confronted with a “horrendous conflict between domestic and international duty”.¹⁵⁷ According to domestic law, a citizen is obliged to be loyal to its government. According to international law, a citizen would be obliged to resist its government. To impose upon citizens in an authoritarian regime an international legal obligation to resist its government means “nothing short of imposing upon them a duty to engage in hopeless attempts to start a civil war or a duty to become martyrs”.¹⁵⁸ More specifically, penalising individual citizens that are subjects of a “terrorist government”¹⁵⁹ would mean not only to hold the actual terrorists accountable, but it would also mean that the “terrorised, the victims of the terror, were declared to be criminals”.¹⁶⁰

6.1 *The Archetype of an Uninformed, Unpolitical Citizen*

This last element of Schmitt’s opinion reveals most clearly that Schmitt’s argument is informed by a particular kind of archetype of a citizen. The section paints a picture of citizens who are on the whole uninformed and unpolitical, that are unable to distinguish independently between whether a war is right or wrong, that are part of a “highly specialised” network of a “modern, industrial polity”.¹⁶¹ There is no doubt that there were parts of German society at the time that did not feel responsible, who “looked on”, were “politically inactive” and did not participate “in the decisions and acts of those in power”.¹⁶²

¹⁵⁴ *Ibid.*, p. 74.

¹⁵⁵ *Ibid.*, p. 73.

¹⁵⁶ *Ibid.*, p. 78–79.

¹⁵⁷ *Ibid.*, p. 78.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 79.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*, p. 74.

¹⁶² K. Jaspers, ‘The Question of German Guilt’, in G. Mettraux (ed.), E. B. Ashton (tr.), *Perspectives on the Nuremberg Trial* (Oxford University Press, Oxford, 2008) p. 675.

But it cannot be overlooked that first “Hitler was actively wanted ... by the majority of Germans”,¹⁶³ and second that this description of Germany as a system that was based on the distinction between the “leaders and the led”, between “the governed and those who governed”¹⁶⁴ is itself an argument. Schmitt’s characterisation of the individual ‘ordinary’ citizens who exists in a ‘normative vacuum’ and who is unable to distinguish right from wrong since its conscience is caught in a web of domestic and international legal norms infantilises the governed and empowers those who lead. It is a narrative that disenfranchises and de-individualises the citizen. It is a narrative designed to enable and justify the projection of power by authoritarian and totalitarian regimes.¹⁶⁵ However, a system of that kind is co-constituted by the leaders and the led, by the governed and those who govern. It relies on ‘ordinary’ individuals like Mr. Puttfarken¹⁶⁶ to denounce others for non-conformist behaviour, on ‘ordinary’ bureaucrats like Mr. Eichmann¹⁶⁷ to administer the security state and on ‘ordinary’ businessmen like Mr. Flick to craft the tools for war. With respect to ‘ordinary’ mega-industrialists like Mr. Flick, in particular, it might be added that the ‘ordinariness’ of their situation cannot be compared to that of an average citizen in terms of access to information and an awareness of general affairs. It is thus misleading, to say the least, to characterise the general German population that overwhelmingly supported its government and especially ‘ordinary businessmen’ like Mr Flick as the victims (the ‘terrorised’) of a terror regime. Large-scale terror does not project itself. It relies on those who are complicit in its projection of power. And complicit are not only those who directly participate in acts of violence but also the Puttfarkens, the Eichmanns, the Flicks – all the ‘ordinary businessmen’ and other ‘unpolitical’, ‘uninformed’ citizens who, at best, meet acts of violence with indifference.

6.2 *To Resist Is to Commit Treason*

Schmitt not only employs the image of a particular kind of archetype, he also exaggerates the consequences that a slightly more political, more autonomous,

163 N. Frei, *1945 und wir: das Dritte Reich im Bewusstsein der Deutschen* (Beck, Munich, 2005) p. 91.

164 Schmitt, *supra* note 3, p. 65.

165 See also, Jaspers, *supra* note 162, p. 673.

166 Mr. Puttfarken denounced Mr. Göttig for having written “Hitler is a mass murderer” on the wall of a bathroom. The case is discussed by G. Radbruch, ‘Statutory Lawlessness and Supra-Statutory Law’, 26 *Oxford Journal of Legal Studies* (2006) p. 2. For additional examples, see also R. Gellately, *Backing Hitler: Consent and Coercion in Nazi Germany* (Oxford University Press, Oxford, 2001) p. 226.

167 See in particular, H. Arendt, *Eichmann in Jerusalem* (Viking Press, New York, 1963) p. 135.

more reflective citizen who would have hesitated to support the regime would have faced. Schmitt contrasts his archetype of a citizen with a proactive member of the resistance when he says that the only option was to either comply with the order of the Nazi regime or to “engage in a hopeless civil war”. It is not clear why ordinary acts of civil disobedience or passive non-cooperation (of which there were very many even within the highest ranks of Hitler’s regime),¹⁶⁸ falling short of outright assassination attempts or calls to start a civil war, would not suffice for Schmitt’s purposes. For example, Eichmann himself acknowledged that he was able to exercise a discretion when discharging his duties and that he had colleagues of his or higher rank that made exceptions when it came to the absolute commitment to the Final Solution.¹⁶⁹

Just like Schmitt overstates the contrast between ‘ordinary’ citizens and extraordinary civil warmongers, he also misconstrues what it means to engage in acts of resistance. According to Schmitt, the decision to engage in an act of resistance is an act against the country to which the person resisting belongs. Schmitt writes that if one expected citizens to resist their government in situations where citizens reached the conclusion that they do not agree with their government’s actions, one would expect them to take decisions “against their country and their nation”.¹⁷⁰ This line of argument confuses allegiance to a country with allegiance to a government and appears to suggest that the victory of a war would by necessity always be beneficial for a nation. It is an argument that for a long time justified using the label ‘traitors’ and ‘criminals’ to describe those who resisted the Nazi regime.¹⁷¹

7 The Opinion’s Legacy

Following his arrest on 13 June 1945, Friedrich Flick was charged with (and ultimately convicted of) the commission of war crimes between 1939 and May 1945 in accordance with Article 2(b) of Control Council Law No. 10.¹⁷² Crucially,

¹⁶⁸ The 20 July 1944 attempt on Adolf Hitler’s life is only the most prominent example. Examples of resistance can be found across all sectors of German society. See, e.g., H. Coppi and S. Heinz (eds.), *Der vergessene Widerstand der Arbeiter: Gewerkschafter, Kommunisten, Sozialdemokraten, Trotzisten, Anarchisten und Zwangsarbeiter* (Dietz, Berlin, 2011).

¹⁶⁹ Arendt, *supra* note 167, p. 137.

¹⁷⁰ Schmitt, *supra* note 3, p. 74.

¹⁷¹ In 2009, 64 years after the end of the Second World War, the German *Bundestag* nullified the convictions of those who had been tried by Nazi Germany for treason.

¹⁷² Control Council Law No. 10 (adopted 20 December 1945) Nuremberg Trials Final Report Appendix D.

and as pointed out above, Flick was not accused of having committed “crimes against peace” (Article 2(a) of Control Council Law No. 10) that would have included wars of aggression. This meant that Schmitt’s expert advice on the legal status of wars of aggression was not needed and, accordingly, Schmitt’s opinion was not submitted to the tribunal. Schmitt’s subsequent request for permission to publish his opinion in an extra-judicial setting were denied by Flick’s legal team.¹⁷³ Although Schmitt was able to publish sections II and III of the opinion in his 1950 *Nomos der Erde*,¹⁷⁴ he was clearly disappointed with the fate of his Gutachten. In 1948, he recorded in his diary that “he would gladly have died in case his 1945 exposition concerning the criminalisation of the war of aggression could have been published at the time or in the course of the trials”.¹⁷⁵ And even 15 years later, in a letter to Ernst Forsthoff dated 18 November 1963,¹⁷⁶ Schmitt reports that the reading of Hannah Arendt’s *Eichmann in Jerusalem*¹⁷⁷ brought back memories of the concluding part of his expert opinion where he problematises the retroactive criminalisation of wars of aggression.

In that specific regard, Schmitt’s concerns have now been superseded by the latest amendments to the ICC’s Regulations that criminalise wars of aggression.¹⁷⁸ However, contemporary proceedings based on alleged violations of international law by corporate actors such as Swedish Lundin Petroleum (with respect to the company’s oil exploration activities in South Sudan)¹⁷⁹ or the French LafargeHolcim (with respect to the company’s operations in Syria),¹⁸⁰ also show that certain questions raised by Schmitt’s opinion remain current. In particular, it remains disputed whether corporations can themselves, as legal persons, be held accountable for violations of international criminal law.¹⁸¹

173 Quaritsch, *supra* note 4, p. 139.

174 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot, Berlin, 1950) pp. 232–255.

175 Schmitt, *supra* note 53, p. 126 (entry on 20 June 1948).

176 E. Forsthoff and C. Schmitt, *Briefwechsel Ernst Forsthoff-Carl Schmitt (1926–1974)* (Akademie Verlag, Berlin, 2007) pp. 198–199.

177 Arendt, *supra* note 167.

178 International Criminal Court, *supra* note 2.

179 R. Milne, ‘Swedish Oil Bosses set to be charged over South Sudan Deaths’, *Financial Times* 18 October 2018, <https://www.ft.com/content/c7295ae6-d2cf-11e8-a9f2-7574db66bcd5>, visited on 14 March 2019.

180 E. Jarry, D. Vidalon and J. Revill, ‘French Put Lafarge under Investigation over Syria Militant Payoffs’, *Reuters*, 28 June 2018, <https://www.reuters.com/article/us-lafarge-syria-idUSKBN1JO1LE>, visited on 14 March 2019.

181 See, e.g., J. Kyriakakis, ‘Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law’, in L. May and Z. Hoskins (eds.), *International Criminal Law and*

At present, the jurisdiction of the ICC is still limited to natural persons.¹⁸² Moreover, in the course of attempts to hold Shell accountable for alleged violations of international law in Nigeria, it was made clear that “since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to ‘ripen[] into a universally accepted norm of international law’”.¹⁸³ It is also uncertain to which extent domestic courts possess the jurisdiction to try alleged violations of international law that occurred extraterritorially. If taken forward, the Swedish proceedings against Lundin Petroleum would constitute one of the first examples of a domestic court’s extraterritorial exercise of jurisdiction with respect to alleged violations of international law by individual businessmen.¹⁸⁴

Notwithstanding these unresolved questions, the most important lesson to be learned from reading Schmitt’s *Gutachten* is that, maybe counterintuitively and with the benefit of hindsight, Schmitt’s attempts to distinguish the activities of ‘ordinary businessmen’ from those of intentional violators of international law merely achieve to prove the opposite of his contention. Namely, that ‘ordinary’ business activities and violations of international law need not be contradictions but can go hand-in-hand.¹⁸⁵ As such, it is imperative for ‘ordinary businessmen’ who seek to avoid engaging in unlawful behaviour to do their very best to reflect upon the consequences of their actions.¹⁸⁶

Philosophy (Cambridge University Press, Cambridge, 2009); H. van der Wilt, ‘Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities’, 12 *Chinese Journal of International Law* (2013) p. 43.

182 ICC Statute, *supra* note 33, Art. 25(1).

183 *Kiobel and ors (on behalf of Kiobel and Tusima) v. Royal Dutch Petroleum Co and ors, Appeal Judgment*, [2010] US Court of Appeals for the Second Circuit Docket No 06-4800-cv, Docket No 06-4876-cv, 623 F3d 111 (2d Cir2010), ILDC 1522 (US 2010) para. 58.

184 M. Ingeson and A. L. Kather, ‘The Road Less Traveled: How Corporate Directors Could Be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad’, *EJIL Talk*, <https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/>, visited on 13 March 2019.

185 Wilt, *supra* note 181, p. 67. See also I. Schoultz and J. Flyghed, ‘Doing Business for a “Higher Loyalty”? How Swedish Transnational Corporations Neutralise Allegations of Crime’, 66 *Crime, Law and Social Change* (2016) p. 183.

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