



Polycratic International Law Scholarship. Carl Schmitt, Victor Bruns and the KWI for International Law

Reinhard Mehring



Berlin under National Socialism, 1937¹

On 2 November 1933, the Chairman of the Board of Trustees wrote "to the members of the Institute for Comparative Public Law and International Law":

"The Director of the Institute for Comparative Public Law and International Law, Privy Councillor of Justice Professor Dr Bruns, has requested that the State Councillor Professor Dr Carl Schmitt, who has been appointed ordinary professor at the Faculty of Law of the University of Berlin, be elected scientific advisor to the Institute. The Director of the Institute has added the following in support of his application:

¹ Photo: [Creative Commons](#).





'The position that Professor Dr Carl Schmitt occupies in the science of his subject makes a justification of this motion superfluous. I would merely like to point out the great importance for the work of the institute corresponding to the appointment of this scholar, who is involved to an outstanding degree in the preparation of new laws². It is to be expected that through his person, the work of the institute in the field of constitutional law will be placed in the direct service of practical government responsibilities. This corresponds to the goals and tasks which the institute has set itself since its founding and which it has since been called upon to realise especially in the field of international law.'

I put this motion to the vote in accordance with § 5 of the Institute's Statutes.

If I am not honoured with a reply by the 15th of this month, I assume that the members of the Board of Trustees are in agreement with the proposal."

Carl Schmitt had declared his acceptance of the call to Berlin on 8 September and had a "very friendly"³ meeting with Victor Bruns in a hotel room a few days later, on 18 September. Perhaps they discussed his employment as an "advisor" at the Institute on that occasion. On 5 November, i.e. a few days after the letter from the Chairman of the Board of Trustees, Schmitt notes a meeting with Bruns and Richard Bilfinger "at the *Fürstenhof*" after a "meeting of the Academy for German Law [*Akademie für Deutsches Recht*]". At that meeting, Bruns gave a lecture on "Germany's equality as a legal problem."⁴ In his treatise on international law "*Nationalsozialismus und Völkerrecht*" ("National Socialism and International Law"), Schmitt wrote about the lecture: "Our claim to equal rights has only recently been set out by Victor Bruns in an almost classical manner towards his various legal functions."⁵ Only very rarely did he cite publications by Bruns. The positive mention of balanced legal analysis is also somewhat poisoned; in other contexts, Schmitt might have spoken more disparagingly of liberal, diplomatically restrained positivism. In any case, at the end of 1933, when Schmitt is just arriving in Berlin in his new role as "crown jurist", his contact with Bruns seems particularly intense and positive. If we return here to the letter from the Chairman of the Board of Trustees, it is almost surprising that in November 1933 elections were still held in accordance with the statutes, since the university constitution had just been changed to fit the "*Führer* principle". The election is also questionable from a formal point of view, since objections are only accepted up to a deadline, for a motion that declares its justification "superfluous" and naturally assumes approval. Were all members of the Institute eligible to vote or only the trustees, as is implied?

² Above all: *Carl Schmitt*, *Das Reichsstatthaltergesetz*, Berlin: Carl Heymanns Verlag 1934.

³ Wolfgang Schuller (ed.), *Carl Schmitt Tagebücher 1930 bis 1934*, Berlin: Akademie Verlag 2010, 303.

⁴ *Victor Bruns*, *Deutschlands Gleichberechtigung als Rechtsproblem*, Berlin: Carl Heymanns Verlag 1933.

⁵ *Carl Schmitt*, *Nationalsozialismus und Völkerrecht*, in: Günter Maschke (ed.), *Carl Schmitt Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924-1978*, Berlin: Duncker & Humblot 2005, 391-423, 393.





Was a vote taken? What were Bruns intentions behind replacing Erich Kaufmann with Schmitt? Did he expect an intensification of legal-political influence in the "constitutional law field"? Was it a gesture of loyalty or did he also seek to secure the institute through the "Councillor of State" and protect it from encroachment?

The "crown lawyer" at KWI. A strategic choice?

Only few sources on Schmitt's advisory function can be found in the MPI archives. Schmitt had transitioned from Cologne to Berlin University in autumn 1933 with a decidedly "state-political (*staatspolitisch*)" mandate and was at the zenith of his Nazi career. He had been appointed Prussian State Councillor by Hermann Göring and had been cooperating closely with the "Reich Commissar (*Reichskommissar*)" and "Reich Law Leader (*Reichsrechtsführer*)" Hans Frank for several months. At the *German Lawyers' Congress (Deutscher Juristentag)*, actually the 4th Conference of the *Federation of National Socialist German Lawyers (Bund Nationalsozialistischer Deutscher Juristen, BNSDJ)*, which was opened by Adolf Hitler himself, he had just, on 3 October, given a programmatic speech on the "Reconstruction of Constitutional- and Administrative Law"⁶, which emphasised "*Führertum* and ethnic identity [*Artgleichheit*] as fundamental concepts of National Socialist law" and recommended the institution of the new State Council as the "first illustrative and exemplary figure" for the "establishment of a *Führer* Council", to which the ambition of the "crown jurist" probably aspired at the time.⁷

Schmitt relied on a thorough transformation of the "total state" into a personalistically integrated, more or less "charismatic" "*Führer* state". It is in line with this thinking when Bruns writes in his slightly oblique octroy that through his "person, the work of the institute in the field of constitutional law will be placed in the direct service of practical government responsibilities". In Bruns' careful wording, a distinction between the scientific institute and political practitioners, who act independently and are only employed as "advisors" is alluded to. What Schmitt actually did for his pay has not yet been researched and is in part probably not even fixated in writing. However, his institutional involvement remained relatively weak in the following years. Although he had driven Erich Kaufmann, with whom he had been cordial enemies since their days together in Bonn, out of the university by intense anti-Semitic denunciation and had taken over his role at the KWI and he also became co-editor of the institute's Journal *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*; today: Heidelberg Journal of International Law, HJIL), he most-likely never belonged to Bruns' closest and innermost circle of advisors and contributors. During the next few years, he

⁶ Carl Schmitt, Der Neubau des Staats- und Verwaltungsrechts, in: Carl Schmitt, *Gesammelte Schriften 1933-1936*, Berlin: Duncker & Humblot 2021, 57-69.

⁷ Carl Schmitt, Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit, in: *Schmitt* (fn. 6), 76- 115, 105-106.





occasionally worked in the institute's library, which was splendidly housed in the city palace next to the university, and probably also sought occasional discussions there, especially with Heinrich Triepel, on whose concept of hegemony Schmitt took a critical position in an in-depth review;⁸ however, the KWI probably never became the preferred stage for his National Socialist *Gleichschaltung* activities.

As extensive and intensive as international research on Schmitt is, it lacks sources for a precise description of Schmitt's multifaceted legal-political work, especially for the period after 30 June 1934. The self-description during his pretrial detention in Nuremberg in 1947 must therefore suffice as a basic access point here, even if it is obviously apologetically embellished.⁹ Prosecutor Robert Kempner wanted a written statement on the question of whether Schmitt had "promoted the theoretical underpinning of Hitler's *Großraum* policy". Schmitt denied this at length. On that occasion he also mentioned his role at the KWI and his relationship with Victor Bruns:

"Since 1936, I have not been asked by anyone, neither by an office nor by a person, neither officially nor privately, for an expert opinion¹⁰ and I have not given such an opinion, neither for the Foreign Office nor for a party [NSDAP] office nor for the Wehrmacht, the economy or the industrial sector. Nor have I given any advice that was in any way even remotely connected with Hitler's policy of conquest or occupation. [...] Like many other law professors, I took part in several meetings of the Committee for International Law of the Academy for German Law, which was chaired by Prof. Bruns,¹¹ but I kept completely to myself there, even in discussions, and did not have or seek the slightest influence. [...] I did not take on any office or position during the war, neither as a court martial councillor, nor as a war administrative councillor in occupied territory, nor as a member of an admiralty court or anything similar. Neither was I offered any such position, nor did I seek it. I did not even succeed Prof. Bruns as director

⁸ On this: *Carl Schmitt*, Führung und Hegemonie, in: Günter Maschke (ed.): *Carl Schmitt Staat, Großraum, Nomos. Arbeiten aus den Jahren 1916-1969*, Berlin: Duncker & Humblot 1995, 225-231.

⁹ *Carl Schmitt*, Stellungnahme I: Untermauerung der Hitlerschen Großraumpolitik; Stellungnahme II: Teilnehmer des Delikts „Angriffskrieg“? in: Helmut Quaritsch (ed.), *Carl Schmitt Antworten in Nürnberg*, Berlin: Duncker & Humblot 2000, 68-90.

¹⁰ In 1936, Schmitt had failed with: *Carl Schmitt*, Stellungnahme der Wissenschaftlichen Abteilung des National-Sozialistischen Rechtswahrerbundes zu dem von der amtlichen Strafprozesskommission des Reichsjustizministeriums aufgestellten Entwurf einer Strafverfahrensordnung (Statement of the Scientific Department of the National Socialist Federation of Lawkeepers [*National-Sozialistischer Rechtswahrerbund*] on the Draft of a Law of Criminal Proceedings as Presented by the Official Commission on Criminal Proceedings of the Reich Ministry of Justice), in: *Schmitt* (Fn. 6), 431-481.

¹¹ Thus, on 30 March 1935, he gave a presentation on the "Problem of Mutual Assistance Between States" at the 3rd plenary session of the Committee on International Law. On 6 May 1938, he presented his report on "The Turn to the Discriminating Concept of War" at the 2nd session of the International Law Group. The Academy minutes also record the participation in and a verbal contribution to presentations by Arnold Toynbee (28 February 1936 and summer 1937).





of the Institute for Comparative Public Law and International Law (Kaiser Wilhelm Society) when Prof. Bruns died in September 1943. [...] I did not have an institute, never became rector or dean".

In view of the numerous misrepresentations he makes strategically, the almost astonished formulation that he "did not even" succeed Bruns is astonishing. Was the office so insignificant? Could Schmitt still make claims at the end of 1943 if he had really been as powerless "since 1936" as he would have us believe?

Schmitt and his relationship to Victor Bruns and Carl Bilfinger

In May 1941, Schmitt commented to Rudolf Smend about one of the meetings of the International Law Committee; he called this "rout" one of the "humiliations of pure science" and elaborated:

"To see how professors feel highly honoured when they are allowed to listen to younger speakers or even old ones from the ministry is very sad. When then a 'discussion' led by Bruns occurs, in which Mr Thoma, Mr Bilfinger Mr von Döngern [sic!], who is just as old, present pioneering concepts - with expressions of gratitude that they have been granted such distinguishing permission - to the address of his high authorities, one longs for the garret." ¹²

That Schmitt made such disparaging remarks about Richard Thoma, Bruns and Bilfinger in 1941 is somewhat surprising. Schmitt refers to a meeting on 2 May 1941 on the agenda item "Land War Convention [*Landkriegsordnung*]". Conrad Roediger spoke about the "codified law of the land [*Landrecht*] in the present war". Richard Thoma spoke in a longer statement about the "validity of international law in the General Government", i.e. in Hans Frank's sphere of power. Thoma asked how one could "achieve a conformity of the German government's actions in this completely overcome area with international law".¹³ He argued that *occupatio bellica* could not be used as legal grounds, but instead an open declaration that the "occupation is carried out with the intentio of the complete destruction of the defeated enemy". Thoma thus dunned international law and an open declaration of National Socialist extremism. Otto von Döngern immediately objected in National Socialist spirit, Bruns as chairman then promptly ended the discussion. A statement by Schmitt, who authored „*Die Wendung zum diskriminierenden Kriegsbegriff*“ ("The Turn to the Discriminating Concept of War"), is not recorded. His letter to Smend thus belittles Thoma by associating him with von Döngern, although, or precisely because, Thoma took the contrary position and called to mind

¹² Reinhard Mehring (ed.), "Auf der Gefahrenvollen Straße des öffentlichen Rechts" Briefwechsel Carl Schmitt - Rudolf Smend 1921-1961, 2nd revised edition, Berlin: Duncker & Humblot 2012, 103f.

¹³ Werner Schubert (ed.), Academy for German Law. Committees for International Law and for Nationality Law (1934-1943), Frankfurt: Peter Lang Verlag 2002, 164.





international law in the General Government. Schmitt's polemics make one doubt that he represented a "classical" concept of war. He considered open mentioning of the war crimes in Frank's General Government taboo. The fact that he polemicized against Thoma in letters to Smend is not surprising given his political differences with Smend. More surprising are the negative remarks about Bilfinger and Bruns.

Previously, he had maintained comparatively friendly relations with all three. Bilfinger must even be described as one of his closest companions; clearly closer to Schmitt in political terms than Smend, who, like Triepel, had already distanced himself from the apologia of the presidential system in 1930 and with whom Schmitt had since maintained rather diplomatic relations based on old ties. Schmitt had however maintained friendly and also familiar relations with Bilfinger since 1924. Even before their close collaboration as councils in the *Prussia versus Reich* case before the Leipzig State Court, the two frequently stayed overnight in each other's homes in Halle and Berlin. Since Bilfinger was a relative and friend of Bruns, their interactions before 1933 also extended to Bruns. They met on various occasions and also went on short trips together in Bruns' *Horch* limousine to the surrounding area. Even though only a few letters from Bruns have been preserved in Schmitt's estate, the surviving diaries clearly prove that the two knew each other quite well. Bruns was not a member of the NSDAP and was probably much more politically moderate than his cousin Bilfinger. Schmitt's diary records numerous meetings and positive mentions in professional contexts, followed by private socialising, especially for the years 1933/34. On 24 January 1934, for example, Bruns heard Schmitt's lecture on the "army and the overall structure of the state", the exposition of the constitutional-historical treatise "*Staatsgefüge und Zusammenbruch des zweiten Reiches*" ("State-composition and collapse of the Second Reich [German Empire]"); in return, Schmitt heard Bruns' lecture on "international law and politics" on 4 July 1934.¹⁴

Schmitt remained in close contact with Bilfinger after 1933. The latter opted for National Socialism no less resolutely than Schmitt. Even if a certain cooling of the relationship can be observed or assumed from around 1934, it remained relatively close and friendly after 1933 - and even after 1945. Bilfinger took on Schmitt's former student from Bonn Karl Lohmann as an employee and enabled him to complete his habilitation treatise in Heidelberg. There are no meaningful sources for the development of his relationship with Bruns after 1934. Although close friendly contacts cannot be assumed, there are no signs of a rift. The negative statements of 1941 and 1947 are therefore surprising; loyalty was however certainly not Schmitt's strong suit.

¹⁴ Schmitt (fn. 5), 392; see on this Schuller (fn. 3), 349; cf: *Victor Bruns, Völkerrecht und Politik*, Berlin: Junker und Dünnhaupt 1934.





The KWI from Schmitt's point of view

In his statement to Kempner in 1947, Schmitt also addresses the work of the KWI in the Third Reich, in particular the ZaöRV, of which he was co-editor. In his further remarks, he went through his journal contributions one by one, emphasising in each case the "scientific" aim and independence of his statements. Regarding the KWI, he said here:

"The most important jurisprudential journal that dealt with questions of international law from the German point of view during these years (1939-1945) was the 'Zeitschrift für ausländisches öffentliches Recht und Völkerrecht', edited by Prof. Victor Bruns, the director of the 'Institute for Comparative Public Law and International Law' of the Kaiser Wilhelm Society. Bruns, who also headed the International Law Committee of the Academy of German Law, was an international law scholar of international renown and great personal distinction. When he died in autumn 1943, the 'American Journal of International Law' dedicated a respectful obituary to him. One of the co-editors of the journal was Graf Stauffenberg, a brother, associate and companion in fate of the Graf Stauffenberg, who made the assassination attempt on Hitler on 20 July 1944. My name was next to Heinrich Triepel's on the journal as "published with the cooperation of" Triepel and myself. However, I have had no influence on the journal since 1936 and have not published any essays. Incidentally, the journal produced valuable essays and published good material that it received from official German agencies. How its cooperation with the Foreign Office and other authorities played out, I do not know. I did not bother and Prof. Bruns would probably not have let me gain insight into this arcanum of his journal, which he guarded closely. ¹⁵

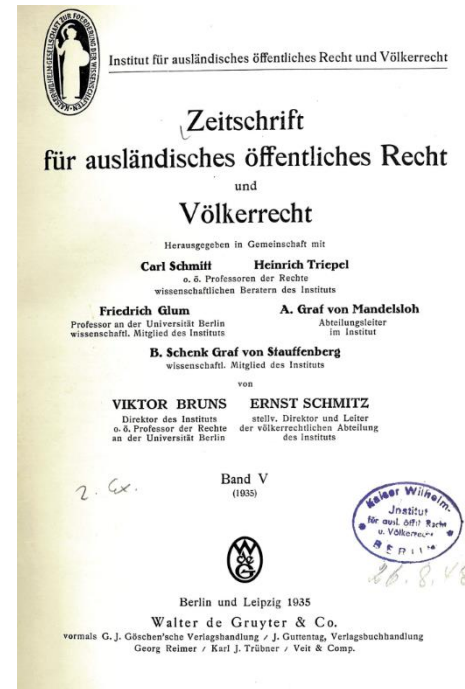
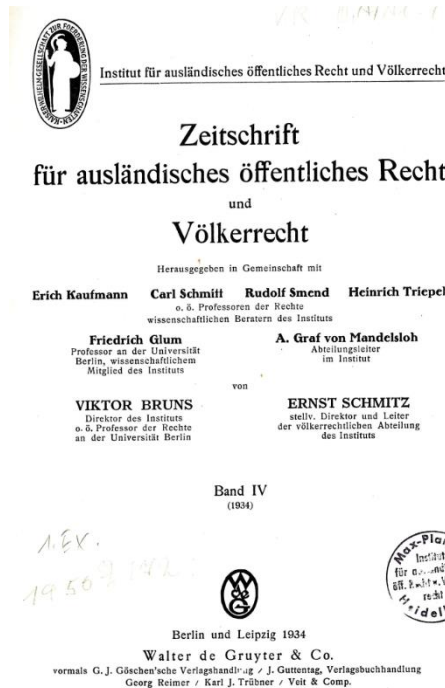
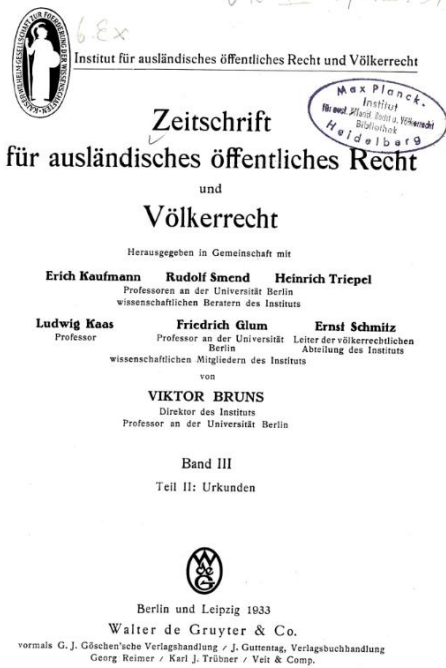
The remarks are full of ambivalences. On the one hand, Schmitt praises and yet on the other hand he quietly disparages. Thus, he cites the Stauffenberg mythos and yet on the other hand emphasises the "advocatory" role of the Institute. It remains that he did publish a self-disclosure¹⁶ of his review essay "Die Wendung zum diskriminierenden Kriegsbegriff" ("The Turn to the Discriminating Concept of War"), in the institute's journal at the time. The fact that he did not publish a major essay, but preferred other Nazi organs, actually contradicts the purpose of his remarks. In his 1947 statement, Schmitt names various actors, spheres of activity and competitors.

¹⁵ Schmitt (fn. 9), 73f.

¹⁶ Carl Schmitt, Die Wendung zum diskriminierenden Kriegsbegriff (Selbstanzeige), HJIL 8 (1938), 588-590.



MPIL 100



The title page of the ZaöRV editions Vol. III (1933) to V (1934). Carl Schmitt appears as co-editor, Rudolf Smend and Erich Kaufmann have been removed.

Where exactly Schmitt stood between Göring, Frank and Joseph Goebbels, Otto Koellreutter, Reinhard Höhn and Werner Best, Triepel, Bruns and Bilfinger on various issues is difficult to say with the agile and enigmatic author. Particularly in international law, he sought institutional alternatives to the state of the 19th century as an advocate of the "legal revolution" and "movement". In debate with Triepel, he had already criticised the "dualistic theory" of strict distinction between international law and national law with its orientation on the concept of the state stemming from international law. His work "Völkerrechtliche Großraumordnung" ("The Großraum Order of International Law") then propagated the "concept of empire" as the central concept of hegemonialist thinking on international law, which closely linked power and law and equated power to law if and when it formed political sovereignty and order as "konkretes Ordnungsdenken" (roughly: theory of factual order).

Schmitt's search for institutional alternatives to the "civic constitutional state" and a new constitution - after the oxymoron of a National Socialist "Normalzustand" ("normal state", as opposed to the *state of exception*) - also implied alternatives to the traditional academic system and type of jurist.¹⁷ Schmitt affirmed Frank's founding of an Academy for German Law as such

¹⁷ On this, for example: *Carl Schmitt*, Bericht über die Fachgruppe Hochschullehrer im BNSDJ, in: Schmitt (fn. 6), 116-118; *Carl Schmitt*, Aufgabe und Notwendigkeit des deutschen Rechtsstandes, in: Schmitt (fn. 6), 350-361; *Carl Schmitt*, Geleitwort: Der Weg des deutschen Juristen, in: Schmitt (fn. 6), 165-173.





an institutional alternative. As an author and editor, he also sought new journalistic forms of academic debate. Thus, he founded the series “*Der deutsche Staat der Gegenwart*” (“The German State of the Present”), in which programmatic pamphlets on the *Gleichschaltung* and reorientation of jurisprudence were published. There is no doubt that he did not regard the KWI and its journal as a model and epitome of a National Socialist institution. It is difficult to say whether he appreciated its form and effectiveness from a strategic point of view due to its international impact. As a successor to Bruns, he would have certainly made some changes. On 25 October 1943, he noted his annoyance at Bilfinger's appointment as director of the institute in his diary: “Bilfinger is to be Bruns' successor. Gloating about it, what ridiculous nepotism, racketeering even beyond death.”¹⁸ When Bilfinger surprisingly became director of the Institute again in 1949,¹⁹ he brusquely broke off the contact, which had been quite intensive for 25 years. Did he really expect to become director of the Institute in 1943, after Bruns' death? That was probably not a realistic prospect. But perhaps, in typical professorial fashion, he at least wanted to be asked. Yet, as he well knew, the office did not fit his person and role. He was more of a National Socialist agitator and less adept at convincing diplomacy. This was one of the reasons he was soon isolated.

Translation from the German original: Sarah Gebel

¹⁸ I would like to thank Dr Gerd Giesler for this information.

¹⁹ In detail: *Felix Lange*, Carl Bilfingers Entnazifizierung und die Entscheidung für Heidelberg. Die Gründungsgeschichte des völkerrechtlichen Max-Planck-Instituts nach dem Zweiten Weltkrieg, HJIL 74 (2014), 697-731.

