

# International Law and the Illusion of Novelty: Georg Schwarzenberger and British International Law

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# INTERNATIONAL LAW AND THE ILLUSION OF NOVELTY: GEORG SCHWARZENBERGER

Robert Cryer\*

## INTRODUCTION

In many ways the history of international law in the United Kingdom (UK) in the 20<sup>th</sup> century tends to be refracted through the lens of what might be called the McNair group. This group, centred around Cambridge, and consisting of Lord McNair, his colleagues, and his students, comprising, *inter alia*, Sir Hersch Lauterpacht, Wilfred Jenks, Clive Parry, and Sir Robert Jennings, exerted a huge influence on international law over this period.<sup>1</sup> However, there is another story about British international law in that era that ought to be told. It is the purpose of this piece to tell the story of one other British international lawyer, who is an important part of the story and tradition of British international law, and its influence elsewhere. This is Georg Schwarzenberger, who, although was one of the most significant international lawyers of his time, has not been the subject of the level of intellectual inquiry that other members of the McNair group (of which he was, definitely, not a part) have been.<sup>2</sup> This chapter will also seek to explain some of the reasons for the relative neglect of Schwarzenberger in the annals of modern British international law (and perhaps more generally).

When Sir Hersch Lauterpacht died there was, understandably, an outpouring of scholarly grief. In addition to a lengthy tribute by Shabtai Rosenne in the *American Journal of International Law*, the *British Yearbook of International Law* not only published an obituary, but also an unprecedented three-part tribute to him.<sup>3</sup> When Georg Schwarzenberger, another émigré international lawyer who had settled in the UK, died the best part of thirty years later, he only received a short obituary in the *British Yearbook*, which was by no means

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\* Birmingham Law School. Thanks to Gerry Simpson for inviting me to give this paper at a seminar in the London School of Economics, and for his unfailing support, *inter alia*, in the preparation of this work. I would also like to thank David Fraser, Paul Roberts, Dirk van Zyl Smit and Nigel White, for their comments on an earlier draft of this piece, as well as for lengthy discussions on point with Iain Scobbie. Finally, thanks are owed to those who knew of, worked with, or were taught by Schwarzenberger and who have shared their reminiscences and experiences of him with me. I only fail to mention them by name owing to my respect for their wishes. In a spirit of full disclosure I should say that I was taught international law by a protégé of Schwarzenberger, Professor E.D. Brown as an undergraduate.

<sup>1</sup> See G.G. Fitzmaurice, 'Arnold Duncan Lord McNair of Gleniffer 1885-1975' (1974-1975) 47 *British Yearbook of International Law* x.

<sup>2</sup> Martii Koskenniemi, for example, whilst treating other States' approaches to international law more generally, in his magisterial *The Gentle Civilizer of Nations The Rise and Fall of International Law 1870-1960* (Cambridge, CUP, 2001), Chapters 3-4, only speaks in detail of Lauterpacht when looking at the UK. See also Robert Cryer, 'Déjà vu in International Law' (2002) 65 *Modern Law Review* 931.

<sup>3</sup> Shabtai Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge' (1961) 55 *American Journal of International Law* 825; C. Wilfred Jenks, 'Hersch Lauterpacht: The Scholar as Prophet' (1960) 36 *British Yearbook of International Law* 1; Gerald Fitzmaurice, 'Hersch Lauterpacht-The Scholar as Judge: Part I' (1961) 37 *British Yearbook of International Law* 1; Gerald Fitzmaurice, 'Part II' (1962) 38 *British Yearbook of International Law* 1; 'Part III' (1963) 39 *British Yearbook of International Law* 133. There was a later tribute in 1979, Gerald Fitzmaurice, 'Hersch Lauterpacht and His Attitude to the Judicial Function' (1979) 50 *British Yearbook of International Law* 1.

hagiographic, and a one-page mention in the *American Journal*.<sup>4</sup> His passing thus went largely unmentioned upon. Since his death, few have commented on Schwarzenberger in English,<sup>5</sup> and such comments that there are have rarely been complimentary.<sup>6</sup>

It would be ill-advised to make too much of the comparative length of Lauterpacht's and Schwarzenberger's respective obituaries.<sup>7</sup> There are a number of reasons that may at least in part, explain this disparity in treatment. One is that the obituaries in the *British Yearbook* have become more notable by their brevity in the recent past (Lord McNair's, in the mid '70s was about the same length as Schwarzenberger's). Another is that Lauterpacht had been an inspirational editor of the *British Yearbook*, thus it would be natural for that publication to seek to commemorate his life, alongside the extraordinary contribution he had made to international law in the UK and elsewhere. In addition, it cannot be ignored that Lauterpacht had been the UK judge on the ICJ, and had given a number of important opinions in that august body.<sup>8</sup> Schwarzenberger, on the other hand, although being a barrister, did not have much success in the world of practice. On a more personal level, it is said that whilst Lauterpacht was, as a person, warm,<sup>9</sup> Schwarzenberger, despite being able to engage the friendship and respect of his students and colleagues,<sup>10</sup> also had a reputation as having at times a stern, 'difficult' manner, and he could be caustic.<sup>11</sup> Even his obituarist said he was his own worst enemy when it came to tact.<sup>12</sup>

But this cannot be the whole story. Matters of substance at least ought to trump questions of infelicity in expression, and Schwarzenberger was not, in spite of his manner, which,

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<sup>4</sup> Maurice Mendelsohn, 'Professor Georg Schwarzenberger (1908-1991)' (1992) 53 *British Yearbook of International Law* xxii-xxvi; Leslie Green, 'Georg Schwarzenberger (1908-1991)' (1992) 86 *American Journal of International Law* 341.

<sup>5</sup> There is, nonetheless, a biography of Schwarzenberger in German, see Stephanie Steinle, *Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908-1991)* (Baden-Baden, Nomos, 2002). For English exceptions see Stephanie Steinle, 'Plus ça change, plus c'est la même chose: Georg Schwarzenberger's Power Politics' (2003) 5 *Journal of the History of International Law* 387; Stephanie Steinle, 'Georg Schwarzenberger (1908-1991)' in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted-German Speaking Emigré Lawyers in Twentieth Century Britain* (Oxford, OUP, 2004) 663

<sup>6</sup> See, e.g. Colin Warbrick, 'Brownlie's Principles of Public International Law-An Assessment' (2000) 11 *European Journal of International Law* 621, pp.621-622. Although, for an exception, see José E. Alvarez, *International Organizations as Law Makers* (Oxford: OUP, 2005) p.xvii.

<sup>7</sup> In the same volume of the Yearbook, J.E.S. Fawcett, for example, had a similar length obituary. Ian Brownlie 'J.E.S. Fawcett' (1992) 53 *British Yearbook of International Law* ix.

<sup>8</sup> See, for example, Fitzmaurice, 'Hersch Lauterpacht', Parts I and II; Rosenne, 'Sir Hersch Lauterpacht'; Iain G.M. Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8 *European Journal of International Law* 264.

<sup>9</sup> For some evidence on point see (albeit from a specific perspective) see Elihu Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: CUP, 2010).

<sup>10</sup> He is one of a reasonably small number of UK legal academics at that time to have a *festschrift* dedicated to him, Bin Cheng and E.D. Brown, *Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on his 80<sup>th</sup> Birthday* (London: Stevens, 1988). One of his students, the esteemed international lawyer Leslie Green remained a great friend of Schwarzenberger's until the end of his life, and sent him a copy of every one of his publications, and waited, with trepidation, for his remarks.

<sup>11</sup> Mendelsohn, 'Schwarzenberger' p.xviii. This also comes through in his writing. Those working for the UN and ICRC for example can hardly have been delighted to see themselves referred to as 'the gnomes of New York and Geneva', Georg Schwarzenberger, 'Neo-Barbarism in International Law' (1968) 22 *Yearbook of World Affairs* 191, p.192. See also e.g. Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263, 263.

<sup>12</sup> Mendelsohn, 'Schwarzenberger' p.xviii.

perhaps, was redolent of the stereotype of a German *doctovater*, unkind.<sup>13</sup> Also, in his academic battle with Wilfred Jenks on the subject of the staunchly positivist, inductive, method Schwarzenberger defended, he was as much sinned against as sinner.<sup>14</sup> Admittedly Richard Falk thought that Schwarzenberger ‘obviously relishes the idiom of controversy ...[and]... succeeds in making Mr. Jenks appear quite obtuse ...[but]... fails to come to terms with the basic criticism’,<sup>15</sup> and he probably had a point. Still, Sir Robert Jennings on the other hand, described Jenks’ original critique as belonging ‘to the world of the steam roller rather than the rapier....[and]...the attempt on page after page to establish a sort of confrontation between Professor Schwarzenberger on one side and almost every known philosopher from Aristotle to Broad and Popper on the other, comes at times dangerously near to comedy’.<sup>16</sup> Although Schwarzenberger was, in many ways, an outsider, he was not without his defenders, including some of those in the McNair group.

There are, however, other reasons for the relative neglect into which Schwarzenberger’s work has fallen, that relate to how many international lawyers like to see themselves,<sup>17</sup> and their subject, which have militated against proper evaluation of Schwarzenberger’s work. It is not intended in this piece to provide a detailed analysis of Schwarzenberger’s oeuvre, which would be impossible in the scope of anything other than a huge work.<sup>18</sup> It is also not intended to proclaim champion Schwarzenberger against all of his critics, or proclaim his work to be infallible, or even amongst the timeless classics of international law. His output is patchy and at times excessively self-referential,<sup>19</sup> pedantic,<sup>20</sup> repetitive<sup>21</sup> and antiquarian.<sup>22</sup> The aims here are more modest (and, it is to be hoped, achievable).

This piece has three primary contentions. First, that Schwarzenberger deserves a more prominent place in the hall of twentieth-century international lawyers, and second that as some of Schwarzenberger’s concerns either are those of many international lawyers, or have contemporary relevance, his work ought to be studied a little more than is currently the case. Finally, that his approach was one that, in spite of his (perhaps self-imposed) sense of being

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<sup>13</sup> See, in particular the introduction to Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Volume IV: International Judicial Law* (London: Stevens, 1986) pp.xix-xxvi. For a tribute to his willingness to assist colleagues see Rosalyn Higgins, ‘Some Recent Developments in the Right to Leave in International Law’ in Cheng and Brown, (eds.), *Contemporary Problems*, 138, p.138.

<sup>14</sup> See C. Wilfred Jenks, *The Prospects of International Adjudication* (London: Stevens, 1964), Chapter 11, *Inductive Approach* Chapter 5; On the controversy see Harry H. Almond Jr., ‘Review’ (1966) 15 *International and Comparative Law Quarterly* 589, p.589.

<sup>15</sup> Richard A. Falk, ‘Review’ (1967) 61 *American Journal of International Law* 629, p.630.

<sup>16</sup> ‘Review’ (1964) 40 *British Yearbook of International Law* 407, p.412.

<sup>17</sup> Although on the disparate identities of international lawyer and their self-identification and imagination see, e.g. Martti Koskenniemi, <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKINTERNATIONAL%20LAWYERS-07b.pdf>

<sup>18</sup> Schwarzenberger produced over 200 published works.

<sup>19</sup> Warbrick, ‘Brownlie’, p.621-622; J.E.S. Fawcett, ‘Review’ (1970) 44 *British Yearbook of International Law* 295, p.295.

<sup>20</sup> A tendency to over-systematise was noted by his obituarist, see, Mendelsohn, ‘Schwarzenberger’ p.xxiv; See also J.K. Grodecki, ‘Review’ (1961) 77 *Law Quarterly Review* 446, pp.446-47; F.A. Mann, ‘Review’ (1951) 67 *Law Quarterly Review* 410, p.411.

<sup>21</sup> See e.g. Georg Schwarzenberger, *The Frontiers of International Law* (London: Stevens, 1962) p.5?? CHECK.

<sup>22</sup> See, e.g. Georg Schwarzenberger, *The Dynamics of International Law* (Abingdon: Oxon.: Professional Books, 1976) Chapter 3; J.E. S. Fawcett, ‘Review’ (1970) 44 *British Yearbook of International Law* 295, p.296; Richard R. Baxter, ‘Review’ (1971) 65 *American Journal of International Law* 635, p.636.

an outsider, was one that was based in an attempt to render his approach one that was conducive the intellectual ideas of his adoptive country.

### REASONS FOR MARGINALISATION: SCHWARZENBERGER AS THE OUTSIDER

It is well known that Schwarzenberger and Lauterpacht did not get on.<sup>23</sup> Their disagreements were jurisprudential<sup>24</sup> (Schwarzenberger had no time for the naturalism espoused by Lauterpacht) and personal.<sup>25</sup> Lauterpacht repeatedly frustrated Schwarzenberger's career ambitions by refusing to support him for a Chair in the University of London,<sup>26</sup> and Schwarzenberger only obtained a chair in 1963, three years after Lauterpacht's untimely death. Schwarzenberger, for his part, rarely allowed an opportunity to criticise Lauterpacht pass him by.<sup>27</sup> For what it is worth, anecdotally, I have been told that Schwarzenberger started the feud, but, if truth be told, neither come out of the story well.<sup>28</sup>

Schwarzenberger's berating of Lauterpacht did not end with the latter's death in 1960.<sup>29</sup> Schwarzenberger's 'tribute' to Lauterpacht in *The Inductive Approach to International Law* was, at best, double edged. Schwarzenberger 'express[ed] my appreciation to those international lawyers, in particular, the late Sir Hersch Lauterpacht-who did me an invaluable service. They provided a much needed form of negative stimulation and made me think out for myself why I had to dissent from them on a number of basic issues'.<sup>30</sup> Although in that work he abjured any critical comments not published during Lauterpacht's lifetime,<sup>31</sup> as late as 1986 he was still pouring (new) scorn on Lauterpacht's ideas.<sup>32</sup>

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<sup>23</sup> Although Lauterpacht gave some positive reviews to Schwarzenberger's earlier works, see, e.g. H[ersch] L[auterpacht], 'Review' (1945) 22 *British Yearbook of International Law* 261, p.261; Hersch Lauterpacht, 'Review' (1951) 28 *British Yearbook* 436, pp.436-437, Equally, he did note (p.437) that its substance and method would be improved if Schwarzenberger 'were to make some concession to the requirement of restraint in scientific discussion and exposition'.

<sup>24</sup> As was Lauterpacht's analogous dispute with Julius Stone, see Leone Star, *Julius Stone: An Intellectual Life* (Sydney: OUP Australia, 1992) pp.148-50. On Lauterpacht more generally see Partick Capps, 'Lauterpacht's Method' (2012) 82 *British Yearbook of International Law* 248.

<sup>25</sup> See Mendelsohn, 'Schwarzenberger' p.xxv, Legend has it that the personal level of their disagreement was begun by Schwarzenberger's rude rebuff of Lauterpacht's offer of assistance when they first met in one of the University of London's libraries.

<sup>26</sup> See Steinle, *Schwarzenberger*, p.673.

<sup>27</sup> See, e.g. Georg Schwarzenberger, *International Law as Applied By International Courts and Tribunals* (London: Stevens, 3<sup>rd</sup> ed., 1957) p.436, 452, Georg Schwarzenberger, *The Inductive Approach to International Law* (London: Stevens, 1965) , pp.13-19, 57, 93, 159, Georg Schwarzenberger, *Foreign Investment and International Law* (London: Stevens, 1969) pp.7-8, Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: Vol. III: International Constitutional Law* (London: Stevens, 1976) pp.27, 44-47, 79, 80, 108, 120, 270, 281, 310-311, 317, 478, 522,.

<sup>28</sup> For some of the documents and e view on point see Lauterpacht, *The Life of Sir Hersb Lauterpacht*, pp.364-71.

<sup>29</sup> It is sadly the case that only the following year was Schwarzenberger appointed to a chair.

<sup>30</sup> *Inductive*, p.4.

<sup>31</sup> *Ibid.* He did also temper his remarks about the *Annual Digest/International Law Reports* that he had made in a previously published version of the chapter, *Ibid.*, pp.2,36. Equally, he left in some stinging barbs, *ibid.*, p.25.

<sup>32</sup> See, e.g. Georg Schwarzenberger, *International Law as Applied By International Courts and Tribunals: Vol IV: International Judicial Law* (London: Stevens, 1986) pp. 64-66, 73, 162-165, 267-268, 507.

The metaphorical (but very real intellectual) fight between Schwarzenberger and Lauterpacht could be considered to be a zero sum game. It is not. Both had something very important to say. It is not the intention of this piece to denigrate Sir Hersch Lauterpacht's abilities or legacy as an international lawyer. Even those who do not agree with everything Lauterpacht wrote (few would today express unqualified acceptance of his full-blooded constitutive approach to the subject in *Recognition in International Law*<sup>33</sup>) are happy to attest to his prodigious talent.<sup>34</sup> As an I. In addition, he was liberal, progressive, highly concerned (and involved) with human rights matters,<sup>35</sup> and held the position of international law in international society and its transformative potential in high regard.<sup>36</sup> In many ways, Lauterpacht represents the self-image of probably the majority of international lawyers that has been internalised: Enlightened, liberal, future oriented, and fundamentally concerned with people,<sup>37</sup> even if, as often as not, those people appear in international law as being mediated by the State.<sup>38</sup>

Schwarzenberger, on the surface, seems precisely the opposite. He railed against 'evangelical' international lawyers,<sup>39</sup> who he saw as overly fashionable,<sup>40</sup> and when Lauterpacht was issuing heartfelt pleas on behalf of the League of Nations just before the war,<sup>41</sup> Schwarzenberger was writing 'The Rule of Law and the Disintegration of International Society'.<sup>42</sup> Similarly, whilst Lauterpacht contributed considerably to international criminal law,<sup>43</sup> Schwarzenberger's view of the Genocide Convention was that '[p]erhaps, in retrospect, the chief effects of the Convention have been to enrich the vocabulary of international invective and enable the International Court of Justice...to complicate further the law relating to treaty reservations'.<sup>44</sup> Lauterpacht saw an international community developing,<sup>45</sup> the Schopenhauer-quoting Schwarzenberger was, to say the least, sceptical.<sup>46</sup>

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<sup>33</sup> Hersch Lauterpacht, *Recognition in International Law* (Cambridge, CUP, 1947). Although few would be as rude about it as Joseph Kunz (Joseph Kunz, 'Critical Remarks on Lauterpacht's Recognition in International Law' (1950) 44 *American Journal of International Law* 713). See Colin Warbrick, 'Recognition and Statehood' in Malcolm Evans (ed.), *International Law* (Oxford, OUP, 2002) 209, p.237; James Crawford, 'International Law in Twentieth-Century Britain' in Beatson and Zimmermann (eds.), *Jurists Abroad*, 681, p.698.

<sup>34</sup> For a eulogy from a critic see Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, CUP, 1997) p.141.

<sup>35</sup> See A.W. Brian Simpson, *Human Rights and the End of Empire* (Oxford, OUP, 2001) pp.205-207.

<sup>36</sup> Martti Koskenniemi, *The Gentle Civilizer*, pp.406-411

<sup>37</sup> Although see Koskenniemi, 'International Lawyers' for a critique of the idea that international lawyers can be considered a unitary body.

<sup>38</sup> For a modern example see Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden Journal of International Law* 477.

<sup>39</sup> Amongst whom he clearly considered Lauterpacht, *International Law vol III*, p.281.

<sup>40</sup> Schwarzenberger, 'Problem of an International Criminal Law' p.263.

<sup>41</sup> See Koskenniemi, *Gentle Civilizer*, pp.353-354.

<sup>42</sup> Georg Schwarzenberger, 'The Rule of Law and the Disintegration of International Society' (1939) 33 *American Journal of International Law* 56.

<sup>43</sup> Martti Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law' (2004) 2 *Journal of International Criminal Justice* 810.

<sup>44</sup> Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals Vol II: Armed Conflict* (London: Stevens, 1968) p.530.

<sup>45</sup> Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 *British Yearbook of International Law* 1, pp.24-30.

<sup>46</sup> Georg Schwarzenberger, *Power Politics: A Study of World Society* (London, Stevens, 3<sup>rd</sup> ed., 1964) p.12.

Schwarzenberger, who frequently referred to international law as ‘power politics in disguise’,<sup>47</sup> and entitled his inaugural lecture ‘The Misery and Grandeur of International Law’,<sup>48</sup> tends to be seen as being closer in outlook to another refugee international lawyer (who, like Schwarzenberger, had a considerable interest in international relations, although unlike him, turned fully to the study of the latter after World War II), Hans Morgenthau, than his more local Cambridge counterpart. Both Schwarzenberger and Morgenthau tend to be seen as taking a pessimistic approach to world society and as having a penchant for discussing things in terms of power rather than ideals.<sup>49</sup>

Schwarzenberger’s outlook was at times, consistent with his respect for, and following of, the form of Protestant theology he adopted notionally outside his legal work, which was that of Reinhold Niebuhr,<sup>50</sup> As such his approach was unquestionably downbeat, with a tendency towards look at the shadow side of things.<sup>51</sup> His major study of international society was called *Power Politics*, and it lived up to its title.<sup>52</sup> In a manner that was very similar to that of Morgenthau, Schwarzenberger was highly critical of those who take the view that international law shows its successes in its less ‘political’ aspects.<sup>53</sup> The argument that international law showed itself at its best when, for example, facilitating mutually beneficial cooperation such as the facilitation of international letter-sending through the Universal Postal Union or air travel through treaties permitting overflight, had little purchase with him.<sup>54</sup>

To Schwarzenberger, emphasising such aspects of international law was inappropriate. Although positive aspects ‘could readily be woven into a heartening nursery tale’, there was another side to the ‘chocolate box picture of international law’.<sup>55</sup> That side was exemplified by its inability to transform unacceptable states of affairs, such as *apartheid* in South Africa,<sup>56</sup> and other conflictual situations. This failure, to Schwarzenberger, showed the limitations of international law. Schwarzenberger had a reason for this. To him, international law is a unitary whole, and ‘a chain is only as strong as its weakest link’.<sup>57</sup> Nonetheless, he was, unlike

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<sup>47</sup> e.g. Georg Schwarzenberger, ‘The Problem of an International Criminal Law’ p.296.

<sup>48</sup> Georg Schwarzenberger, ‘The Misery and Grandeur of International Law’ (1964) 17 *Current Legal Problems* 184.

<sup>49</sup> The similarities between Schwarzenberger and Morgenthau are noted in Robert A. Freidlander, ‘Power Politics and the Rule of Law: Professor Schwarzenberger Reconsidered’ (1974-1975) 24 *DePaul Law Review* 836, 837 and Koskeniemi, *Gentle Civilizer* p.472. Morgenthau gave *Power Politics* a highly positive review, Hans J. Morgenthau, ‘Review’ (1942) 36 *American Journal of International Law* 351, p.351. Nonetheless, as we will see, there are considerable differences between Schwarzenberger and Morgenthau too.

<sup>50</sup> Whose thoughts on point were usefully summed up in Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Scribner and Sons 1932).

<sup>51</sup> Which won him some plaudits, E.J. Cohn, ‘Review’ (1949) 65 *Law Quarterly Review* 118, p.119; J.G. Merrills, ‘Review’ (1971) 45 *British Yearbook of International Law* 484, p.484.

<sup>52</sup> Schwarzenberger, *Power Politics*.

<sup>53</sup> An example is Ian Brownlie, ‘The Reality and Efficacy of International Law’ (1981) 52 *British Yearbook of International Law* 1, p.1-2.

<sup>54</sup> For the view that practically all international law worthy of the name can be explained on the basis of mutual benefit or coercion see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: OUP, 2005). The work cannot be considered persuasive however, see Robert Cryer, ‘The Limits of Objective Interests’ (2005) 81 *International Affairs* 905.

<sup>55</sup> ‘Misery and Grandeur’ p.194.

<sup>56</sup> ‘Misery and Grandeur’, pp.185-186

<sup>57</sup> Schwarzenberger, ‘The Misery and Grandeur’, p.185.

many realists, a strong advocate of international law and an unabashed supporter of it. When he saw the system of international law as being threatened during World War II he was fierce in its defence.<sup>58</sup>

Consistent with this, to Schwarzenberger, international law was a discipline of crisis.<sup>59</sup> He tended to concentrate on two things. The first was the situations in which international law could be seen as less determinative.<sup>60</sup> The second came from the resolutely positivist 'inductive' method he took to divining international law. The approach concentrated heavily on seeking empirical evidence of international law and its content rather than deducing it from abstract propositions, of which he was sceptical owing to his distrust of naturalist theories of law.<sup>61</sup>

Despite the approach's seemingly neutral grading of the sources of international law in the order of the list contained in Article 38(1) of the ICJ Statute, (which is not quite consistent with the drafting history of that provision, but consistent with the tendency for the court to consider them 'successively')<sup>62</sup> there is another way in which the approach might be subject to the accusation that he saw the law as a discipline of crisis. In spite of the order in which Schwarzenberger tended to rank the sources (and Article 38(1)(d)'s relegation of them to of subsidiary status, for evidence of international law Schwarzenberger placed rather heavy (perhaps excessive) reliance on the decisions of international courts and tribunals,<sup>63</sup> where a dispute already exists.

Given that international law for the most part plays a coordinating role, such disputes, and particularly those that reach the level of judicial proceedings are the exceptions in international law rather than the rule. Nonetheless, his strict interpretation of the inductive approach can also be seen as an attempt to adopt a more British, empirical, approach to international law, than a more continental *dogmatisch* approach.<sup>64</sup>

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<sup>58</sup> Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London: Jonathan Cape, 1943) See F.E. Oppenheimer, 'Review' (1943) 37 *American Journal of International Law* 552, p.552.

<sup>59</sup> On this aspect of international Law see Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 *Modern Law Review* 377.

<sup>60</sup> E.g. 'Misery and Grandeur'.

<sup>61</sup> See, e.g. *The Inductive Approach*, p.6.

<sup>62</sup> See, e.g. Allain Pellet, 'Article 38' in Andreas Zimmermann *et al* (eds.), *The Statute of the International Court of Justice: A Commentary* (Oxford: OUP 2<sup>nd</sup> ed, 2012), 730, pp.841-848.

<sup>63</sup> See *Inductive Approach* pp.21-25. Which goes some way to explaining why his *magnum opus* was the 4 volume *International Law As Interpreted by International Courts and Tribunals* (London: Stevens, 1955-1986). See the critiques of this in Mendelsohn, *ibid*; L.H. Woolsey, 'Review; (1946) 40 *American Journal of International Law* 860, p.861; Herbert W. Briggs, 'Review' (1951) 45 *American Journal of International Law* 801, p.801; Gillian White, 'Review' (1969) 85 *Law Quarterly Review* 553, p.554; F.A. Mann, 'Review' (1951) 67 *Law Quarterly Review* 410, p.411; Elihu Lauterpacht, 'Review' (1958) 34 *British Yearbook of International Law* 440, p.441. Schwarzenberger was aware of this, however, *International Law as Applied Vol I* pp.xv-xvi. On this work as his *magnum opus* see Philip C. Jessup, 'Review' (1977) 71 *American Journal of International Law* 793, p.793; Maurice Mendelsohn 'Review' (1978) 49 *British Yearbook of International Law* 252, p.252.

<sup>64</sup> On the difference in the types of reasoning see Robert Cryer, 'Imputation and Complicity in Common Law States: A (Partial) UK View' (2014) 12 *Journal of International Criminal Justice* 267, pp.??



Treating international law as a discipline of crisis has come under heavy fire, in particular from Hilary Charlesworth and Anne Orford.<sup>65</sup> As Hilary Charlesworth has said, 'International lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance'.<sup>66</sup> It is true that Schwarzenberger was pleased when his work was considered of contemporary (crisis-based) relevance. It is difficult to miss the delight in the preface to *The Legality of Nuclear Weapons*: 'while the paper went through the press ...[for publication in *Current Legal Problems*]... the publisher received a considerable number of inquiries whether it would be possible to make it available separately and earlier...in view of the topical character of even the legal aspects of this fateful issue, I have willingly acceded to the publisher's request to agree to the advance publication of the paper.'<sup>67</sup>

However, the critique of international lawyers as seeing the world in terms of crises for their own purposes is broader than criticising their search for relevance. As Charlesworth and Orford have said, it is about international lawyers seeing themselves as heroic and romantic progressives bringing peace and justice to others through modern international law. In Charlesworth's words the self-image of international lawyers is of 'tough humanitarians capable of pragmatic yet principled responses to restore freedom and order. The romantic style of teaching in international law reinforces this image'.<sup>68</sup>

It might be questioned whether these critiques, mainly made of international lawyers in the post-cold War era, can appropriately be applied to Schwarzenberger's work, which was highly (too) sceptical of the law of human rights,<sup>69</sup> and any form of action in support of those rights it contains, and he could hardly be accused of easy romanticism in his work.<sup>70</sup> To return to Schwarzenberger's work on nuclear weapons, as the 'even' in the quote above implies, Schwarzenberger's outlook prevented him from assuming that his work would change the world. As he noted in his conclusion, 'the first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or another the decision on the use of these devices of mechanised barbarism'.<sup>71</sup> A fair case can be made that the (in)famous pronouncement of the ICJ that it was unable to determine ultimately the legality of all uses of nuclear weapons was motivated by precisely this dilemma: should it take a strong view and be ignored, or sacrifice normativity for relevance?<sup>72</sup>

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<sup>65</sup> Charlesworth, 'Discipline of Crisis'; Anne Orford, 'Embodying Internationalism: The Making of International Lawyers' (1998) 19 *Australian Yearbook of International Law* 1.

<sup>66</sup> Charlesworth, 'Discipline of Crisis', p.377.

<sup>67</sup> Georg Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens, 1958) p.vii. The issue of nuclear weapons was the metonym through which, in many ways, Schwarzenberger and Lauterpacht seemed to express their various differences, both personal and professional, see Lauterpacht *The Life of Sir Hersch Lauterpacht*, pp.364-370.

<sup>68</sup> Charlesworth, 'Discipline of Crisis' p.388, See also Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: CUP, 2003) Chapter 5.

<sup>69</sup> *Inductive Approach*, p.59.

<sup>70</sup> Equally, the critique that a concentration on crises can lead to a static view of international law (Charlesworth, 'Discipline of Crisis' p.377) is applicable to Schwarzenberger.

<sup>71</sup> Schwarzenberger, *Legality* p.58.

<sup>72</sup> *Legality of the Threat or Use of Nuclear Weapons* Opinion (1996) ICJ Rep. 226, See David Kennedy 'The Nuclear Weapons Case' in Laurence Boisson de Chazournes and Philippe Sands (eds.), *International Law, The International Court of Justice and Nuclear Weapons* (Cambridge: CUP, 1999) 462.

Schwarzenberger did not see the world as transformable by international law or international lawyers, but took the view that when society finally moved on to a more humane and socialised level, international lawyers could assist by providing the legal skills to write the law that the new society wanted. It was not for international lawyers to create a new society. Although alongside those such as Roscoe Pound or Emile Durkheim he saw law arising out of, and reflecting, a society,<sup>73</sup> the possibility of law being used as to push society on was one about which he had considerable doubts on two levels.

The first was a radical scepticism about the ability of law to restructure, or even contribute towards transforming, society.<sup>74</sup> The second was that even if it could, the subjectivity of views about the way in which society should develop meant that attempts to push society in any particular direction by international lawyers would simply reflect their own biases.<sup>75</sup> Even the UN did not escape his ire, as he considered it a system of business-as-usual power politics in disguise.<sup>76</sup> It must be noted however, that Schwarzenberger was an open advocate, at the metajuridical level, of freedom and open discussion: 'Free discussion is one of those essentials of our Western culture we no longer dare take for granted. As, in our lifetime, we have witnessed the lamps of civilisation being dimmed or extinguished in an increasing number of places, we have learned to cherish more consciously the value of frank discussion and treat with contempt the monologues of the vainglorious.'<sup>77</sup> In many ways, this was a reflection of his Benthamite (and fully positivist) distinction between descriptive and censorial jurisprudence that came from his intellectual home, University College London,<sup>78</sup> to which he had a great loyalty,<sup>79</sup> and his admiration for Karl Popper's work on the value of free debate, and free societies, although some attendees of his seminars might question the extent to which he put this into practice. The metaphorical dunce's hat was not outside his approach to teaching.

He was not without his own ideals, though. His own personal preference was to move towards an international community of shared values ordered along federalist lines. Owing to the time he was writing however, he was prepared to settle for incremental increases of understanding between the superpowers.<sup>80</sup> In this, at least, he was closer to the Columbia scholars such as Louis Henkin and Oscar Schachter. Both are international lawyers to whom others in the area have far more frequent reference, but (and perhaps because) their tone was rather more optimistic than Schwarzenberger's.<sup>81</sup>

This perhaps leads us on to one of the reasons why Schwarzenberger's work tends to be understudied. This is because there is a reluctance on the part of many international lawyers,

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<sup>73</sup> See, e.g. 'Misery and Grandeur' pp.205-209.

<sup>74</sup> See, *Ibid.*

<sup>75</sup> See, e.g. 'Images and Models'. Not that Schwarzenberger did not have opinions on this, see, e.g. 'Misery and Grandeur', p.210.

<sup>76</sup> *Power Politics*, 2<sup>nd</sup> ed. Chapter 32.

<sup>77</sup> *Inductive Method*, p.1.

<sup>78</sup> It is no surprise that Schwarzenberger's piece on the Eichmann case was entitled 'The Eichmann Judgment: An Essay in Censorial Jurisprudence' (1962) 15 *Current Legal Problems* 248).

<sup>79</sup> It is also the case that the College has a prize for international law in his honour.

<sup>80</sup> *Power Politics*, (3<sup>d</sup> ed.), Chapter 30.

<sup>81</sup> On the Columbia school see *Gentle Civilizer*, p.477 and David Kennedy, 'When Renewal Repeats: Thinking Against the Box' (1999-2000) 32 *New York University Journal of International Law and Politics* 335., pp.380-386

who are rather perturbed by an international lawyer, who took such a sceptical and Hobbesian view of international affairs and insists on the humility of international law and international lawyers. International lawyers are often bombarded, especially after the crisis in Iraq, both at work (from domestic law colleagues)<sup>82</sup> and socially, by peers,<sup>83</sup> with the old questions of whether international law is ‘really’ law or if it actually has any effect in the ‘real’ world. The idea that an international lawyer might express doubts renders the view of him as something of a cuckoo in the nest of international law.<sup>84</sup> Schwarzenberger was an outsider in international legal circles in part for precisely this reason.<sup>85</sup>

This all too easily also flows into an idea that Schwarzenberger was a rather old fashioned,<sup>86</sup> misanthropic lawyer who was not interested in helping humanity and therefore someone whose views are suspect. Although his almost obsessive concentration on the limitations and failures of international law is troubling, nothing could really be further from the truth than the view that Schwarzenberger was simply a cynic.<sup>87</sup> Schwarzenberger was a Social Democrat, who left Germany in 1933 owing to his Jewish ancestry and political views (although the latter may have become more ambiguous in later times).<sup>88</sup>

Although he was hostile to utopian projects as the subjective preference of ideology,<sup>89</sup> the common view of Schwarzenberger as a simplistic realist<sup>90</sup> is impossible to square with his own writings. He was, for example, very careful to distinguish his views from ‘the so-called realistic treatment of international relations....[as] it consists of the awareness which academic exercises in *realpolitik* appear to lack that there is an ever-present possibility of transforming personal and group relations from society relations into community relations and to reverse this process. What was and what is need not so remain.’<sup>91</sup> The vision of Schwarzenberger as international law’s fifth columnist remains, however,<sup>92</sup> leaving to people disregarding his work rather too quickly.

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<sup>82</sup> See Gerry Simpson, ‘On the Magic Mountain: Teaching Public International Law’ (1999) 10 *European Journal of International Law* 69, pp.73-74

<sup>83</sup> David J. Harris, *Cases and Materials on International Law* (London, Sweet and Maxwell, 6<sup>th</sup> ed., 2004) p.6 describes the question as a ‘standard sherry-party’ one.

<sup>84</sup> The confessional tone of some of his work, particularly when discussing the limitations of international law only makes this more disconcerting, see. e.g. Georg Schwarzenberger, *International Law and Order* (London: Stevens, 1971) p.253.

<sup>85</sup> See Bardo Fassbender, ‘Review of Stephanie Steinle, *Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908-1991)*’ (2003) 97 *American Journal of International Law* 1019, pp.1021-1022.

<sup>86</sup> See, e.g. Mendelsohn, ‘Schwarzenberger’, p.xxvi. Schwarzenberger did not always help himself on this count: ‘Actually tendentious descriptions of international law as ‘modern’, ‘new’ or the like are helpful. They put the reader more automatically on his guard.’ *Fundamental Concepts*, p.689. See also O.J. Lissitzyn, ‘Review’ (1959) 53 *American Journal of International Law* 197, pp.197-98; Richard A. Falk, ‘Review’ (1967) 61 *American Journal of International Law* 629, pp.629-30.

<sup>87</sup> Some reviewers noticed this at the time P.M. Smedts, ‘Review’ (1953) 2 *ICLQ* 161, p.161; Derek Bowett, ‘Review’ (1963) 12 *ICLQ* 701, p.701 ‘in view of the stark realism with which Dr. Schwarzenberger treats his themes...it is notable that Dr. Schwarzenberger maintains his optimism about the future of the international legal order’.

<sup>88</sup> Steinle, ‘Schwarzenberger’ pp.664-667.

<sup>89</sup> Georg Schwarzenberger, *The Dynamics of International Law* (Abingdon, Professional Books, 1976) p.20.

<sup>90</sup> See for example, Anne-Marie Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 *American Journal of International Law* 205, p.207.

<sup>91</sup> *Dynamics*, p.118.

<sup>92</sup> *Gentle Civilizer*, p.472.

But, the point of this chapter is not solely to bemoan the lack of attention given to Schwarzenberger, and to say that it is because we (if there is a 'we' of which can be spoken of) do not like people who fail to smile too often. It is to remind the 'invisible college'<sup>93</sup> that international lawyers often tend to assume that scholarship in the area from the cold war era is not as relevant in the modern era. It is.<sup>94</sup>

Although the bipolar nature of international society at that time is no longer considered to exist in such a strong form (although to forget China, and a resurgent Russia would be counter-intuitive now, to say the least) international society has not changed as much as often thought, and it is more than possible that international affairs are likely to return to a form of relations that replicate the cold-war era, and the conflicts in Georgia, and Syria, have shown. In addition, above base politics, there are still major schisms in the way that different societies see the world and their interests, and the proper role of international law may remain to attempt to create a fairly modest framework in which to manage those differences, rather than assuming that international law can solve all international problems at once or that international law already does solve all such problems.

To do so is to risk setting international law standards it cannot live up to, thus overburdening it with expectation. Doing so invites cynicism about international law more generally, undermining its ability to fulfil the tasks for which it is clearly suited. This, in many ways, was Schwarzenberger's primary point, and he, although perhaps having overstated it, may have had one. International law, like law more generally, cannot solve the World's problems, although without it, life would be far worse.

## INTERNATIONAL SOCIETY, INTERDISCIPLINARITY, IDEOLOGY AND CHANGE

### *Interdisciplinarity*

Far from being an anachronism, aspects of Schwarzenberger's approach are remarkably similar to modern trends in international legal method. The main one is his avowed commitment to interdisciplinarity. Although the linking of international law and international relations has recently become remarkably fashionable, especially, but by no means only, in the United States, in particular through the work of Anne Marie Slaughter,<sup>95</sup> here we find an example of the illusion of novelty Schwarzenberger identified.

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<sup>93</sup> On which, see Oscar Scahcter, 'The Invisible College of International Lawyers' (1977-1978) 72 *Northwestern University Law Review* 217.

<sup>94</sup> The cold war era work, for example of Edward McWhinney, for example is not frequently referred to in writing, despite *mutatis mutandis*, its clear contemporary relevance. See, for example, Edward McWhinney, *United Nations Law Making: Cultural and Ideological Relativism and international Law Making for an Era of Transition* (Paris, UNESCO, 1984); Edward McWhinney, *Conflict and Compromise: International Law and World Order in a Revolutionary Age* (Alphen aan der Rhien: Sitjhoff, 1981).

<sup>95</sup> Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, pp.512-513, 527-528. For a critique see José E. Alvarez, 'Do Liberal States Behave Better: A Critique of Slaughter's Liberal Theory' (2001) 12 *European Journal of International Law* 183.

Co-operation between international lawyers and international relations scholars was occurring far earlier in the UK than elsewhere, indeed, from the 1960s, in particular with scholars identified with the 'British School' of international relations such as Hedley Bull. But even before this, in 1939 Schwarzenberger obtained a lectureship in international law and international relations, and subtitled one of his earliest articles 'Prologomena to a Sociology of International Law'.<sup>96</sup> In addition, long before the 'return to history' was declared a modern nostrum in international law scholarship,<sup>97</sup> Schwarzenberger was telling us that 'Both the illusion of novelty, as well as the equation of textbook wisdom with actual practice, can be avoided, if current changes are seen in their proper perspective, and it is suggested that nothing can help better in the proper sociological assessment of contemporary events than to review them in the historical perspective'.<sup>98</sup>

It is true that Schwarzenberger's work, in particular his *Power Politics*, is unsubtle from the point of view of modern international relations theory. Hedley Bull considered that work to be sprawling and unsophisticated.<sup>99</sup> Bull had a point. *Power Politics* was overlong and at times lacked nuance.<sup>100</sup> Indeed Schwarzenberger was painfully aware of some of its faults.<sup>101</sup> However, despite its merits<sup>102</sup> *Power Politics* was not Schwarzenberger at his best.<sup>103</sup> It is also important to remember the period in which Schwarzenberger was writing. International relations as a discipline in the UK was only really inaugurated in 1919 with the conferment of the Woodrow Wilson chair of international relations at the University of Aberystwyth. Thus the field was barely twenty years old when Schwarzenberger began publishing on it.<sup>104</sup> The first edition of *Power Politics* predated Morgenthau's seminal *Politics Among Nations* by six years.<sup>105</sup>

When Bull was criticising *Power Politics* in the 1970s, quite legitimately, he was doing so from the standpoint of a discipline that had been in existence roughly twice the time it had been in existence, and had naturally become far more subtle. That is not to say that Schwarzenberger's approach to international relations scholarship ought not to have developed over the same period. It should have, but did not.<sup>106</sup> However, as Schwarzenberger would probably have argued himself, it is important to place academic work in appropriate historical context.

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<sup>96</sup> Georg Schwarzenberger, 'Jus Belli ac Pacis: Prologomena to a Sociology of International Law' (1943) 37 *American Journal of International Law* 460

<sup>97</sup> Andreas Paulus, 'Towards Renewal or Decline of International Law: International Law After Postmodernism' (2001) 14 *Leiden Journal of International Law* 727, pp.737-739.

<sup>98</sup> Georg Schwarzenberger, *International Law and Totalitarian Lawlessness* (London, Stevens, 1943) p.38.

<sup>99</sup> See Steinle, 'Schwarzenberger' pp.677-78, quoting Hedley Bull 'The Theory of International Politics 1919-1969' in B. Porter (ed.) *International Politics* 30. Bull did, however quote Schwarzenberger approvingly in *The Anarchical Society* Hedley Bull, *The Anarchical Society* (London: Macmillan, 2<sup>nd</sup> ed.,1995) p.209.

<sup>100</sup> See also Myres S. McDougal, 'Dr. Schwarzenberger's *Power Politics*' (1953) 47 *American Journal of International Law* 115.

<sup>101</sup> See *Power Politics* (3<sup>rd</sup> ed.), p.xvi.

<sup>102</sup> Ian Brownlie, for example, took the view that 'both its ambitious reach and its timing exhibit a *sang froid*, a breadth of mind and a scale of endeavour which here, by any measure, remarkable' Ian Brownlie, 'The Relation of Law and Power' in Cheng and Brown (eds.), *Contemporary* 19, p.19.

<sup>103</sup> It may be postulated that one of the reasons for the oversight of Schwarzenberger's work is that possibly his more generally known works is not his best.

<sup>104</sup> 'Jus Belli ac Pacis'

<sup>105</sup> Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1948).

<sup>106</sup> See, e.g. *Power Politics* (3<sup>rd</sup> ed.).

Again Schwarzenberger's work, in spite of its failings, should also be defended from some of the more modern criticisms of work which bears superficial similarity to his own. Modern, particularly American international law/international relations scholarship has been subjected to considerable criticism on the basis that it has an ideological tinge, and that this comes through in its deformed concept of law.<sup>107</sup> As Koskenniemi put it:

the interdisciplinary agenda itself, together with a deformed concept of law, and enthusiasm about the spread of 'liberalism,' constitutes an academic project that cannot but buttress the justification of American empire, as both Schmitt and McDougal well understood. This is not because of bad faith or conspiracy on anyone's part. It is the logic of an argument that hopes to salvage the law by making it an instrument for the values (or better 'decisions') of the powerful that compels the conclusion.<sup>108</sup>

Schwarzenberger could not be accused of this. Although he was thoroughly committed to seeing law in its sociological and historical context, his approach to law was positivistic through and through. Schwarzenberger's approach to finding the law can be seen in a number of places. He could, as mentioned above, be excoriating about any form of naturalist speculation: To take one example he opined (perhaps in spite of his own metaphysical commitments): in a doubting, if not faithless age, natural law is hardly any longer a universal or generally acceptable ethical foundation of law. We are also too conscious of the fact that '*le droit naturel suppose une t non pas critique...mais speculative.*' Thus, lawyers who, in our time, draw upon natural law as an article of faith cannot expect more than the tolerance due to any metaphysical belief.<sup>109</sup>

His positivism can also be seen in relation to the fundamental status he attributed to the separation of *lex lata* and *lex ferenda*,<sup>110</sup> law and politics,<sup>111</sup> and attachment to careful derivation of international law from its traditional sources.<sup>112</sup> This was in part because of his commitment to rigorous application of the inductive method, but also from a broader desire to ensure that international law was truly the outcome of agreement around the world rather than a parochial assertion of purportedly universal norms or the masking of a political position with legal argumentation. He was heavily critical of 'authoritarian shortcuts to unanimity'.<sup>113</sup>

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<sup>107</sup> *Gentle Civilizer*, Chapter 6.

<sup>108</sup> *Gentle Civilizer*, p.484.

<sup>109</sup> *The Frontiers of International Law* p.66. See also Georg Schwarzenberger, 'The Fundamental Concepts of International Law' in Ronald St. John Macdonald and Douglas M. Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Dordrecht: Nijhoff, 1986) 685, p.687.

<sup>110</sup> See e.g. *Inductive Approach* pp.65-66. Mendelsohn thinks he perhaps drew the boundary too severely, 'Schwarzenberger' p.xxvi.

<sup>111</sup> Koskenniemi uses Schwarzenberger as the paradigmatic example of an international lawyer who believes in the separation of international law and politics, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989) pp.160-167.

<sup>112</sup> See, for example, *The Inductive Method in International Law* (London: Stevens, 1965).

<sup>113</sup> *International Law and Order* p.262.

Fittingly, given that the entirety of his academic career in the UK was at University College London,<sup>114</sup> Schwarzenberger adopted Jeremy Bentham's approach to law: 'That it ought to be correctly identified, then critiqued from a metajudicial point of view.'<sup>115</sup> Thus he could not be criticised for using interdisciplinarity as a mechanism for downgrading the importance of formal law. If anything, he could be criticised for an almost obsessive formalism in the legal aspects of his writing.

### *Ideology and International Law*

Still, the real crux of the case for the modern relevance of Schwarzenberger ought to be his focus on the ideology of international lawyers and the extent to which this affects claims about the fluid or static nature of international society. The two were expressly linked in his 'Images and Models of International Law'.<sup>116</sup> In this Schwarzenberger noted the interplay between argument about specific rules, general principles, models of international society and particular situations or solutions that are often preferred: when many international lawyers argue about general principles they, as often as not, are thinking of how they could apply their own legal systems, or personal biases to particular situations rather than engaging in an objective analysis of those general principles.<sup>117</sup> As he put it:

The student who, with his mind firmly fixed on concrete difficulties of his own, argues a general proposition that would neatly solve his own dilemma is a familiar figure. Yet the tendency to invent *ad hoc* principles is not the monopoly of the young. Even those of us who try hard against this temptation know that, while we attempt to state or restate generally applicable legal rules or principles, particular groups or problems in which we happen to be involved may harry us from the back of our minds....When mature scholars argue general or particular propositions, they are likely to do so against the background of their own imagery, but also against that of their subconscious or undisclosed models<sup>118</sup>

Schwarzenberger was modern enough, however, not to claim that international lawyers can simply excise this from their ways of thinking, but in a manner quite similar to Martti Koskenniemi's call for a return to formalist argument in *A Gentle Civilizer of Nations*,<sup>119</sup> Schwarzenberger suggested that lawyers are at their best make their major premises known rather than allow them to remain unidentified,<sup>120</sup> and be open enough to change and adapt their models when they are shown to be inadequate.<sup>121</sup> He did not believe, for example that

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<sup>114</sup> Late in life, he became an emeritus professor at Notre Dame University's London branch.

<sup>115</sup> See, e.g. Georg Schwarzenberger, *The Frontiers of International Law* (London: Stevens, 1962) Chapter 4 ('International Law in Ethical Perspective'). Schwarzenberger was fully conversant with Bentham's work see George Keeton and Georg Schwarzenberger (eds.), *Jeremy Bentham and the Law* (London: Stevens, 1948).

<sup>116</sup> Georg Schwarzenberger, 'Images and Models of International Law' (1966) 19 *Current Legal Problems* 192.

<sup>117</sup> 'Images and Models' pp.193-194.

<sup>118</sup> Georg Schwarzenberger, *International Law and Order* (London: Stevens, 1971) (chapter 14 of which is an updated version of the above piece), p.253, 255.

<sup>119</sup> *Gentle Civilizer*, pp.494-509.

<sup>120</sup> 'Images and Models' p.196; *Power Politics*, p.10.

<sup>121</sup> 'Images and Models' p.196.

anyone could ever entirely overcome their ingrained conscious and subconscious modes of thinking and biases, but he did believe that more agreement could be reached if people were open and honest about them. Hence he said that ‘the conscious elaboration of images and models in any academic field assists in widening the scope of articulate and rationally verifiable discussion’.<sup>122</sup> To be fair to Schwarzenberger, he at least attempted to do this in his own writings,<sup>123</sup> despite his tendency to assume that he had done more to achieve objectivity in his views when compared to others, who remained ensnared in their modes of thinking.<sup>124</sup>

But this leads us to one of the most important parts of Schwarzenberger’s work. Much of his contemporary relevance can be based on the fact that he never tired of reminding international lawyers of the possibility of ideology in international legal argument. Ideology critique has recently been rehabilitated, primarily through the work of Susan Marks, although in a more sophisticated form than Schwarzenberger used it.<sup>125</sup> Marks uses ideology critique in the specific Marxist sense of using the terms and concepts of a discourse to expose its contradictions and to open it up to other voices. Schwarzenberger, on the other hand, was probably simply warning international lawyers not to confuse their own political preferences for law, or to clothe such preferences with a cloak of ostensibly objective legal analysis.

Although this may not have endeared him to many international lawyers, he was candid that both processes occurred in international law discourse:

We may take a particular view of a problem because we happen to act openly as counsel for an interested party. It may, however, happen that the ‘principal’ is not disclosed but forms a potent background picture in the ‘agent’s’ mind. Thus, advisers or advocates of particular governments, who are involved in actual or potential disputes, may participate in discussions of learned societies on controversial issues such as the law of international rivers or, without disclosing their own commitments, arrive in their writings at emphatic conclusions which happen to coincide with those of their clients.<sup>126</sup>

This was linked to his strong positivism in some ways, but he was notably candid (for the time) about the human factor in legal reasoning:

Even the best methods and tools mean little if the workman, be he a label-fixer, content-tester or confluence controller, is incompetent or, in fulfilling his task, is guided by overriding considerations of an extraneous character. In this case, not even Article 38 is immune from misuse. Ultimately, the objectivity of international law and

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<sup>122</sup> *International Law and Order*, p.256. His method of expressing this, however again gives us a clue as to one of the reasons for his unpopularity ‘evidence of strength of feeling or loss of temper in academic discussions is another sign that the hunt for hidden images is likely to be successful’ *ibid.* p.255.

<sup>123</sup> See, for example his admission that his preference was for community approaches over society ones, but that this was from a personal, metaphysical choice rather than dictated by logic in *Dynamics of International Law* p.118.

<sup>124</sup> For which he was criticised, see J.M[ervyn].J[ones]. ‘Review’ (1945) 22 *British Yearbook of International Law* 321, p.324; P.J. Fitzgerald, ‘Review’ (1958) 74 *Law Quarterly Review* 302, p.304.

<sup>125</sup> See, e.g. Susan Marks, *The Riddle of All Constitutions* (Oxford, OUP, 2000); Susan Marks, ‘Big Brother is Bleeping Us-With the Message that Ideology Does not Matter’ (2001) 12 *European Journal of International Law* 109.

<sup>126</sup> *International Law and Order* p.254.



its concepts rests on the competence, independence and integrity of its custodians. International lawyers do a disservice to the discipline if they pretend that such scholarship is not at times produced, as it is in many areas, by those whose commitment to causes both good and bad effects their judgment or inspires casuistry.<sup>127</sup>

As a result, Schwarzenberger's call for 'scepticism and detachment regarding the highly pragmatic pronouncements of interested parties, belligerents and neutrals alike'<sup>128</sup> is one which ought to be borne in mind, in particular when conflictual situations, armed or otherwise are at issue.

### *International Order and Change*

One of the most useful parts of Schwarzenberger's oeuvre is his attempt to apply his form of the critique of ideology to claims relating to postulated changes in world order. For Schwarzenberger, although international society is susceptible to change we must appraise debates about the nature of current international society with a keen eye on the motives of the participants in such debates. In *The Dynamics of International Law* Schwarzenberger wrote, with his characteristic bluntness:

Distorting emphasis on the statics or dynamics of the law may...be due to extrinsic causes. These may range from those behind the briefs of legal exponents of vested interests or to those inspiring the emanations of committed scholarship. Products in these categories are not to be despised. They are likely to offer quotable evidence of the ideologies and utopias woven around the law. In the international field, a paper-gold medal should perhaps be awarded to the Sixth committee of the General Assembly of the United Nations for unequalled excellence in the field of legal ideology mongering, with relevant *ad hoc* committees of the General Assembly as close runners-up.<sup>129</sup>

Although his concern here cuts both ways, and rightly so, his overall scepticism and lengthy historical perspective meant that he tended to view claims that the world had rapidly changed as overstated. For example, he could perhaps be rightly taken to task for adopting the view that the UN had not really altered world order in any meaningful way (although some might say that after Iraq he may have a point). However, in an extraordinary work written in the Second World War, *International Law and Totalitarian Lawlessness*, Schwarzenberger reacted very strongly against what he saw as a common fallacy: 'the over-emphasis and over-valuation of the dynamic aspects of current events'.<sup>130</sup> This, he saw as

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<sup>127</sup> Fundamental Concepts, p.71. Probably the best-known advocate of committed scholarship of this sort was Myres S. McDougal, see, e.g. Myres S. McDougal and Associates, *Studies in World Public Order* (New Haven: Yale University Press, 1960); For critique see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: OUP, 1995) pp.191-199.

<sup>128</sup> *International Law and Totalitarian Lawlessness* p.39.

<sup>129</sup> *The Dynamics of International Law*, pp.5-6.

<sup>130</sup> *International Law and Totalitarian Lawlessness*, p.35.

strongly linked to ‘the illusion of novelty...the so called revolutionary nature of changes’.<sup>131</sup> His reflections on the matter deserve quotation at length:

Emphasis on this point that there is nothing new under the sun, may have a salutary effect of preventing an abuse of the functional method which is just as possible as of its analytical counterpart, that is to say that it may degenerate into an ideology. Only the consequences may be graver, as the allegation of functional changes has usually a merely destructive effect. For the most that this approach can prove is that the law has broken down, and thus functional jurisprudence may become involuntarily an ally of those forces of barbarism and nihilism to stem which is one of the functions of the present war. Therefore it is well to keep in mind Professor Jessup’s warning that ‘of all the clichés which infect patriotic exhortations, the most subtly poisonous is that which calls the war in progress at the moment ‘different from all other wars’.<sup>132</sup>

The relevance of this to today should be clear. Since the attacks on the United States on 11<sup>th</sup> September 2001 there has been a repeated refrain that the world has changed and that this justifies redescriptions and new approaches to the law. Maybe the world has changed, maybe not, but it is necessary to inquire into two things before reaching judgment. First, why someone is suggesting the world has fundamentally altered; and second, whether the purported changes require that the law must change or give way. It seems advisable, with Schwarzenberger, take a rather sceptical approach to any such changes requiring a fundamental reappraisal of the role of law in international affairs.

Many international lawyers have, perhaps for self-defined ‘progressive’ reasons, been willing over the last couple of decades or so, been quick to say that the world has changed for the better. From the ‘New World Order’,<sup>133</sup> to claims by well-meaning international lawyers such as Thomas Franck and Fernando Tésón that international law has been transformed by changes in the world to become the carrier of liberal values around the world,<sup>134</sup> perhaps reaching its apogee in the Kosovo action in 1999.

However, the easy claims that the world has changed for the better, adopting a rather low standard for claiming the world has changed, have turned on their authors who now, stuck with that standard, are feeling that the world has now changed fundamentally again, albeit this time for the worse.<sup>135</sup> The anguished tone of Thomas Franck’s *American Journal of International Law* comment on the Iraq conflict and the scofflaw attitude of the United States

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<sup>131</sup> *International Law and Totalitarian Lawlessness* p.35.

<sup>132</sup> *International Law and Totalitarian Lawlessness*, p.37, see also his citation, at p.39 of Jessup’s pithy statement ‘against the all-too-ready and frequent tendency to pin the label of novelty on anything which does not happen to previously happen to have come to one’s attention. Ignorance of the law is no excuse for the individual; ignorance of history is no justification for a government’.

<sup>133</sup> Anne-Marie Slaughter, ‘Liberal States’ Although some commentators were never convinced, e.g. Noam Chomsky, *World Orders, Old and New* (Oxford, Polity, 1994).

<sup>134</sup> See, e.g. Fernando Tésón, *A Philosophy of International Law* (Boulder, Carolina UP, 1998); Thomas Franck, *Fairness in International Law and Institutions* (Oxford, OUP, 1995).

<sup>135</sup> The inspiration for this sentiment is Bill Bowring’s excellent piece ‘The Degradation of International Law?’ in John Strawson (ed.), *Law After Ground Zero* (London, Glasshouse, 2002) 3.

administration is a case in point.<sup>136</sup> It is difficult to imagine Schwarzenberger falling for the charms of those States which claimed their actions in the 1990s were purely intended to further the cause of liberal values through international law. Although he was unequivocally on the side of open societies,<sup>137</sup> he had, as we have seen, condemned the invocation of international community as naturalism, and thus subject to the criticisms he never seemed to tire of making.<sup>138</sup> In many ways this situates Schwarzenberger very much in the British tradition of international law.

In a related manner, despite his interdisciplinary bent, Schwarzenberger's was far more traditionally 'legal' in approach than impressed by speculation about changes in society. And on a purely legal level, we must not forget that international law itself allows for changes in society, through the principle of *rebus sic stantibus*. This principle is codified in Article 62 of the Vienna Convention on the Law of Treaties as follows:

A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.<sup>139</sup>

As was made abundantly clear in the *Gabcikovo-Nagymaros* case, the burden of proof is on the propounder of change, and the bar is set high. The end of the cold war and vastly different economic situations facing the countries was held insufficient in *Gabcikovo-Nagymaros*.<sup>140</sup> In the early part of the 20<sup>th</sup> century, abusive claims of *rebus sic stantibus* were commonplace by States who wished to avoid their legal obligations.<sup>141</sup> Schwarzenberger, unsurprisingly, thought that any transformation in international society had to be demonstrated by those alleging its occurrence.<sup>142</sup>

## CONCLUSION

It is tempting to dismiss Schwarzenberger as an awkward iconoclast who did not quite have the ability or nous to leave a major mark on international law.<sup>143</sup> The fact that

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<sup>136</sup> Thomas Franck, 'What Happens Now? The UN After Iraq' (2003) 97 *American Journal of International Law* 607.

<sup>137</sup> See, e.g. *Power Politics* (3<sup>rd</sup> ed.), p.xvi.

<sup>138</sup> See, e.g. *Dynamics*, pp.107, 115.

<sup>139</sup> See generally Oliver Lissitzyn, 'Treaties and Changed Circumstances (Rebus sic Stantibus)' (1967) 61 *American Journal of International Law* 895.

<sup>140</sup> *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v Slovakia) (1997) ICJ Rep 7, paras 102-104.

<sup>141</sup> See, e.g. Georg Schwarzenberger and Edward D. Brown, *A Manual of International Law* (Abingdon: Professional Book, 6<sup>th</sup> ed., 1976) pp.138-139.

<sup>142</sup> *Dynamics*, p.109.

<sup>143</sup> See Steinle, 'Georg Schwarzenberger' p.680.

Schwarzenberger's work is not that frequently referred to in modern legal scholarship,<sup>144</sup> and such references that there are often ambivalent lends support to this argument.

But there is more to the story than this.<sup>145</sup> As James Crawford has pointed out, Schwarzenberger was 'less doctrinaire than appearances might lead one to believe'.<sup>146</sup> The chapter on the South West Africa and Namibia Cases in *International Law as Applied By Courts and Tribunals Vol III*, for example, would not have been out of place in a realist work (in the jurisprudential sense). Schwarzenberger undoubtedly influenced international law. For example, most international criminal lawyers are conversant with his 'The problem of an international criminal law',<sup>147</sup> even if they do not agree with all (or perhaps even any) of it. He was also a very early proponent of the study of international economic law.<sup>148</sup> Scholars in that area are perhaps more indebted to him than is sometimes realised. As was said back in 1970, Schwarzenberger was 'a pioneer of international economic law since long before it became the staple of fashionable symposia...'<sup>149</sup>

Part of why Schwarzenberger has largely dropped off the international legal radar is likely owing to his unflinching investigation of the weaknesses of international law. These discomfort many international lawyers, even if he did overstate them. It would be wrong to ignore Schwarzenberger's work on this ground. There is much to be gained from engagement with his writings. In addition, Schwarzenberger's unwillingness to temper his views to fit the mood of the moment, or to blow in the wind even where it would have helped his career,<sup>150</sup> stands in positive contrast to some international lawyers, who can both be prone to faddishness and in some cases willing to act as the 'political decision maker's little helper'<sup>151</sup> whilst playing fast and loose with the law.<sup>152</sup>

On a more general level, a study of Schwarzenberger's work can lead us to a reflection on more general aspects of international legal scholarship. In the past decade or so there has been a tendency to relegate scholarship prior to the early 1990s to history, on the understanding that the world fundamentally changed with the assertion of the 'New World Order'. International lawyers should not forget cold-war scholarship. There is a clearer thread back to it than many realise, or want to think.

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<sup>144</sup> For an exception, which reprints two of Schwarzenberger's essays see Gerry Simpson (ed.), *War Crimes Law* (Aldershot: Asgate, 2 vols, 2004). See also Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: CUP, 2002) 39-43.

<sup>145</sup> In relation to his impact on law more generally, it should be noted that Schwarzenberger was one of the founding editors of *Current Legal Problems* and the lecture series which forms its content.

<sup>146</sup> James Crawford, 'Public International Law in Twentieth-Century England' in Beatson and Zimmermann, *Jurists Uprooted*, 681, p.683.

<sup>147</sup> 'The Problem'.

<sup>148</sup> Georg Schwarzenberger, 'The Province and Standards of International Economic Law' (1948) 2 *International Law Quarterly* 402; Georg Schwarzenberger, *Foreign Investments and International Law* (London: Stevens, 1969); Georg Schwarzenberger, *Economic World Order: A Basic Problem of International Economic Law* (Manchester: Manchester University Press, 1970).

<sup>149</sup> A. A. Fatouros, 'Review' (1970) 64 *American Journal of International Law* 462, p.462.

<sup>150</sup> See Mendelsohn, p.xxiii; Brown, 'London Institute', pp.5-6; Herman Moser, 'Political and Justiciable Legal Disputes: Revival of an Old Controversy?' in Cheng and Brown (eds.), *Contemporary* 216, p.216.

<sup>151</sup> *Gentle Civilizer*, p.495.

<sup>152</sup> For a strong (and, in my own view, justifiable) expression of this view in relation to the 'torture memoranda' see Richard B. Bilder and Detelev Vagts, 'Speaking Law to Power: Lawyers and Torture' (2004) 98 *American Journal of International Law* 689.

Scholars in the cold-war often had a far better understanding than its more recent, and aggressive proponents, of the fact that international law may be at its most useful when it allows people to follow their own ideas of the good rather than trying to universalise one such view and impose it.<sup>153</sup>

Things do not change as much as is sometimes thought, and as Schwarzenberger said, models are often chosen for a reason. As Don Greig has remarked, 'It may be that arguments about the diminution of sovereignty and invocations of the international community and the interdependence of its members as exemplars of that diminution involve more than a description of a present reality and amount to playing with words to support a particular view of the contemporary world.'<sup>154</sup> Schwarzenberger would probably have said much the same thing.

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<sup>153</sup> For a critical view to the same effect see Martti Koskenniemi, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397.

<sup>154</sup> Don Greig, 'International Community, Interdependence and All That...Rhetorical Correctness' in Gerard Kreijen (ed.), *The State, Sovereignty and International Governance: Essays in Honour of Pieter Kooijmans* (Oxford, OUP, 2002) 521, p.522.