The reality and power of international law: Georg Schwarzenberger's forgotten theory of International Relations

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Abstract

Georg Schwarzenberger's oeuvre has remained significantly underexplored in International Relations literature despite his status as one of the most important thinkers in International Relations and international law of the twentieth century. Ahead of their time, his works reveal a picture of law that transcends academic boundaries and challenges the traditional portrayal of both realist theory and international law. Through a detailed examination of the works of this theorist, this article offers an analysis of the fundamental aspects of his theory of International Relations and international law. It explores the elements at the heart of Schwarzenberger's theory of International Relations, which, though examined infrequently and practically forgotten, retain their relevance in today's international society. Through this exploration of Schwarzenberger's works, this article argues that his theory of International Relations provides a powerful commentary on the fundamental structure, nature and problems of international law. It points to and reveals issues that have remained at the heart of international law until today, offering a sophisticated and self-conscious interrogation of the relationship between law, power and politics. In doing this, this article challenges our understanding of realism as a theory that is unable to account for international law and highlights Schwarzenberger's continued relevance today.

Keywords

classical realism, Georg Schwarzenberger, international law, International Relations theory, realism

Introduction

Georg Schwarzenberger's works stand out from those of other classical realists through their sheer focus on the nature of international law, its problems and its relation to power politics and international society. An émigré trained in the legal science of Weimar Germany, he paints a picture of international law that retains immense value today,

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offering an unflinching account of the weaknesses of international law (Cryer, 2016: 470–471, 482). IR scholarship has, so far, seriously underestimated the importance of this thinker.[1] His analysis of international law was based upon the fundamental sociological distinction between society and community made by the German sociologist Ferdinand Tönnies (Guilhot, 2017: VI; Landheer, 1966: 40–42). A student of Professor Gustav Radbruch, he adopted his 'neo-Kantian distinction between the "ough"t and the "is"', as well as an appreciation for the effect of social forces on the compass and meaning of the law (Navari, 2011: 137–138). His theory, which interpreted the enormous changes the international sphere saw within his lifetime and developed together with them, remained, despite it, remarkably coherent and consistent in its conclusions (De Yturriaga Barberán, 1963: 2299; Schuman, 1952: 161–162).

Schwarzenberger was among the first to explore and develop the 'standard of civilisation' in international society (Bowden, 2017: 130–131; Fidler, 2001: 144–145). He shared Morgenthau's, Herz's and Kelsen's laborious German legal background as both a jurist and an émigré (García Sáez, 2016: 39–93; Jütersonke, 2006: 210, 2022: 73; Scheuerman, 2012a: 457; Schuett, 2021: 13–14).[2] An advocate of legal realism, he tried to combine legal research with a critical outlook on the influence of law on politics and bitterly engaged with Hersch Lauterpacht (Cryer, 2006: 246–247, 2016: 458–460; Paulus, 2002: 270). Focused on the social background of international law, he saw it in terms of irreducible hostility between states, representing what for Koskenniemi (2006: 184–195) is the rule approach of international law. Despite this, he argued for the urgency of laying down generally valid legal standards to articulate the gap between present-day reality and the minimum requirements of civilised world community (Scheuerman, 2011: 152–153, 2012a: 460–461, 2012b: 50).

Over the course of the following pages, this article brings to light the significance of Schwarzenberger's contributions to IR by exploring the different facets of his analysis of international law together with its commonalities and differences with other realist thinkers. In doing this, this article shows how his theory of International Relations transcends the superficial portrayal of realism as a theory that is unable to account for international law. The argument develops in six stages. First, the article establishes Schwarzenberger's analysis of the development and role of international law in international society and its differences with municipal law. Second, it explores the social background of international law. Third, the article engages with the role and influence of ethics, morality and the rule of force in international law. Having done this, the article examines the different shapes international law takes in international society, which Schwarzenberger illustrates through the laws of power, coordination and reciprocity. Finally, the article brings these aspects of Schwarzenberger's thought together and explores their significance together with his proffered solutions for the weaknesses and problems of international law. In doing this, it argues for the value of reengaging with this forgotten realist theorist and highlights how his theory of International Relations remains of utmost relevance today.

The nature and role of international law

For Schwarzenberger, the laws which regulate a community generally only formalise customary behaviour which would be observed even without its existence. These laws

define the relations members regard as substantially sound and adequate, and make it vital to recognise the 'correlation between a community or a society and the different functions of their respective legal systems' (Schwarzenberger, 1939: 61–62). It is upon these ideas that Schwarzenberger (1939: 61–62) builds his analysis of international law, which examines the question of whether the function of international law is to stabilise power positions, give expression to common values or witness agreements indifferent from the standpoint of a community.

The historical development of international law and its social forces plays a fundamental role in how Schwarzenberger views the function of international law. International law is the product 'of the experience gained in international affairs in the last three centuries of European history' (Schwarzenberger and Keeton, 1946: 1). This origin fundamentally affects it. The pyramidal structure of the medieval community gave international law its universalistic spirit, allowing it to be replaced by the international law of civilised nations (Schwarzenberger, 1939: 63–64). The principles of national sovereignty and consent thus came to distinguish international law, making it subservient to either international politics or fields which were irrelevant from the point of view of the rule of force (Schwarzenberger, 1946: 170–171, 1965: 175).

It is the very history and development of international law that makes Schwarzenberger address the following question: Does international law fulfil the functions of a society law and, if so, what is its relation to other regulating principles in the interstate sphere? In a society where the interests of members conflict, the main concern of each entity 'must necessarily be directed towards self-preservation' (Schwarzenberger, 1939: 66–67). The only realistic alternative to universality for countries that are not in a position of geographical or political security is provided by the balance of power. International law, however, is not incompatible with the balance of power. Political and economic interests played a key role in how it was shaped, with its rise requiring the symbiosis of independent states (Schwarzenberger, 1948: 52). International law, in other words, is a real, if separate, dimension of international society that can contribute to the regularisation of relations between Powers on a basis of mutuality and reciprocity so long as major issues do not arise.

Schwarzenberger (1962: 20) addresses two key, additional questions in his examination of international law: 'Is international law law or is it merely positive morality?' and, how can 'a system claim legal character if it lacks all or some of the customary attributes of municipal law: legislative organs, courts and sanctions?' Questions of this type offer an inaccurate picture of international law: they either lead to unrealistic assertions of the identical nature of international and municipal law or resigned admissions of the differences which deprive it of its legal character.[3] Schwarzenberger argues against both positions. International law has an underlying order (Schwarzenberger, 1970b: 1). To not be purely nominal, it has to satisfy a single condition: 'There must be a state of relative absence of physical disorder; that is, the prevalence of a state of peace' (Schwarzenberger, 1970a: 353–354). This circumscribes international law to the limits set by power politics, making it the background against which international legal rules are developed (Schwarzenberger, 1943a: 9).

The fundamental differences between international and municipal law – particularly in relation to overruling dissent – are what prevent international law from becoming the

antidote to violent changes and revolution (Schwarzenberger, 1941: 393–394, 401). International society is deeply divided. International law, therefore, has no rules of *jus cogens*: it lacks rules which 'by consent, individual subjects of international law may not modify' and relies on the majority of its subjects acting in a spirit of reasonableness (Schwarzenberger, 1951: 117, 1967: 29–30). These differences fundamentally affect the reach of international law. The existence and scope of its rules and principles are less securely established than in municipal law (Schwarzenberger, 1965: 74–75). It is because of this that international law cannot grow in the way of municipal law, as it needs to obtain the consent of all concerned to any change in the law (Schwarzenberger, 1962: 36–37).

Schwarzenberger's understanding of the differences between municipal and international law strongly differs from Morgenthau's more formalistic, Kelsenite own (Jütersonke, 2022: 79). He assails Kelsen's analogy between primitive and modern international law, criticising its misleadingly legalistic interpretation of state violence (Hexner, 1943: 49–50; Scheuerman, 2012a: 461). The problem is not that international law is a primitive system of law. It is its lack of an organised, centralised power that fundamentally affects it, making it dependent on the consent of every state while also being unable to impose its will on recalcitrant members of international society (Schwarzenberger, 1962: 38). This, in turn, subjects international law to the interests of different groups of states and makes it strongly hierarchical (Schwarzenberger, 1964b: 140), granting it a political element. It is sovereign states and the oligarchy of world Powers that decide on the character of international affairs.

These ideas underpin the entirety of Schwarzenberger's theory of international law, which will be examined in the following section through its sociological and ethical foundations and perspectives.

The social background of international law

The key to understanding the functions fulfilled by any legal system lies, for Schwarzenberger, in the structure of its social background. The specific character of the social group impresses itself on the law. Law and justice, regardless of their essence, are primarily social agencies that fulfil social functions (Schwarzenberger, 1943b: 89, 1947: 159). Two key questions arise from this idea: First, 'what is the nature of the social substratum of international law', and second, 'what are the dominant motive powers determining the actions of groups in the international sphere?' (Schwarzenberger, 1947: 160). It is only through a sociological analysis of international law that we can uncover answers to these questions, as well as the decisive factors that 'determine the limits of the functional frontiers of international law, beyond which international legislators may stray only at their peril' (Schwarzenberger, 1965: 67).

The prominence of Schwarzenberger's sociological analysis of international law in his works was noted by multiple contemporaries (John, 1952: 529; Morgenthau, 1940: 537; Smith, 1951: 254). The importance of the sociological dimension of law is also made clear in Herz's critique of Kelsen's pure theory of law, where he asserts that the sociological state guarantees the effectiveness of the legal state, while the latter is a personification of the former (Sylvest, 2010: 421). Law and society are fundamentally

correlative terms: where 'there is Law, there is Society' (Schwarzenberger, 1964b: 31). Three features characterise the structure of international law on the level of unorganised international society: its universality, its exclusiveness (who is subject to it) and its individualistic character (how its subjects are bound by its rules) (Schwarzenberger, 1967: 8–9). These are linked to the different functions which international law may serve in a social environment, wherein it may be an instrument of power, a regulator of reciprocal interests or a means of coordinating common efforts. Terms such as society or community represent ideal types of social relations and, in actual life, never exist in an undiluted form.

Schwarzenberger's analysis is akin to that of other classical realists through its focus on the impact the rise of modern states has on international law and their inability to keep peace (Frei, 2018: 67; Scheuerman, 2011: 40–41). The implications of Schwarzenberger's investigation into the social background of international law are akin to Morgenthau's and Carr's. Any attempted legal, moral and customary restraints on states are, due to their very nature, insufficient (Scheuerman, 2011: 50). This is because legal orders can only define certain distributions of power and offer standards and processes to ascertain and maintain it in concrete circumstances (Morgenthau, 1978: 96–97). Schwarzenberger's analysis of the limitations of international law also bears a strong resemblance to Carr's analysis of the static nature of international treaties.[4] General principles and general methods of approach to political issues are applied according to specific institutions that work in accordance with specific rules (Carr, 1939: 3). This method of application is inherent in international society. Any social order implies a large measure of standardisation and abstraction, and there cannot be a different rule for every member of the community (Carr, 2016: 29).

Schwarzenberger's investigation into the social background of international law differs, however, in significant ways from Carr's and Morgenthau's. Schwarzenberger's analysis proceeds with neither Carr's historical method nor diplomatic focus (Smith, 2017b) and is instead notably more legal in character. Schwarzenberger also lacks Morgenthau's (1978: 96) emphasis on peace and international law serving primarily as ideologies for status quo and imperialistic policies. International law, for Schwarzenberger, instead tends to present the characteristics of an extreme type of society law: 'It is preponderantly, but not necessarily exclusively, a law of power' (Schwarzenberger, 1967: 12). Depending on the degree of integration between states, however, it may change into a hybrid between society and community law 'a law of reciprocity', or a fully-fledged community law, 'a law for the co-ordination of joint efforts on the basis of voluntary co-operation' (Schwarzenberger, 1967: 12). International law's main setback is not that its norms exist in a rudimentary way (Morgenthau, 1933: 70), but that the lack of integration between states and social background – that is, the structure of international society – conditions its role and purpose.

The investigation into the social background of international law makes an examination of the role power plays essential if aiming to understand its weaknesses. Power 'is the test which determines the place of sovereign States in the hierarchy of the international society' (Schwarzenberger, 1967: 23). It makes self-preservation the primary objective of every member of the international aristocracy, conditioning the foreign policies of states in turn and making the balance of power system span across the globe. Each

group perceives themselves not merely as a means to a common end, but as an end in itself, limiting law and morality to relatively subordinate positions (Schwarzenberger, 1967: 24). Morgenthau, despite agreeing with Schwarzenberger's analysis of the weaknesses in the structure of international law, did not share his emphasis on the incompatibility between force, as manifested in power politics, and law, as there could be 'no such thing as law without force, nor . . . organized force without law' (Morgenthau, 1940: 537). For Schwarzenberger, however, the effects of international society on international law are clear. The primary function of law in societies in which power is the overriding consideration is to assist in maintaining the supremacy of force and give such a system the respectability and sanctity of law (Schwarzenberger, 1967: 25).

The role of power in international society, therefore, explains the shortcomings of international law. These are a direct result of its social background (Schwarzenberger and Keeton, 1946: 38). This represents a point of confluence between Schwarzenberger's and Carr's theories. The shortcomings of international law, for Carr (2016: 165), stem not from technical shortcomings but from the embryonic character of the community in which it functions. The undisguised intrusion of power is, thus, 'far more frequent, and the appeal to morality less likely to be listened to' (Carr, 1948: 66). Municipal law is not free from these defects, though their importance and effect are not as obvious as in international society due to how it is less open to objection and divided than at the international level (Schwarzenberger, 1965: 74; Schwarzenberger and Keeton, 1946: 47–48). International law is conditioned by the rule of force and, therefore, expresses power relationships instead of regulating them (Landheer, 1966: 40–41).

The influence of power on international law, however, denies neither the existence nor importance of international law. The 'very States which, since time immemorial, have been immersed in the vortex of power politics', Schwarzenberger (1967: 24) argues, 'themselves attest to the reality of international law'. The fact that the independence of states is one of the cornerstones of international law attests to this. International society is prevented from interfering with the domestic jurisdiction of a state; the exercise of state sovereignty is not limited by rules of international customary law, treaties or the general principles of law recognised by civilised nations. Furthermore, participation in international congresses also depends on the free will of states, with unanimity being required for any decision (Schwarzenberger, 1946: 32, 1967: 25).[5] The social environment in which international law finds itself binds and determines its functions. Although inhibited by the structure of international society, international law, for Schwarzenberger, has a powerful impact on the states which form the international society. The key way in which this is the case – ethics, which are also explored by other classical realist theorists like Carr and Morgenthau – will be explored in the following section.

Ethics, morality and the rule of force

The investigation into the social background of international law leads Schwarzenberger to conclude that force is the supreme law of international society. The impact this has on international law is considerable; it affects the way it operates in international society and makes it both dependent on states and static in nature. International law can only run

smoothly if the 'inter-State system is so static that no changes of major importance are necessary, or if sovereign States are reasonable enough to make sure that unavoidable changes are effected by agreement' (Schwarzenberger, 1946: 32). Elaborate international treaties and agreements are not a solution for this problem. Legal bonds only decrease the 'non-committal character of such liaisons', only giving them 'the appearance of stability' (Schwarzenberger, 1946: 35). The implications of this are akin to Morgenthau's own. Any attempted legal, moral and customary restraints on states are, due to their very nature, insufficient (Scheuerman, 2011: 50). International law can instead only provide quasi-legal excuses for political measures which are otherwise incompatible with the sovereignty and equality of states. This limits its reach and strength considerably.

The shortcomings of international law are, therefore, a direct result of this subordination to the rule of force. Although not necessarily permanent, inherent or unavoidable, 'they cannot be eradicated until the existing relationship between law and power politics is reversed' (Schwarzenberger, 1946: 38). The threat of force thus plays an important part in the spheres in which international law is subservient to power politics, and once that force there remains no further effective threat (Schwarzenberger, 1946: 38). The impact of this is considerable: 'There are no objections', Schwarzenberger (1946: 46) writes, 'to regarding as a legal system that part of international law which lies outside the range of power politics'. The question thus arises as to whether international law can claim to fulfil the functions of a legal system at all. It is here that international morality plays a role in international law, with its principal problem being expressed by Schwarzenberger (1946: 49) as follows: Are there any rules which are comparable to the moral norms that apply to the relationships between individuals in the relationship between the 'stars' of international society?

Examining state practice makes it seem that diplomatic correspondence, the preambles of international treaties and the public statements of statesmen are imbued with ethical conceptions and maxims (Schwarzenberger, 1946: 53). They 'abound in protestations of faith in the canons of international morality', with notions of good faith, justice, equity, peace, humanity, civilisation, friendship, freedom, equality, natural rights and honour appearing frequently as themes (Schwarzenberger, 1964b: 215). If states are in search of territorial expansion, 'they do not normally justify their demands on grounds of the economic or strategic assets they desire to acquire' but on the need 'for "natural" frontiers or a "natural" right of access to the sea' (Schwarzenberger, 1964b: 219). Similarly, allies united against a third power do so 'in the interest of peace and security, if not mankind at large' (Schwarzenberger, 1964b: 219–220). International morality reinforces state policy. That these ethical maxims are similarly present in the pronouncements of totalitarian states seems to confirm the impression that the power of international morality is a reality.[6]

Ascertaining the reality of this is only possible through an assessment of the impact the rule of force has on moral values. 'In a system of power politics', Schwarzenberger (1946: 62–63) writes, 'appeals to moral standards by statesmen would not occur so regularly if they did not serve some useful purpose'. It follows, then, that the main function of morality in international society does not consist in controlling one's behaviour, but in its use 'as a powerful weapon against potential and actual adversaries' (Schwarzenberger, 1946: 62–63). When it comes to state practice, international morality is, therefore, primarily

used as an ideology cloaking policies of national self-interest and self-preservation (Schwarzenberger and Keeton, 1946: 62–63).[7]

Schwarzenberger's position in this respect is reminiscent of Carr's, who believed power and morality operated in tandem and attacked the belief that the harmony of interests was universal and could serve as the basis of an international order (Molloy, 2003a: 293–294). From this point of view, all concepts in IR – including human rights, development and security – are 'susceptible to be weaponised and used towards ends contrary to what they originally promised' (Karkour, 2022: 7). Schwarzenberger's position is also reminiscent of Morgenthau's notion of interests, which implies a tactical and moral transformation (Williams, 2005: 185–186). Political actors engage in a process of self-deception by portraying acts of power as acts of morality. The function of morality in this context is therefore ideological: 'It conceals power from itself and the actor' and, in turn, 'the dilemma of means and ends' (Karkour and Giese, 2020: 1113). Rather than an exaltation of power, this warns against attempting to universalise the particular (Karkour and Giese, 2020: 1122). Universalistic morality is conflated with a state's selfish aspirations (Scheuerman, 2011: 50). The lust for power is 'an ever present reality in this community of interests' (Molloy, 2008: 96), with morality and international law being less developed and weak regulators of international politics (Behr and Heath, 2009: 333).

There are, however, positive aspects to this state of affairs. Interests can become secondary to the ideas which they have called to their assistance. Thus, in exceptional cases, 'the influence of international morality exceeds even that of international law' (Schwarzenberger, 1946: 64). The reality of this is demonstrated through how, in the development of international law, it was international morality that provided the first stone of its foundations (Schwarzenberger, 1946: 64–65). This explains the joint references to law and morality found in international correspondence, whereby international morality 'is used primarily as an ideology cloaking in deference to public opinion, policies of national self-interest and self-preservation' (Schwarzenberger, 1946: 66). The tug of war between the standard of civilisation and the requirements of war in the laws of war is a particularly prominent example of this (Gong, 1984: 74). Their content, which is controlled by both the standards of civilisation and considerations of humanity, nevertheless sees its scope limited by the necessities of war (Schwarzenberger, 1968a: 13).[8] The connection between international morality and law has never been disrupted, even with the pre-eminence of the rule of force in international society. If the standards of international morality are to be raised, for Schwarzenberger (1946: 68), the problem therefore 'turns on the transposition of these loyalties to the international society'.

Considering this, a single, key question can be asked: What, if any, is the role played by ethics and morality in international law? Schwarzenberger here diverges from Carr, for whom morality cannot be empowered by a formal bureaucracy, on this point (Molloy, 2008: 90). He also diverges from Morgenthau, for whom ethics and morality can legitimate the claims of enduring regimes to govern and establish standards by which their exercise of power may be judged (Klusmeyer, 2009: 343). International ethics, for Schwarzenberger, much like international law, is primarily 'conditioned by international society, rather than the reverse' (Schwarzenberger, 1984: 301–302). Although civilisation as an ethical test has its uses, it has to be universalised, relativised and dynamised to be relevant (Schwarzenberger, 1984: 301–302).

Ethics and morality are not, however, meaningless: considerations of international morality can fulfil clear functions if not overridden by those of state interests. Powers, often under the pressure of public opinion, 'act in accordance with the categorical imperative formulated long since Isocrates: "Treat weaker States in the same way as you would like stronger States to treat you"' (Schwarzenberger, 1964b: 221–222). Furthermore, notions of chivalry and humanity have led to the mitigation of practices which, according to the laws of war at the time prevailing, were lawful. Thus, despite its clear limits, it would be mistaken to assume that international morality is redundant (Schwarzenberger, 1964b: 222). Ethics and morality enable states to apply higher standards in their relations with one another, with these standards, crystallising into legal rules if applied over prolonged periods of time. International morality offers higher standards of an optional character that states can accept as legally binding and serves as the nursing ground for international law despite the gulf that remains between aspiration and achievement in contemporary civilisation (Schwarzenberger, 1964b: 224). It cannot, therefore, be disregarded when considering its role in international law or international society.

Having established this, we will analyse the different shapes international law takes in international society, which Schwarzenberger illustrates through the laws of power, coordination and reciprocity.

The laws of power, coordination and reciprocity

The social background of international law, together with the competing roles of ethics, morality and the rule of force, makes an analysis of the role power plays in international law unavoidable. In a society where power is the overriding consideration, the primary function of law is 'to assist in maintaining the supremacy of force and hierarchies' and to give them 'the respectability and sanctity law confers' (Schwarzenberger, 1964b: 199). Power is the mean between influence and force, and can both be a subjective and relative phenomenon. So long as states are judges of their own cause, 'the borderline between power and law, too, must remain fluid' (Schwarzenberger, 1964b: 14–15). The outstanding characteristic of the law of power – that is, the law pertaining to a pure type of society – is, therefore, that it serves sectional interests rather than the group at large. Its emphasis 'is on order rather than law' (Schwarzenberger, 1971: 12). Its functions 'strengthen the illusion of the autonomy of the law of power from its sustaining social order', and disguise its character as an 'ideological prop of domination and exploitation' (Schwarzenberger, 1971: 13).

Despite the overarchingly legal nature of the majority of his works, Schwarzenberger – much like Kelsen – understood that 'power and interests are distributed among the most relevant political actors on the ground' (Schuett, 2021: 59). By building international law on the foundation of national sovereignty, international law remains subject to the overriding rule of force (Schwarzenberger, 1947: 166–167). Schwarzenberger's analysis on this point is akin to Wolfers' (1949: 185), who asserts that government or statehood, 'whether national or world-wide is therefore no panacea against those aspects of power politics which are morally deplorable. The real evil is enmity and its threat to values to which people are devoted'. Legal constructions alone cannot avoid the influence of power. The dominant position of one party encourages legal interpretation in

favour of the stronger side (Schwarzenberger, 1968b: 16–17). Groups inside international society concentrate on the pursuit of their own self-interest and 'tend to do what they can rather than what they ought' (Schwarzenberger, 1964b: 13). The predominance of the law of power thus goes down to the very root of international law and affects all its facets.

International law best serves the purposes of the law of power if its real character and functions are 'disguised behind a façade of technicalities and quasi-ethical doctrines' (Schwarzenberger, 1943b: 91–92). In the absence of international organs entitled to impose authoritative interpretations of their rights and duties, states can be tempted to 'employ international law as a quasi-legal garb to disguise designs that may well run counter to their international obligations' (Schwarzenberger, 1967: 13). Furthermore, international law offers 'convenient excuses of a quasi-legal character such as the principles of self-preservation or self-defence or the *clausula rebus sic stantibus*' for any state that wants to break an international engagement (Schwarzenberger, 1947: 165). International law can become the instrument of power politics.

'Is international law, then', asks Schwarzenberger (1947: 170), 'merely a pious fraud, at which the augurs smile?' Schwarzenberger's answer to this question is more multifaceted and optimistic than what the preceding analysis might suggest. An unqualified answer in the affirmative would be 'as unrealistic and unscientific as is the attitude of those who choose to ignore the ideological functions fulfilled by international law' (Schwarzenberger, 1947: 170). International law is not just a law of power. It is also, he argues, 'a law of reciprocity', where 'even traces of the law of co-ordination are not entirely lacking' (Schwarzenberger, 1947: 170).

The laws of reciprocity and coordination attain effectiveness in different ways from the law of power, requiring consensual superstructures of a bilateral or multilateral character. They change the functions that are fulfilled in the law of power by the dichotomy of law and order, and express the reality of their groups (Schwarzenberger, 1971: 14). Rather than seeking to exploit disparities in power positions, the law of coordination 'serves as a means of co-ordinating individual efforts for the better achievement of common purposes' (Schwarzenberger, 1967: 6–7). In such a congenial atmosphere, judicial organs can 'make powerful contributions of their own to the furtherance of community aspirations' through the interpretation of relevant undertakings in a spirit that becomes the law of *coordination* (Schwarzenberger, 1968b: 16).

Furthermore, the law of power also 'partakes of the characteristics of the law of co-ordination, and the law of co-ordination borrows from its opposite type' (Schwarzenberger, 1943b: 93). The members of a community can value their membership to such an extent that 'the mere possibility of disapproval by and exclusion from the community acts as a deterrent and guide for the actual behaviour of its members' (Schwarzenberger, 1943b: 92). Thus, the law of coordination assists in the maintenance and continuous integration of the community. Its function – the coordination of efforts – makes it and the law of power 'form the two antipodes which legal genius has created' (Schwarzenberger, 1943b: 92–93). While the one embodies 'strong ideological elements', the other 'largely remains an unfulfilled aspiration and, to that extent, utopian' (Schwarzenberger, 1943b: 92–93). It is, however, undoubtedly real.[9]

The law of reciprocity constitutes a compromise between the law of power and coordination and the 'extremes of brutal domination and saintly self-negation' (Schwarzenberger, 1962: 16). It provides a meeting ground and an intermediate stage between the laws of power and coordination, and can be used for the regulation of affairs which are considered peripheral from the point of view of the group (Schwarzenberger, 1947: 159–160). It is the mutual interest of state parties to an agreement that instils 'the requisite doses of reasonableness, good faith and common sense' (Schwarzenberger, 1968b: 16). Similarly, international law develops freely and on a footing of reciprocity in matters such as diplomatic immunity, extradition, commerce, communications and transport. states, for example, cannot 'expect more generous treatment for their own envoys abroad than they themselves were prepared to grant to those of other States' (Schwarzenberger, 1964b: 203). A legal order based on reciprocity can therefore 'safely rely on the penalties inherent in its social machinery: the unwillingness of participants to jeopardise the enjoyment of the benefits derived from participation in the legal regime in question' (Schwarzenberger, 1964b: 211). International law, even in the thick of power politics, is a curious mixture of these three types of law rather than being solely motivated and driven by power.[10]

Having analysed this, we will bring these aspects of Schwarzenberger's thought together and explore their significance together with his solutions for the weaknesses and problems of international law.

The road forward: Schwarzenberger, realism and international law

Schwarzenberger's theory, as shown in this article, fundamentally seeks to address the dangers the weaknesses of international law can give rise to. It is, much like Morgenthau's, 'a theory of the limits of power politics as opposed to a theory of pure power politics' (Molloy, 2008: 97). Rather than passively accepting the influence of power on international law and international society, it actively seeks to redress this through its focus on the nature of international law, the impact of its social background and the seemingly conflictive influence of ethics and power. This is not, however, as recent literature on classical realist theorists has shown, an exclusive feature of Schwarzenberger's thought. Reengagement with classical realism reveals a tradition that provides a 'subtle and sophisticated understanding of the role of ideas in IR' (Williams, 2004: 633–634) and has significant intersections with pacifism through its lack of moralisation of war (Moses, 2018: 49). The key to the quest for truth in political matters, for Morgenthau, was 'to reveal (and restrain) the ideological function of morality vis-à-vis power' (Karkour and Giese, 2020: 1114). Similarly, Carr's critical theoretical task was to 'pierce the utopian veil by exposing the ontological presuppositions of Woodrow Wilson and his supporters as ideological projections rather than reflections of reality' (Molloy, 2021: 328–329). The following key question thus stands: What value can reengagement with Schwarzenberger's works and thought bring to the table?

The incisiveness with which Schwarzenberger engages with international law and its place in international society is unique despite Morgenthau's, Herz's, Wolfers' and Carr's analyses of it. His thought transcends the boundaries and assumptions that have traditionally dominated discussions about realist theory both in International Relations and

international law literature. Schwarzenberger's thought shows how realism does not merely argue that international law plays 'virtually no role in international affairs, especially in the area of the use of force' (O'Connell, 1999: 336), that it 'essentially doesn't matter (or doesn't matter very much)' (Greenberg, 2003: 1791) or that 'law is virtually irrelevant, as is the concept of legal obligation' (Brunnée and Toope, 2010: 10–11). His thought, which engages with international law and the influence its social background, ethics and power have on it, instead seeks to show how international law can rise above the problems posed by state sovereignty and power politics.

Schwarzenberger's theory of International Relations also presents several stark differences from neorealist theory. It does not assume, as Waltz does, that the major problem with IR theory is that it rarely meets the standards of the philosophy of science (Molloy, 2003b: 72–73). Rather than seeking to establish states as either rational or nonrational (Mearsheimer and Rosato, 2023: 1), Schwarzenberger grounds his analysis in a historical- and sociological-oriented examination of international law in international society. The differences between Schwarzenberger's classical realist theory of International Relations and neorealism go even further. Unlike Mearsheimer (2018: 136), who argues that for realists an international community 'is a rhetorical device that powerful states use to sound high-minded when they are pursuing their interests', Schwarzenberger – as shown throughout this article – actively engages with this concept and differentiates it from that of an international society. Similarly, rather than assuming that states 'operating in a self-help world almost always act according to their own self-interests' and do not subordinate them to those of other states (Mearsheimer, 2014: 33), he accounts for the role of ethics in international law. Furthermore, he argues international law is a mixture of the laws of power, reciprocity and coordination rather than being solely motivated and driven by power.

Reengagement with Schwarzenberger's theory of International Relations presents a number of distinct benefits for contemporary IR theory. His works develop, as Scheuerman (2011: vii) has shown regarding classical realists, a 'forward-looking reformist Realism very different from that now pervasive in both the academy and halls of government'. Schwarzenberger's theory, however, goes beyond that of other classical realist authors through its unique and near-exclusive focus on international law in international society. Although his training as a legal scholar is not a characteristic that is unique to him (Scheuerman, 2008; Sylvest, 2010; Zajec, 2015), his continued focus and engagement with international law after 1945 and the question of power in international society make him a valuable resource for our troubled times. Schwarzenberger's theory of International Relations shows – much like Karkour (2022: 19) and Babík (2013: 510) have done regarding postcolonialism and critical theory in Carr's works – how the classical realist position is more nuanced and complex than traditionally expected. It accounts for the role of the history and social background of international law and seeks to actively redress the problems brought about by building international law on the foundation of national sovereignty.

International law offers an inherently contradictory and diffuse picture within Schwarzenberger's theory. Judging contemporary international law by its achievements is a dangerous illusion, as they remain far from the 'objective of the collective system of the United Nations: the maintenance of international peace of and security'

(Schwarzenberger, 1964c: 4). Furthermore, so long as *jus cogens* remains lacking in international law, the assertion of the will of world society as a basis for obligation in international law remains a mockery (Schwarzenberger, 1964c: 21–22). For Schwarzenberger, however, as for Morgenthau, political, legal and ethical principles can prevail over power politics and are not marginal in international politics (Behr and Heath, 2009: 338). International law 'has survived astonishingly well the host of ingenious horoscopes cast regarding its future by magi in many lands' (Schwarzenberger, 1962: 297). While flawed in its current state, it is neither at one extreme nor the other, as no legal system can be absolutely effective (Schwarzenberger, 1983: 295). It can neither be sceptically disregarded nor taken for granted.

The demands made of contemporary international law are far more exacting than those that were made of pre-1914 international law. While the price of pre-1914 international law was its unvarnished subordination to overriding requirements of power politics (Schwarzenberger, 1983: 297), this price is unsuitable if we are to meet the challenges of our day. These challenges are formidable not only in their scale but also in 'the fact that they explicitly break with the norms, institutions, and mores of the prevailing era of liberal internationalism' (Cunliffe, 2020: 4). Schwarzenberger's theory of International Relations actively addresses these challenges rather than arguing for the helplessness of international law. Its credibility can only be raised through the application of the three concrete tests: (1) the degree of integration of the environment of treaties, (2) the homogeneity of the contracting parties and (3) the minimal ethical common denominator. The more proposals for the codification and development of international law correspond to these criteria 'the higher is their credibility', while, conversely, the more readily they fit 'into an existing social environment', the less they can ameliorate 'the shortcomings of an existing *status quo*' (Schwarzenberger, 1983: 301). These are not the only problems uncovered by Schwarzenberger's analysis of international law. 'Anybody concerned about what he may consider to be an unduly "critical" attitude towards the valiant efforts made on the legal level by the proverbial men of good will', he writes, 'may wish to recall that the phenomenon of political law is hardly a novelty' (Schwarzenberger, 1981: 267). The necessity of ameliorating the evils of war is needed more than ever: 'Unless the proliferation of nuclear weapons is stopped in time, bipolarised world society is likely to relapse again into a pluralist world society' (Schwarzenberger, 1964a: 1–2).

If international law is not to remain helpless and impotent in such an emergency, its defences and remedies must be congenial to the magnitude of the challenge. The main impediment for the achievement of this is, rather than power politics, state sovereignty. 'The main body of opponents' is, Schwarzenberger (1943a: 77–78) argues, 'furnished by adherents of State sovereignty and all it stands for'. Sovereign states regard themselves as ends in themselves rather than a means to supranational ends. This fundamentally links the problems faced by international law to the society-community distinction introduced throughout his works. So long as 'international relations are fundamentally governed by power politics', a relationship between 'sovereign States of unequal strength easily degenerates from one on a community footing to one in a society nexus' (Schwarzenberger, 1959: 250).

To solve the fundamental problems faced by international law, then, it is necessary to keep the following factors in mind. First, that 'sovereign States have become more interdependent, but some more than others' (Schwarzenberger, 1964c: 24). Second, that even if the leaders of world Powers imposed 'considerable restraint on themselves' and contented themselves with the indefinite continuation of the nuclear stalemate, they could not 'afford to tolerate any substantial change to their own disadvantage in the underlying balance of thermo-nuclear terror' (Schwarzenberger, 1964c: 24–25). Finally, that 'competition between the world camps for the non-aligned countries has both a negative and positive impact on international law' (Schwarzenberger, 1964c: 25). Schwarzenberger's proposed solutions for the problems faced by international law can be summarised in the following way: no international legal order can be stronger than the political order which conditions it. The more a 'legal system has the character of a society law', the more 'apparent are the functions of the dualism of order and law' (Schwarzenberger, 1975: 349).

Schwarzenberger's proposed solutions differ from Kelsen's argument that the only ordering principle of international society with 'a realistic chance of securing a stable peace would be the establishment of some kind of a positivist world state' (Schuett, 2021: 45). They also differ regarding Kelsen's lesser focus on the sociological foundations of international society (García Sáez, 2016: 263). However, well devised an international organisation may be it will only work in practice if collective interests exist, if these are recognised by all concerned and if said recognition brings about the birth of a collective will. It is, however, noteworthy that Schwarzenberger and Kelsen converge on the idea that there is nothing objectively verifiable that could have us say that national interests do not allow for more international law or an ever-more centralised international legal order (Schuett, 2021: 119).

Having examined this, this article brings the different ideas explored throughout the previous pages together. In doing this, it highlights how Schwarzenberger's theory transcends the traditional caricature of realism and argues for the importance of reengaging with this forgotten IR theorist.

Conclusion

The problem of world peace, for Schwarzenberger (1936: 180), can only ever be solved in the long run if states take into account the interdependence of the conditions of world peace. They must, in other words, accept the reality of international law. 'Our time', Schwarzenberger (1941: 432–433) writes, 'has lost its belief in the necessarily convincing effect of argument and reason'. The liberal myth of progress 'does not prevent man from retrograde action, leading towards a mechanized barbarianism infinitely worse than anything to be found in primitive society or the "dark" ages' (Schwarzenberger, 1941: 432–433). The only alternative to this 'road of debasement, cynicism and nihilism' is a return to the 'springs from which our civilization flows' (Schwarzenberger, 1941: 433). Any design for world peace must 'subordinate and limit power politics that the international order can prevail' (Schwarzenberger, 1951: 737–738). The essence of its success therefore lies in aiming not at the maximum, but at the minimum of change that is required for this purpose. Morality alone – which for Morgenthau is the dualistic counterpart and means of salvation from the lust for power – is not, for Schwarzenberger,

enough (Molloy, 2006: 93). It is essential to address and minimise the problems posed by the principle of sovereignty in international society. 'Such a legal system', he writes, 'would eliminate all the loopholes of power politics in disguise' and provide for the establishment of international organs required for the 'legal skeleton of a true international community' (Schwarzenberger, 1951: 759–760).

It is essential to note that Schwarzenberger's writings and conclusions are fundamentally optimistic. This optimism was widely noted by contemporaries in a number of book reviews. Schwarzenberger's approach to the relationship of power and international law was, though realistic and sober, not cynical (Bowett, 1963: 701; Lissitzyn, 1959: 198; Smith, 1951: 254). He believed that power could 'be abolished by political and social reform' (Morgenthau, 1942: 351) and his proposals bore witness to his positive attitude (Gross, 1952: 1244). Mitrany distinguished his analysis of IR from Morgenthau's, Schuman's and Carr's belief that International Relations could not be anything but a relation of power (Mitrany, 1952: 71–72). Although this is not a feature unique to Schwarzenberger (Smith, 2017b: 477; Tjalve, 2008: 131), the optimistic and constructive nature of his theory, which differs from the one-dimensional and cynical reading of realist texts, challenges the traditional caricature of realism as a position that disdains progressive change and ethics in the international order (Bell, 2008: 2; Molloy, 2008: 83–84; Reichwein, 2021: 79–80).

Schwarzenberger's theory of International Relations shows how international law can rise above the problems posed by state sovereignty and brought about, in turn, by power politics. The weaknesses he brings to the limelight remain at the heart of our contemporary international society. His analysis is reminiscent of Herz's in how it views the great global issues as solvable while not underrating the difficulties involved in drawing the line between the realisable and the utopian (Herz, 1981: 196). In contrast to Morgenthau, he does not fully reject a juridical solution to the problem of world peace and believed that major steps could immediately be taken to create a new global order (García Sáez, 2016: 274; Scheuerman, 2011: 85). The nature of the problems facing international society and international law means that individual, single-state solutions are insufficient if aiming to address these problems. Our contemporary world already is a society, and, in the most elementary sense, an 'indivisible world community: it is a community for life and death' (Schwarzenberger, 1964b: 553). Addressing these problems and weaknesses cooperatively is, therefore, essential. International law must rise above the problems posed by state sovereignty and power politics. Pure idealism and realism are both fallacies if aiming to achieve this. Although aiming high is not easy, doing so appears more worthwhile, as what is needed is 'world public order which any of the parochial States can flout only at its own risk' (Schwarzenberger, 1971: 218). To argue that this is unattainable would amount to accepting that power politics with or without disguise are to forever remain the lot of mankind.

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Notes

1. Schwarzenberger was widely regarded as a preeminent member of Carr's realist school (Bentwich, 1942: 271). The incisiveness, range and depth of his conclusions are common features in the great majority of the published reviews of his works (John, 1952: 531; Morgenthau, 1942: 352; Schuman, 1952: 161–162). Despite this prominence, he has been all but forgotten by current IR literature. The nature of his theory and arguments – which both defended and undertook an unflinching investigation of the weaknesses of international law – is largely responsible for how he was made oddball among both international jurists and post-war political scientists (Cryer, 2016: 482; Scheuerman, 2011: 84).
2. Several works (Green, 1992; Steinle, 2003) have offered a biography of Schwarzenberger's life.
3. Schwarzenberger's assertion on this point challenges the traditional caricature of realism as a position that disdains progressive change and ethics in the international order. This will be expanded upon in this article's final section and conclusion.
4. The author's prior examination of Carr's theory of international law expands considerably on this aspect of Carr's thought (Chas, 2023).
5. Schwarzenberger's argument differs notably from Kelsen's on this point, who argues that the legal rules constituting the 'so-called equality of States are valid not because the States are sovereign, but because these rules are norms of positive international law' (Kelsen, 1944: 209–210).
6. Schwarzenberger develops this argument by reference to several examples in the interwar period (Schwarzenberger and Keeton, 1946: 56–57). These examples, however, are different in focus from Carr's analysis of interwar diplomacy, which, as Smith (2017a, 2017b) and Molloy (2006: 27) have shown, play a significant part in his thought. Unlike Carr, Schwarzenberger approaches these through the lens of international law rather than diplomacy or history.
7. Attempts made on the universalist plane to equate basic human rights and fundamental freedoms 'with binding legal norms have hardly contributed to straightening existing international law', have, for example, instead fashioned them into an 'ideological weapon for purposes of intervention in domestic affairs of other sovereign States' (Schwarzenberger, 1983: 297).
8. Although Schwarzenberger's examination of the standard of civilisation is 'particularly sensitive to the historical grievances rooted in the perception that non-European countries were exploited and discriminated against', he argues the concept is historically significant due to how it illustrates the development of international law in international society and the role of states and power within it (Gong, 1984: 87–89). This is a notable difference from Carr's analysis of the standard of civilisation, which, as Karkour (2022: 83) has shown, both rejects it and critiques the dualism of barbarism and civilisation in Enlightenment morality.
9. Schwarzenberger (1964b: 207) cites the gradual limitation and abolition of the slave trade as its most impressive contribution.
10. Schwarzenberger's arguments in relation to international law as a law of reciprocity challenge the traditional way in which realism has been stereotyped in IR theory.

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