

The international criminal justice system has moved beyond its infancy and is now fully functioning in a variety of areas—providing justice for victims and fair trials for those accused of the most serious crimes known to humanity. With this maturity comes the development and refinement of highly specialized bodies of law, such as international criminal evidence and provisions for the transfer and surrender of accused person to international criminal courts. The two volumes reviewed here—May and Wierda's *International Criminal Evidence* and Knoop's *Surrendering to International Criminal Courts*—fill a vacuum in the literature and make important contributions to our understanding of these components of the international criminal justice system.

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Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908–1991). By Stephanie Steinle. Baden-Baden: Nomos Verlagsgesellschaft, 2002. Pp. xii, 271. Index. €49.

"International law," Georg Schwarzenberger wrote in this *Journal* in 1943, at the age of thirty-five,

is a typical social law . . . which does not condition, but is conditioned, by the rule of force. Therefore, it is hard to conceive a more unrealistic assumption than the one which is the basis of the modern doctrine of international law: the normality of peace. The state of peace, as it exists between major wars, is nothing but the interval between the dynamic periods in which previous systems of power politics undergo a process of confirmation or transformation.¹

This statement—from "Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law"—encapsulates some essentials of Schwarzenberger's thinking about international law. Drawing on a distinction made by the German sociologist Ferdinand Tönnies, he believed that in modern times, states live in a social environment that must be described as a "society," not a "community," and that is therefore regulated by a "law of power," not

a "law of coordination."² In that environment, characterized by the incessant "power politics" of states and other actors, physical force is always present. International society and the laws actually observed by its members can be understood only by making "realistic," disinterested assumptions. The 1943 "Jus Pacis Ac Belli?" also displayed its young author's strong self-confidence: "It appears, therefore," he concluded, "that none of the assertions of the modern doctrine on peace and war can be upheld."³

Schwarzenberger's own fundamental beliefs and convictions about international relations and international law, which he first set out in his 1941 book *Power Politics*,⁴ were formed early in life and did not subsequently change much.⁵ His short *Civitas Maxima*?—published in his native German in 1973—is a rather pessimistic summary of his view that in world history, more often than not, "international law was nothing but an ideological cloak, intended to disguise the vested interests of the interstate sphere, and to serve as a first line for their defense."⁶ A generation that experienced two world wars, Schwarzenberger concluded in 1973, should be immune to the siren calls of power politics in disguise, and would be better to follow

² See *id.* at 478. In another article, the author described "the law regulating the relations between the members of a society" as follows:

Its purpose is to prevent the *bellum omnium contra omnes*, or to make limited coöperation possible between individuals who, being anxious to maintain and improve their own positions and seeking primarily their own advantage, are therefore at the best only prepared to apply in proportion to their actual power the principle of reciprocity in their relations with each other.

Georg Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, 33 AJIL 56, 61 (1939).

³ See Schwarzenberger, *Jus Pacis Ac Belli?* *supra* note 1, at 474.

⁴ The book was originally subtitled "An Introduction to the Study of International Relations and Post-war Planning." In the second (1951) and third (1964) editions, the subtitles were changed to "A Study of International Society" and "A Study of World Society," respectively. German and Spanish editions were published under the titles *Machtpolitik: Eine Studie über die internationale Gesellschaft* (1955) and *La Política del Poder* (1961), respectively.

⁵ See, in particular, his books *The Frontiers of International Law* (1962) and *International Law and Order* (1971). The book under review includes a full bibliography of Schwarzenberger's books, lectures, and articles (though the subtitles of most of his books have unfortunately been omitted).

⁶ The quotation is taken from Schwarzenberger's 1939 article, "The Rule of Law and the Disintegration of the International Society," *supra* note 2, at 72.

* The views expressed herein are solely those of the author and do not reflect the views of the United Nations, ICTY, or Office of the Prosecutor.

¹ See Georg Schwarzenberger, *Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law*, 37 AJIL 460, 479 (1943) (footnote omitted).

the example of the apostle Thomas, who was ready to believe only what he actually saw.⁷

It is thanks to this first monograph about Georg Schwarzenberger's life and work that we can better understand how he could arrive so early in life at such pointed ideas about the relationship between international law and power politics. In a dissertation submitted to the Faculty of Law and Economics of the University of Bayreuth in Bavaria, Stephanie Steinle convincingly explains that Schwarzenberger's personal experiences were of great consequence for his thinking—for example, his early encounter with National Socialism in Germany, his forced emigration to Great Britain in 1934, and, in particular, his observation that, in the following years, the civilized world offered almost no resistance to Hitler's blatant violations of international law. At the same time, his early maturity and the recognition that he had already gained as a student and young lawyer in Germany led him to trust his own judgment in political and legal matters.

Steinle's book was written in the framework of a larger research project on the history of European (and especially German) international legal doctrine in the late nineteenth and the twentieth century. The project, initiated by Michael Stolleis at the Max Planck Institute of European Legal History in Frankfurt, has already produced valuable biographical studies of Hans Kelsen, Franz von Liszt, and Walther Schücking (the first and only German judge on the Permanent Court of International Justice (PCIJ)).⁸ Kelsen and Schücking also appear in Steinle's book—the latter as someone helping Schwarzenberger to find employment in London, the former as a co-émigré whose idea of a "pure" law Schwarzenberger rejected as not being in accordance with reality:

Legal research . . . has to apply the sociological method as well as the logical and dogmatic. . . . [T]he refusal of the lawyer to investigate from his own angle the relation of the legal system to the wider issues of social life, in short, law as a historical reality, must inevitably lead to sterility of legal research, especially in a period of crisis and transition.⁹

⁷ SCHWARZENBERGER, *CIVITAS MAXIMA?* 41 (1973).

⁸ See JOCHEN VON BERNSTORFF, *DER GLAUBE AN DAS UNIVERSALE RECHT: ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER* (2001); FLORIAN HERRMANN, *DAS STANDARDWERK: FRANZ VON LISZT UND DAS VÖLKERRECHT* (2001); FRANK BODENDIEK, *WALTHER SCHÜCKINGS KONZEPTION DER INTERNATIONALEN ORDNUNG: DOGMATISCHE STRUKTUREN UND IDEENGESCHICHTLICHE BEDEUTUNG* (2001).

⁹ See Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, *supra* note 2, at 58 n.12.

Steinle has divided her careful study into three parts. The first and shortest is "Schwarzenberger's years in Germany (1908–34)." Here, as well as in the following parts, Steinle was able to draw on the unpublished autobiography of Suse Schwarzenberger, née Schwarz, whom Georg married in 1931. Georg Schwarzenberger was the only son of liberal Jewish parents. He grew up in Heilbronn, a small town in Württemberg. His father Ludwig owned a cotton-waste factory; his mother Ferry, née Riesz, was of Hungarian descent. Georg studied law in Heidelberg—where he and Suse (his later wife) belonged to the circle of the legal philosopher Gustav Radbruch—and in Tübingen. Together with Suse, he was active in the socialist student society and the Social Democratic Party, writing articles in a local party paper and making many public speeches in the crucial Reichstag election campaigns of 1932 and early 1933. As a known adversary of the Nazis and as a Jew, Schwarzenberger was dismissed from his judicial clerkship on December 1, 1933, and his admission to the bar exam was revoked. On the basis of the files of the Württemberg Ministry of Justice, Steinle has shown that it was the pressure exerted by certain colleagues and local Nazi party officials that made the conservative officials of the ministry give up their original, rather benevolent stance. Thus, a legal career in Germany—for which Schwarzenberger had been predestined because of his excellent achievements as a law student and also his notable scholarly publications¹⁰—was made impossible.

In his efforts to emigrate to England, Schwarzenberger was supported by Radbruch, Albrecht Mendelssohn Bartholdy, Hermann Kantorowicz, and, with Schücking's help, Cecil Hurst, the British judge at the PCIJ. In London, two organizations were of service to Schwarzenberger—the Academic Assistance Council, founded by William Beveridge, director of the London School of Economics (LSE), and the Notgemeinschaft deutscher Wissenschaftler im Ausland (Association of German Scholars Abroad). Karl Mannheim

It should be mentioned, however, that Hans Kelsen's *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* (1951) was later published "under the auspices of the London Institute of World Affairs" as the eleventh volume of "The Library of World Affairs," edited by Schwarzenberger and George W. Keeton.

¹⁰ They included his legal dissertation about the League of Nations' mandate over Palestine and a monograph about the so-called Kruger loans. See GEORG SCHWARZENBERGER, *DAS VÖLKERBUNDS-MANDAT FÜR PALÄSTINA* (1929); *DIE KREUGER-ANLEIHEN: EIN BEITRAG ZUR AUSLEGUNG DER INTERNATIONALEN ANLEIHE- UND MONOPOLVERTRÄGE SOWIE ZUR LEHRE VOM STAATSBANKEROTT* (1931).

and Wolfgang Friedmann were among his friends in London. For a number of reasons, it was difficult for young scholars trained in Continental law to find work in England. In most cases, they were advised to move on to the United States or reorient their work in the direction of political science. Schwarzenberger found a position at the New Commonwealth Institute, however—a research bureau of the New Commonwealth Society for Justice and Peace, which had been founded and financed by the liberal politician David (later Lord) Davies in 1932 to promote his idea of a stronger League of Nations. In 1943, the institute, which became the center of Schwarzenberger's work, was renamed London Institute of World Affairs. Schwarzenberger also became a Ph.D. student at the LSE. In the spring of 1936, he submitted his thesis *The League of Nations and World Order*, which was published in the institute's own series of monographs.¹¹ In 1938, he became a part-time lecturer in international law and relations at University College London, where he would teach until his retirement in 1975. Only late in his career, in 1963, was he appointed "Professor of International Law in the University of London."

All of the above and more (including Schwarzenberger's imprisonment as an "enemy alien" between June and November 1940) is set out in detail in the second part of Steinle's book, which primarily covers Schwarzenberger's time in London until the end of World War II. The author explains how Schwarzenberger turned to a specific sociological method of international law—which he developed through a process of critical examination of writings by Max Huber, Georges Scelle, and Dietrich Schindler, and which became the basis of *Power Politics*—and compares it to the traditional English study of international law (represented by Arnold McNair and his students, among them Hersch Lauterpacht), on the one hand, and the methods used by the new discipline of international relations, on the other.

The book's third part is centered on Schwarzenberger's multivolume work *International Law as Applied by International Courts and Tribunals*, the first volume of which appeared in 1945. While it is true that with that effort to establish legal rules as actually accepted and applied in state practice, Schwarzenberger again took up international law in the stricter sense, the title chosen by Steinle for this part ("Back to International Law: The Search

for Objective Law") is somewhat misleading. In Schwarzenberger's own view, he had, of course, been doing international law all along. In fact, he surely regarded his sociological approach—that is, of uncovering the power politics behind the rules and of raising questions about both the validity and credibility of those rules—as his main contribution to the science of international law. Also, as Steinle herself explains, Schwarzenberger's *International Law* was based on this "inductive" approach (which Steinle calls "empirical positivism"). In a way, the work was the realization of the program of "constructive" sociological research that he had outlined in his 1943 "*Jus Pacis Ac Belli*?"¹² Schwarzenberger proceeded with elaborating his approach until his death, insisting that it was the task of the academic observer "to call, in the face of fundamental contradictions between reality and ideology, things by their proper name."¹³

It seems harsh to call Georg Schwarzenberger an "outsider," as the author does in her concluding remarks ("The Academic Career of an Outsider"). And yet this judgment is accurate. One could also say that he went his own way and was less willing to compromise than the average man—or average lawyer.¹⁴ In his 1943 article, he criticized the naturalist writers of the seventeenth century for the concessions that they made "to make their systems acceptable to the powers that be. . . . [T]hey were prepared to come to terms with the powers that be, [with the consequence that] their theories could be turned to useful purposes."¹⁵ But that was not Schwarzenberger's way. Since coming to London, he was always loyal to England, but unlike some of his colleagues, he did not feel obliged to defend, "in the national interest," every official British policy. In short, he was an independent, though perhaps not a truly original, thinker. If one appreciates these foundations of Schwarzenberger's intellectual existence, the degree to which he could establish himself and develop his abilities in England testifies to his energy and determination—but also, one must admit, to an English open-mindedness that was arguably unique in Europe at that time.

¹² See Schwarzenberger, *Jus Pacis Ac Belli?* *supra* note 1, at 478–79.

¹³ See SCHWARZENBERGER, *CIVITAS MAXIMA?* *supra* note 7, at 40.

¹⁴ For a brief, but insightful, sketch of Schwarzenberger's personality, see Maurice Mendelson, *In Memoriam Professor Georg Schwarzenberger (1908–1991)*, 1992 BRIT. Y.B. INT'L L. xxii.

¹⁵ See Schwarzenberger, *Jus Pacis Ac Belli?* *supra* note 1, at 462, 464.

¹¹ See GEORG SCHWARZENBERGER, *THE LEAGUE OF NATIONS AND WORLD ORDER: A TREATISE ON THE PRINCIPLE OF UNIVERSALITY IN THE THEORY AND PRACTICE OF THE LEAGUE OF NATIONS* (1936).

Notwithstanding his (not unsuccessful) efforts to assimilate himself to the English (legal) culture, he remained an emigrant, always drawing on the thinkers that he had encountered in his youth. After the humiliations that he had experienced as a young man, he refused to return to Germany, where he was offered a newly created chair of international law and relations in Tübingen. He also turned down offers from Dalhousie and McGill Universities: "If it can be avoided, one shall not repeat a break like the one our emigration from Germany to England was to us in 1934," he wrote to a friend in 1969 (p. 220).¹⁶ It is likely that after the Second World War, Schwarzenberger would have fared better in the United States than he did in England. Efforts of 1949, 1952, and 1957 to procure for him a professorship at University College London all met with disapproval by Lauterpacht and also Arthur Goodhart, Gerald Fitzmaurice, Robert Jennings, and McNair, and failed accordingly. But even in the group of the "realists," he remained alone and found his writings criticized by, for instance, Hans Morgenthau¹⁷ and Myres McDougal.¹⁸ Steinle concludes that Schwarzenberger's interdisciplinary work fell between two stools—the normative school of international law, on the one hand, and international relations theory, on the other. Schwarzenberger did not produce a "school," and his London Institute of World Affairs did not survive him very long. Among the few international legal scholars who shared his views was—interestingly, and perhaps characteristically—a German of the same generation, Wilhelm Grewe, who in his studies of the history of international law was also searching for the "social substratum of the interstate system."¹⁹

¹⁶ The translation is by the author of this review. The German original reads: "Wenn man es vermeiden kann, soll man so einen Bruch, wie es unsere Auswanderung aus Deutschland nach England im Jahre 1934 war, nicht wiederholen."

¹⁷ See Hans J. Morgenthau, Book Review, 36 AJIL 351 (1942) (reviewing GEORG SCHWARZENBERGER, *POWER POLITICS* (1941)) ("[T]he author still clings to the antithesis between power politics and rule of force, on the one hand, and community spirit and rule of law, on the other. He still believes . . . that power politics can be abolished by political and social reform . . .").

¹⁸ See Myres S. McDougal, *Dr. Schwarzenberger's Power Politics*, 47 AJIL 115, 118–19 (1953) ("Dr. Schwarzenberger's theoretical structure is not adequate to the tasks he imposes upon it The root difficulty stems from an imprecise conception of power and, hence, a failure to achieve a comprehensive description of power processes in terms of participants, bases of power, and practices.").

¹⁹ See WILHELM G. GREWE, *FRIEDE DURCH RECHT?* 20–21 (1985). The quoted phrase is Schwarzenberger's,

In a thorough and balanced way, Stephanie Steinle has paid tribute to a legal scholar whose belief in international law as an effective regulative and "civilizing" force in international relations was shaken early in life, but who did not abandon that law or treat it in a cynical or sarcastic way. Instead, he tried to understand the creation and functioning of its rules in a manner that, to him, was the only possible and intellectually honest one. Just because of his own personal experience, the high expectations that he had in his student days for the role of international law, and the later concomitant bitter disappointment, Schwarzenberger did take international law seriously, and struggled with the problem of how its great potential could be developed. Therefore he called for "a sociological analysis of international law as a law of power, reciprocity and coördination, and correspondingly as an ideology, reality and utopia."²⁰

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BRIEFER NOTICE

Toward a Just World: The Critical Years in the Search for International Justice. By Dorothy V. Jones. Chicago: The University of Chicago Press, 2002. Pp. xv, 264. Index. \$32.00.

Dorothy V. Jones is a scholar-in-residence at Chicago's Newberry Library and an associate in the history department at Northwestern University. Her thesis is that "[t]he modern search for international justice began at an international conference [the 1899 Hague Peace Conference] in The Netherlands at the end of the nineteenth century" (p. 1). Telling this story, she focuses on those she calls "[m]embers of the faithful company of those with trust in reason" (p. 19) because she believes that "[i]n the ongoing search for international justice there is one constant . . . a belief in the power of reason." (p. 15). Her book covers four main periods: the twenty years before the establishment in 1919 of the League of Nations (pp. 1–42); the League's attempts to cope with the

see Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, *supra* note 2, at 59. For a critical analysis of Grewe's interpretation of the modern history of international law, see Bardo Fassbender, *Stories of War and Peace: On Writing the History of International Law in the "Third Reich" and After*, 13 EUR. J. INT'L L. 479 (2002).

²⁰ See Schwarzenberger, *Jus Pacis Ac Belli?* *supra* note 1, at 479.