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Recommended Citation

Robert A. Friedlander, *Power Politics and the Rule of Law: Professor Schwarzenberger Reconsidered*, 24 DePaul L. Rev. 836 (1975)
Available at: <https://via.library.depaul.edu/law-review/vol24/iss4/3>

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POWER POLITICS AND THE RULE OF LAW: PROFESSOR SCHWARZENBERGER RECONSIDERED

*Robert A. Friedlander**

Professor Friedlander utilizes the literature of Georg Schwarzenberger to present his views on the contemporary status of international law in the maintenance of world public order. At the same time Schwarzenberger's position is reconsidered in the light of the awakening interest in international criminal law and the growing threat of international terrorism. Friedlander warns against the continuing powerlessness of the United Nations and joins his senior colleague in calling for a world federal order. Intertwined in this analysis are the recurring problems which lawyers and jurists encounter in the principles announced at Nuremberg.

ASSUME that a group of well armed gangsters resolve to establish themselves as a ruling class and to impose their authority over a helpless people. They seize control of the national decision-making apparatus, take over the key administrative posts and the judiciary, expropriate the most desirable real property, regulate education, and abolish the right to political association and free expression. A new philosophy of racial superiority is introduced which promotes international conquest. The ideal of justice is replaced by the doctrine of strength, and law becomes the exercise of power.

This paradigm, based on the Nazi experience of the 1930's, is used by Professor Georg Schwarzenberger to introduce the first of two volumes of collected papers covering the post-Second World War era and dealing with the problems and prospects of international law.¹ The central underlying theme of almost all his work for the past four

* Associate Professor of International Law, Lewis University College of Law; Co-Director, Lewis University Center for International Criminal Justice Studies; Lecturer, School for New Learning, DePaul University. Ph.D., Northwestern University; J.D., DePaul University College of Law.

The author is indebted to Professor Schwarzenberger for furnishing a copy of his most recent work, *Civitas Maxima?*, 29 Y.B. WORLD AFFAIRS 337 (1975), which appeared after this analysis was at press. The aforementioned article provides an excellent synthesis of many of Schwarzenberger's ideas which have been propounded over the last thirty years. The analysis presented below also applies to this latest study.

1. G. SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 11-13 (1962) [hereinafter cited as *FRONTIERS*].

decades is that "power politics and war are inevitable consequences of the organisation of international society on the basis of sovereign States and empires. . . ."² Humankind, according to Schwarzenberger, has developed three basic patterns of law, power, coordination, and reciprocity.³ The delicate balance between them has determined the substantive content of both municipal and international law. In the last analysis, however, it is the Hobbesian view of the world that predominates.⁴

With respect to the functioning of society, either national or international, power is thus the overriding consideration. A recurrent theme throughout Professor Schwarzenberger's postwar studies is that international law has become "merely power politics in disguise."⁵ The principles and precepts of international law, whether by custom or by treaty, have only had a limited effect in the world political arena.⁶ In fact Schwarzenberger seems to reinforce the similar viewpoint of his American counterpart, Hans Morgenthau, that from the dawn of humanity to the post-Second World War era, force has been both the ends and means of national foreign policy.⁷ Admittedly, this reasoning amounts almost "to a counsel of despair," for in accordance with this theory, the international community possesses no effective

2. *Id.* at 312. Cf. G. SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 169 (1971) [hereinafter cited as *LAW AND ORDER*], wherein the author lists "[a]rmed conflict, violence and the breakdown of law and order" as being descriptive of many of the most notable events of the contemporary world. See also G. SCHWARZENBERGER, *POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY* (2d rev. ed. 1951) [hereinafter cited as *POWER POLITICS*], G. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW*, (4th ed. 1960) [hereinafter cited as *MANUAL*]; G. SCHWARZENBERGER, *INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS* (1943); G. SCHWARZENBERGER, *THE LEAGUE OF NATIONS AND WORLD ORDER* (1936).

3. *FRONTIERS* at 16, 25-36.

4. See T. HOBBS, *LEVIATHAN* 124 (Collier ed. 1962): "[L]aw, properly, is the word of him, that by right hath command over others." Hobbes also postulated the necessity of the state in order to define the normative standards of conduct. See also Friedrich, *Thomas Hobbes—Myth Builder of the Modern World*, 3 *J. Soc. PHIL.* (1938).

5. See, e.g., *FRONTIERS* at 24, 29, 156, 241-42, 290; *LAW AND ORDER* at 19, 22, 25, 74, 281; *POWER POLITICS* at 14, 148, 261 *et seq.*; 1 *MANUAL* at 10, 118, 179, 356, 368.

6. 1 *MANUAL* at 382.

7. See H. MORGENTHAU, *A NEW FOREIGN POLICY FOR THE UNITED STATES* 208 (1969). The predominance of the national interest over everything else is a favorite theme of Professor Morgenthau. See especially H. MORGENTHAU, *POLITICS AMONG NATIONS* (4th ed. 1967); H. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* (1951).

enforcement sanctions and cannot adequately fulfill its peace-keeping obligations.⁸

Despite the careful use of language and the formal legal terminology employed (including many Latin maxims), Professor Schwarzenberger's world-view is basically a hostile one. It is partly one of frustration and partly one of disillusionment. Neither the statesman nor the scholar, he argues, can "set out an objective and, at the same time, refuse to contemplate the means by which it can best be attained." Therefore, power politics remains the lot of humanity.⁹ Nonetheless, international law still operates more or less as a legal system within certain identifiable perimeters. These are the frontiers of international law, and they include: the law of peace, the law of armed warfare, the law of international institutions, the law of *jus cogens* (binding international law, *i.e.*, treaties), and the law of sovereignty.¹⁰ However, the prevailing system of international law, in all its facets, is still deemed by Professor Schwarzenberger to be a "quasi-order . . . of power politics in disguise."¹¹

The key to the entire Schwarzenberger analysis is power. Power is the determining factor in the formation of the international hierarchy of nations which are now divided into world powers, middle powers and small states. "The essence of power is the ability to exercise compelling pressure irrespective of its reasonableness."¹² Nevertheless, if international law is to have any meaning, good faith and consent are necessary to its operation. There must still be rules to the game, no matter how the game is ultimately played.¹³ In the words of Professor Julius Stone, "the illusory choice between Power Politics and World Community does in fact deprive all human beings of any

8. LAW AND ORDER at 166.

9. 1 MANUAL at 375. *But cf.* J. BRIERLY, THE LAW OF NATIONS 55-56 (6th ed. H. Waldock 1963), which claims that one must nevertheless believe that reason predominates and that "order and not chaos is the governing principle of the world. . . ."

10. *Cf. especially* FRONTIERS, chs. 9-12; LAW AND ORDER, chs. 4-5, 9-10.

11. LAW AND ORDER at 25. *Contra*, C. FRIEDRICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 229 (2d rev. ed. 1963): "[a]n eventual world law within the framework of a world constitution seems therefore to be quite in line with the progressive realization of the task which law as the realization of justice presents to mankind."

12. FRONTIERS at 22.

13. *Id.* at 78, 157, 295, 299; LAW AND ORDER at 269; 1 MANUAL, ch. 6.

constructive role, however small, in the struggle for peace."¹⁴ An alternative to the politics of power must exist in the international arena if the world community is to survive. Value oriented systems involving the concepts of human dignity and human rights are basic to the survival of world public order.¹⁵

The traditional notions of international law, according to Schwarzenberger, are based upon the distinction between the law of peace and the law of war,¹⁶ although the twentieth century can be mostly characterized as being subjected to a state of *status mixtus*.¹⁷ This uncertain condition has necessarily affected the legitimization of both jural agencies and jural activities, and has, thereby, increased the tendencies of nation states "towards subjectivism and an unscrupulous abuse of terms."¹⁸ The result has been a century of crises and conflict, and even at times chaos, which often operates beyond the effective controls of international law. The historian and former diplomat, George Kennan, has stated the problem boldly and bluntly: "[t]he mark of a genuine concern for the observation of the legal principle in the affairs of nations is a recognition of the realistic limits beyond which the principle cannot be pressed."¹⁹

Professor Schwarzenberger is more than a mere political analyst writing within the constraints of a legal system, however imperfect. He is also a legal philosopher dedicated to the principles and the precepts of the rule of law. Any definition of law he insists, must include those norms established on a basis of either consent or compulsion. World order operates by means of a metalegal apparatus of force and power. World society, as distinct from international society (trans-national society) is a combination of disintegration, expansion, and centralization. Order almost invariably controls the legal superstructure: the greater the control, the greater the need for legitimization. Thus, the exact relation between law and order and a legal system depends upon the legitimization of that system's social

14. See J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* xxxix (1954).

15. See M. McDUGAL AND ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 246 (1960). See also P. CORBETT, *THE GROWTH OF WORLD LAW* 176-85 (1971).

16. *FRONTIERS*, ch. 10.

17. *Id.* at 250-54; *LAW AND ORDER* at 17; *1 MANUAL* at 174.

18. *FRONTIERS* at 255; *cf.* *1 MANUAL* at 178-81.

19. G. KENNAN, *REALITIES OF AMERICAN FOREIGN POLICY* 39 (1954).

infrastructure and the community character of specific group relations.²⁰ However, all of these variants share one common denominator; they are not capable of actual realization or effective implementation without the motivating force of power politics.²¹ By themselves, excluding the politics of power, all legal systems whether national or international are mere utopias. "Thus, international law can do little more than offer the alternative of a set of optional standards of a legally binding character higher than those ordinarily practised in a system of power politics."²²

Contrast this with the realist approach of the noted French philosopher and political commentator, Raymond Aron, who postulates that it is difficult to conceive of a juridical order that does not prohibit its subjects from becoming a law unto themselves and pursuing an exclusive world-view of *raison d'état*. A global society, he argues requires a moral unity and solidarity of outlook. There must be a kinship of ideals if humanity is to survive, and nation-states must agree to submit their external conduct to the rule of law.²³ Hence, avoidance of force becomes a necessary concomitant of the conditions of justice. "In the long run you cannot expect one without the other."²⁴

But, how did international law originate? And of what does it actually consist? Rudimentary systems of international law have existed from the dawn of recorded history, although the growth and development of modern international society is a direct result of the disintegration and reformulation of the precepts and principles of the Roman Empire and the Medieval Christian commonwealth. Modern international law is therefore primarily of Western origin. "The conditions on which the rise of international law depends were first fulfilled by the Italian city States and the independent States on the fringe of the Holy Roman Empire."²⁵ From the Peace of Westphalia of 1648, international relations has operated within a framework of multi-

20. Cf. FRONTIERS at 22-36, 43-44; LAW AND ORDER at 10-15.

21. LAW AND ORDER at 25.

22. POWER POLITICS at 253; but see STONE, *supra* note 14, at xxxiv-xli.

23. R. ARON, PEACE AND WAR 717, 725-36 (1966).

24. Speech of Secretary of State, John Foster Dulles, quoted in BRIERLY, *supra* note 9, at 432; cf. M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 354 (1961).

25. POWER POLITICS at 29; cf. FRONTIERS at 1, 43-57; 1 MANUAL at 4-7.

lateral treaties and on legal principles designed to make sovereignty the exclusive measuring rod of international personality. By the twentieth century international law had become the law of sovereign nation-states.²⁶ However, international law is at best a quasi-international order. While universal, exclusive and individualistic, it is, most of all, dependent upon treaties, custom and the general principles enunciated by civilized nations seeking to legitimize their functions within a world political process.²⁷

The key to Schwarzenberger's analysis may be found in his treatment of the nature of sovereignty. According to Thomas Hobbes, might makes sovereign authority, for "[w]here there is no common power, there is no law . . ."²⁸ Applying the Hobbesian approach to the twentieth century, Schwarzenberger sees international customary law as resting upon the axis of the rule of force. The concept of sovereignty in contemporary international law supervenes the United Nations Charter, undermines general international obligations, and minimizes the requirements of good faith, consent, and national responsibility. For all intents and purposes the great powers are above the dictates of the international legal system and have often acted in total disregard of the general principles of law recognized by civilized nations. Sovereignty itself is both legal and political, absolute and relative. If not limited by treaty or established custom, a nation-state is free to do what it likes, and each sovereign polity may be considered supreme within its own jurisdiction. In fact, during the interwar period, the totalitarian states so glaringly abused their domestic sovereign authority that the standard of civilization almost vanished altogether.²⁹

The principle of the equality of nation-states is a complementary aspect of state sovereignty. But since international society is stratified into hierarchies of powers, sovereignty still translates into pre-eminence or predominant leadership and, perhaps, omnipotence (a con-

26. FRONTIERS at 57, 96.

27. LAW AND ORDER, ch. 3; 1 MANUAL at 7 *et seq.* For a more traditional and optimistic approach *cf.* BRIERLY, *supra* note 9, at 1-25, 41-56; 1 D. O'CONNELL, INTERNATIONAL LAW 1-6 (2d ed. 1970); J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 1-22, 32-33 (7th ed. 1972).

28. HOBBS, *supra* note 4, at 101; *see also id.*, ch. 20.

29. *Cf.* LAW AND ORDER, ch. 5; FRONTIERS at 25, 299; POWER POLITICS, ch. 5; 1 MANUAL at 13-14, 58-59.

dition which is not totally incompatible with the Charter of the United Nations).³⁰ The distinguished political scientist Stanley Hoffman echoes these sentiments, defining international law as the reflection of power relations which leaves sovereignty intact or submits the sovereignty of a given state to restrictions imposed on that same state by the greater force of its combined enemies.³¹ Sovereignty, in Schwarzenberger's international construct, is either relative or absolute. The various stages of sovereignty can be tabulated in the following manner: (1) absolute supremacy and independence; (2) relative independence; (3) inter-dependence; (4) relative dependence; (5) absolute subjugation and dependence. The precarious nature of legal sovereignty as it exists in international law, and the theory of "sovereign equality" as enunciated in the United Nations Charter, are only meaningful within the broader divisions of political sovereignty in the space and nuclear age.³²

In the last analysis, international customary law is subordinate to the rule of force, and the new Leviathans, or super powers, are capable of crushing resistance to their authority with impunity (although the experience of the United States in Southeast Asia may call this view into question). The concept of sovereignty is basic to the international state system. And it has not been uncommon for a twentieth century super power to place itself above the law.³³ But, international jurisprudence has long recognized that "no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration; or to any other kind of pacific settlement."³⁴

30. See POWER POLITICS at 37-38; 1 MANUAL at 58-60. See also H. ARENDT, THE HUMAN CONDITION 234 (1958): "[S]overeignty, the ideal of uncompromising self-sufficiency and mastership, is contradictory to the very condition of plurality." Cf. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 280-90 (2d ed. 1973), for a more traditional viewpoint.

31. See, e.g., Hoffman, *An Evaluation of the United Nations*, 22 OHIO STATE L.J. 462 (1961).

32. LAW AND ORDER at 65-66. See also FRONTIERS at 25, 299-300; but see G. TUNKIN, THEORY OF INTERNATIONAL LAW 267 (W. Butler transl. 1975): "since Schwarzenberger recognizes that principles of the United Nations Charter have become virtually universal, then according to his conception the operative sphere of these old norms is severely limited."

33. LAW AND ORDER at 63-66.

34. Advisory Opinion on Eastern Carelia Case, P.C.I.J., ser. B, No. 5, 27 (1923).

The exercise of sovereignty can be either positive or negative. Since sovereignty is power, positive sovereignty represents the complete subjugation of the individual to the state and is primarily domestic in its focus. If there existed a world authority structure, then positive sovereignty could be defined as the supremacy of a universal state organism over a plurality of political entities. Negative sovereignty specifically describes the operation of law, or lack of it, in the contemporary world. It may be defined as the "non-recognition of any superior authority," and thus implies the unlimited freedom of the national polity in the international arena. The significance of negative sovereignty is that it "constitutes a potent guarantee of the supremacy of the rule of force over the rule of law in international relations."³⁵

One hundred years ago the English positivist and legal philosopher, John Austin, claimed that either "[e]very supreme government is free from legal restraints; or . . . every supreme government is legally despotic."³⁶ The influence of Austin on Schwarzenberger is evident,³⁷ and, though the latter seemingly refutes Austin's denial of the existence of an international law,³⁸ Schwarzenberger's own world-view is equally harsh. International relations is pure power politics "in which groups consider themselves to be ultimate ends," and the contemporary international community is merely "a system of *power politics in disguise*."³⁹ But even though Professor Schwarzenberger recognizes the international realities of the twentieth century world, he too lightly passes over the goal-setting role of legal norms. The unarticulated issue is whether or not an international legal system can exist without the command influence of a universal political authority.⁴⁰

Sir Hartley Shawcross, Chief British Prosecutor at the Nuremberg Trials, drew a careful distinction in his closing argument between a state's obligations and a state's power. "Legal purists," he declared,

35. LAW AND ORDER at 60-62, 67-70; 1 MANUAL at 61.

36. 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 160 (R. Cambell ed. 1875).

37. See, e.g., LAW AND ORDER at 63-65; POWER POLITICS at 86-87, 216.

38. 1 AUSTIN, *supra* note 36, at 92-93, 121.

39. FRONTIERS at 24; cf. ARENDT, *supra* note 30, at 200, 204. Ms. Arendt maintains that power is what preserves the public realm.

40. See W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW 7 (1966), where stress is placed upon the importance of "a centralized system of law-creation and law-application."

"may contend that nothing is law which is not imposed from above by a sovereign body having the power to compel obedience. The idea of analytical jurists has never been applicable to International Law."⁴¹ Professor Schwarzenberger phrases the issue more pointedly by asking, whether there are binding norms of international law which individual state parties (the subjects of international law) may not modify. In other words, are there rules of world public order arising from custom and tradition that treaties or states may not challenge? This is the problem of international *jus cogens*, the denial of which forms an essential part of Schwarzenberger's jurisprudence.⁴²

The 1969 Vienna Convention on the Law of Treaties declares:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. . . . a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁴³

Moreover, a treaty is void if it conflicts with a peremptory norm which becomes established after said treaty enters into force.⁴⁴ Thus, to quote Professor Ian Brownlie, the doctrine of *jus cogens* refers to "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent rule of contrary effect."⁴⁵ In order to concede the universal application of this doctrine, Schwarzenberger would have to admit that contemporary international law is a fully operative legal system and this he staunchly refuses to do. Instead, he maintains that unorganized inter-

41. Quoted in Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHIL. & PUB. AFFAIRS 132, 144 (1975).

42. The following discussion is based on LAW AND ORDER, ch. 5; 1 MANUAL at 24-26, 59-60, 101-02, 150-51.

43. Art. 53, U.N. Doc. A/CONF. 39/27, May 23, 1969, 63 AM. J. INT'L L. 875, 891 (1969).

44. Art. 64, U.N. Doc. A/CONF. 39/27, May 23, 1969. For an analysis of the Vienna Convention see Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

45. BROWNLIE, *supra* note 30, at 499-500. While there is disagreement among most legal analysts as to just what norms are universally recognized, the more prominent possibilities include the law of genocide; the prohibition of aggressive war; the prohibition of racial discrimination; war crimes; the prohibition of slavery and the outlawry of piracy. It is possible that the principle of self-determination and the right of permanent sovereignty over natural resources may also be included. For further discussion see *id.* at 500-03.

national society (pre-United Nations) never knew any peremptory rules of international public policy and that contemporary international law is derived from a *de facto* world public order or quasi-order. Thus, there exists only a rudimentary legal system based upon more or less effective multilateral or consensual peace settlements.

Schwarzenberger's leading critic with respect to the principle of *jus cogens*, Professor Alfred Verdross, takes strong exception to this position. Beginning with the basic argument that in the field of international law there are rules having the character of *jus cogens*, Verdross emphatically asserts that this principle governs all international agreements. It could not be otherwise, for fundamental principles and universal norms require good faith among nations, and without good faith there can be no international legal system.⁴⁶ Brownlie, although admitting that prevailing international law is decentralized at best and lacks any significant enforcement procedures, nonetheless refers to certain "overriding principles" of international law. Noting the fact that Schwarzenberger considers the principle of *jus cogens* as a source of instability in treaty relations, Brownlie also raises the interesting question of whether one aspect of the principle, such as crimes against humanity, is more important than another, such as the controversial "right" of self-determination. And what of the jurisdictional problems involved?⁴⁷ Schwarzenberger draws attention to the basic contradictions inherent in a doctrine binding sovereign states as to whether those same peremptory norms derive their authority from a *compulsion* which does not exist or from *consent* which is another area of international law with its own principles and law creating processes.⁴⁸ He therefore concludes that "[i]nternational customary law does not know of any corresponding international *jus cogens* and must resign itself to the supremacy of the rule of force in international relations."⁴⁹

If this is so, then a subordinate if nonetheless significant issue is

46. See Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966).

47. See BROWNLIE, *supra* note 30, ch. 22. For an extensive analysis of whether self-determination actually represents a principle or right see Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1 DET. C.L. REV. 71 (1975).

48. 2 MANUAL at 398. See also 1 MANUAL at 8-9, 116-17, 138-40, 150-51; LAW AND ORDER at 30-33.

49. LAW AND ORDER at 63.

whether or not international law recognizes any rules parallel to those of municipal law which support a theory of international criminal law. The answer is an emphatic no. One cannot find evidence, he argues, for the existence of a universal criminal justice as part of established customary international law.⁵⁰ The very term international criminal law, according to Professor Schwarzenberger, has at least six different meanings: the territorial scope of municipal criminal law, internationally prescribed municipal criminal law, internationally authorized municipal criminal law, municipal criminal law common to civilized nations, international cooperation in the administration of municipal criminal justice, and criminal law in the material sense of the word. Peremptorily omitting piracy and war crimes, long accepted as offenses against humankind (*jure gentium*), Schwarzenberger further maintains that the question as to the liability of the individual as either the subject or the object of international law is irrelevant, if there are no generally accepted proceedings of an international criminal character.⁵¹ For example, he insists there has not been a single instance in which international courts or tribunals have considered an act of state to be an international crime.⁵²

Schwarzenberger argues that the main barrier to the recognition of an international penal law is that sovereign nations are free to determine the territorial scope of their municipal laws. If that freedom were absolute, however, the result would be international chaos; thus, in practice, conflicting claims have been reduced to manageable proportions by the norms and conventions of customary international law.⁵³ As to crimes of an international character or offenses against

50. This conclusion and the analysis to follow is taken from FRONTIERS, ch. 8, "The Problem of an International Criminal Law." This chapter is reprinted in INTERNATIONAL CRIMINAL LAW 3 (G. Mueller & E. Wise eds. 1965).

51. But see "Note on Piracy and Hijacking," in LAW AND ORDER at 283-84.

52. Many scholars would cite the Nuremberg and Tokyo war crimes tribunals as manifestations of the opposite point of view. See also Treaty of Versailles (1919) arts. 227-31; 2 MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967 1389-91 (F. Israel ed. 1967).

53. See Van Bemmelen, *Reflections and Observations on International Criminal Law*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 77 (M. Bassiouni & V. Nanda eds. 1973). Van Bemmelen's article is especially critical of Schwarzenberger and stresses the need to consider human rights conventions in assessing the role of international criminal law. See also J. STONE, OF LAW AND NATIONS 303-10 (1974); Sinha, *The Position of the Individual in International Criminal Law*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 122 (M. Bassiouni & V. Nanda eds. 1973). Sinha criticizes Schwarzenberger for confusing the problem of criminal conduct of individ-

the law of nations, Schwarzenberger proposes two categories of remedies. The first is both original and controversial: if a state fails to punish offenses committed against life, liberty, or property, or if the application of its municipal criminal law falls below the minimum standards of international society, then the home state of the victims of the offense may hold the state of the offender liable for the commission of an international tort. The liability for such act is reparation made to the victims' state.⁵⁴ The second approach is merely the application of the commonly accepted sanctions of municipal criminal law. Although there may be no individual obligation on individual states to take a particular action, nevertheless they have the alternative of either entering into international conventions or applying their own municipal legislation. Thus, there are alternative solutions to the apparently unacceptable doctrine of an international criminal law. Whatever the offense and whatever the customary legal norm, Professor Schwarzenberger does not deviate from his main theme: "in the present state of world society, international criminal law in any true sense does not exist."⁵⁵

What then of crimes of an international character of such magnitude that they constitute offenses against international peace or against humanity? The unprecedented development of twentieth century technology, plus the unparalleled orgy of destruction of two World Wars, led to the formation of new principles concerning the law of nations and to an expansion of existing norms derived from "the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience."⁵⁶ The Nuremberg and Tokyo war crimes tribunals in both their charters and their

uals with the more traditional problem of the illegal activities of states; however, the latter claims that certain great powers have been "immune to the application of collective enforcement measures . . . [and only] paper swords of war and justice" have been wielded against them. *FRONTIERS* at 208-09.

54. See also the discussion in 1 *MANUAL* at 162-69. Schwarzenberger divides the remedy into three component parts: restitution, satisfaction, and compensation.

55. For opposing and equally well reasoned arguments see Stone, *supra* note 53, at 301-23; Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 46 *REVUE INTERNATIONALE DE DROIT PENAL* 3 (1975), and the strongly worded statement by WRIGHT, *THE SCOPE OF INTERNATIONAL CRIMINAL LAW: A CONCEPTUAL FRAMEWORK*, 15 *VA. J. INT'L L.* 561 (1975). There is, surprisingly, no reference to the Schwarzenberger analysis in the Wright article.

56. *FRONTIERS* at 78-81. The quoted phrase is taken from Para. 9 of the Preamble of Hague Convention IV, October 18, 1907. *Id.* at 78.

judgments expanded the generally accepted rules of international customary law to include crimes of aggression and crimes committed in complete disregard of the dictates of humanity. Due to the specific violations of the law of war enumerated in the charters, violations of the elementary standards of justice enunciated in the Nuremberg Judgment, and the United Nations General Assembly resolution unanimously adopted on December 11, 1946, endorsing the Nuremberg principles, certain acts were deemed to be crimes against peace and humanity. Thus, any member of the world community of nations is henceforth estopped from asserting that these principles lack validity under international customary law.⁵⁷ However, Schwarzenberger confesses uneasiness over the application of extraordinary jurisdiction to belligerents accused of war crimes. He maintains that the international military tribunals at Nuremberg and Tokyo were in reality joint municipal military courts rather than *ad hoc* international courts and their jurisprudential legacy has been the vast enlargement of extraordinary state jurisdiction under the municipal criminal law. The real effect of these procedural innovations in the law of nations is that "still tighter ropes have been drawn in advance round the necks of the losers in any other major war."⁵⁸

It has become axiomatic in the Anglo-American legal system that hard cases make harsh law and Schwarzenberger's view of the Nuremberg trials reflects this position. The tribunal's reasoning, he maintains, was not based on the general principles of law recognized by civilized nations. Neither the laws of war nor international customary practice envisaged the punishment of war crimes. They authorize, however, the assumption of criminal jurisdiction over individuals who have committed war crimes and who fall into the hands of their adversaries. Under this theory, although customary international law does not support any substantive international criminal law, it does permit the assumption of an extraordinary form of criminal jurisdiction over accused war criminals and enables them to be tried under

57. *Id.* at 263-73, 203-05; LAW AND ORDER at 248; 1 MANUAL at 199-200.

58. 1 MANUAL at 232-33; FRONTIERS at 205. *See also id.* at 269-73. For a thoughtful contemporary reassessment of the Nuremberg trials and international law see Paulson, *supra* note 41. *Cf.* G. VON GLAHN, LAW AMONG NATIONS 703-04 (1970), for a more critical view of the tribunal and the incisive commentary in ARON, *supra* note 23, at 111-16.

the municipal criminal law of their captors.⁵⁹ If Schwarzenberger's arguments appear somewhat tendentious, they are a necessary prerequisite to his analysis of the most dramatic and significant war crimes trial since the end of World War II, that of Adolf Eichmann.

It is the Eichmann judgment that provides the answer to the paradigmatic problem introduced at the beginning of this study.⁶⁰ What happens when a civilized nation becomes mesmerized and is then taken captive by a group of gangsters and madmen?⁶¹ Eichmann symbolized the almost unimaginable barbarism of the Holocaust and the Final Solution. His kidnapping and trial were not only national acts of revenge and retribution, but were necessary to remind the post-Second World War generation of the outrages and savagery of the Third Reich. The primary objective of the Eichmann trial was to make the young Israelis see the Holocaust in a concrete perspective. To forget the record of the Third Reich would be synonymous with failing to understand the challenge to the existence of civilized nations presented by any type of racial or religious discrimination. In not permitting the world to forget the shameful record of the Nazi terror, the Eichmann trial "succeeded in serving the ends of justice."⁶²

Despite the underlying metalegal rationale, and even acknowledging the obvious retributive purpose, the Eichmann tribunal both substantively and procedurally adhered to the accepted universal standards of the rule of law. Jurisdiction over Eichmann was ultimately conceded or admitted by both Argentina and West Germany, and although Israel did not acquire an international personality until after the Second World War, its assumption of criminal jurisdiction was "within the limits" of the prevailing international *lex lata* (law in

59. FRONTIERS at 272-73; LAW AND ORDER at 247-48. For an overall critique of the Nuremberg principles as they applied to and as they affect international law see E. DAVIDSON, THE NUREMBERG FALLACY (1973).

60. See p. 836 *supra*.

61. The discussion which follows is based upon LAW AND ORDER, ch. 13, unless otherwise noted.

62. A similar justification is put forward by the chief prosecutor in the case against Eichmann, G. HAUSNER, JUSTICE IN JERUSALEM 447-54 (1966); see also STONE, *supra* note 53, at 281-84; S. SONTAG, AGAINST INTERPRETATION AND OTHER ESSAYS 131-32 (reprint ed. 1969):

The truth is that the Eichmann trial not only did not, but could not have conformed to legal standards only. . . .

The function of the trial was like that of a tragic drama: above and beyond judgment and punishment, catharsis.

force).⁶³ Determining the statute under which Eichmann had been tried to be compatible with international law, Professor Schwarzenberger nevertheless places equal emphasis upon the ethical perspective of contemporary civilized standards. The defense of superior orders, as raised by both Eichmann and the Nuremberg defendants, is contemptuously brushed aside as representing the obedience of mechanized barbarism. Although he admits that many of us might not have acted so differently if placed in similar circumstances, Schwarzenberger nonetheless concludes that both the Eichmann trial and judgment pass the tests of international law and the standard of civilization. As an afterthought, however, he wonders whether it would not have been best for the Israeli court to have declared that any punishment would have been inadequate to the nature of the crimes committed, and that after having branded Eichmann with "the sign of Cain," to have returned him to his homeland for whatever destiny his countrymen might determine.⁶⁴

Schwarzenberger is fully cognizant of the criticism that the judgment was an exercise of retroactive legislation on the part of a newly created sovereign state, a charge leveled against the Eichmann proceedings as well as against the Nuremberg and Tokyo trials. His answer is both moral and historical, though not totally satisfactory. Under these unique circumstances, the application of retroactive criminal law is in harmony with the international *jus aequum*, the accepted customary practice where rights are relative and may be asserted if exercised reasonably and in good faith. If the acts subject to a retroactive statute are deemed criminal by any civilized community, then the passing and enforcement of such retroactive legislation is a vindication of the accepted norms of civilization and properly subject to court jurisdiction. Thus, "from an ethical point of view, the proceedings before the [Israeli] Court stand the test of the requirements of the Rule of Law."⁶⁵

63. Surprisingly, Professor Schwarzenberger does not attach great significance to the Geneva Conventions of 1949 whose signatories undertook to assume criminal jurisdiction over war criminals, no matter what crimes had originally been committed. See *LAW AND ORDER* at 243-44, 247-48.

64. Cf. the controversial analysis of Hannah Arendt in H. ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 232-56 (1963), which stresses the irregularities of the trial in Jerusalem, but concurs with the capital verdict because no person can be expected to share the earth with one who had committed such monstrous acts.

65. See Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.*

Eichmann, the symbol of unbridled governmental terrorism in a disordered world, has been replaced by three groups who now are the new "dispensers" of violence: terrorists, guerrillas, and mercenaries. All three have existed from the very beginnings of organized government, none have secured recognition in international law, and each of them have received considerable attention by the world community with respect to the law of armed conflict and so-called wars of national liberation.⁶⁶ Terrorism and guerrilla warfare are inextricably intertwined. Both consist of irregular methods of fighting, are likely to result in criminal activities on the internal level, and may well be considered war crimes on the international level. Terrorism thrives on fear, uses indiscriminate force for violent objectives, and often is the product of an individual act.⁶⁷

Guerrilla warfare has become synonymous with revolutionary organization and is largely identified with irregular warfare. Terrorists or guerrillas who operate on their own initiative during an armed conflict and not under identifiable, responsible superior authority are outside the Hague and Geneva conventions and entitled at best only to nominal protection. With respect to internal wars, when they achieve recognition as insurgents or belligerents, guerrillas are entitled to international protection, as their status is then transformed from that of irregulars to regular combatants. But there are a growing number of situations in which an internal rebellion may also be a *de facto* or *de jure* armed conflict, such as in Biafra and Viet-Nam. Since the United Nations has taken the position in numerous General Assembly resolutions that wars of national liberation are in effect international conflicts, Schwarzenberger argues that world order has become the loser. The United Nations attitude mocks one of the rules of classic international law. Likewise the U.N. declaration that the use of mercenaries against national liberation and independence movements is a criminal act, and that mercenaries must be considered

593, 618-20 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-61 (1958). In these companion articles two distinguished legal philosophers support, from different perspectives, the concept of retroactive legislation as a reasonable prophylactic applied to a community in which law had ceased to rule.

66. The following analysis is taken from LAW AND ORDER, ch. 12.

67. See generally INTERNATIONAL TERRORISM AND POLITICAL CRIMES 5-64 (M. Bassiouni ed. 1975); E. WALTER, TERROR AND RESISTANCE: A STUDY OF POLITICAL VIOLENCE 3-55 (1969); R. MOSS, THE WAR FOR THE CITIES 17-38 (1972).

as outlaws, is a dangerous and catastrophic "reform" of international legal norms, and another milestone on the road towards violence in the world societal structure.

If contemporary international law continues to operate as mere quasi-order, and if power politics and armed conflict are still the hallmarks of organized international society, then what hope is there for a rational and relatively stable world order? In Professor Schwarzenberger's pessimistic and fundamentally harsh analysis the answer is obvious. Unless there is an assimilation or integration of existing sovereign political entities into a world federation, and unless vested and parochial national interests are discarded in favor of mutual interdependence and international collaborative enterprise, the rule of might makes right will replace the rule of law. The failure to develop a federal framework of world society and world law has already resulted in growing concentrations of power that menace the very survival of the international state system.⁶⁸

68. FRONTIERS at 300-13; 1 MANUAL at 365-82; POWER POLITICS at 804-06. Writing in 1961 as a political scientist, Secretary of State Kissinger declared:

Our margin of survival has narrowed dangerously. But we still do have a margin. The possibility of choice remains. . . . The prerequisite, however, is that we give up our illusions. We are not omnipotent. We are no longer invulnerable. The easy remedies have been thought of. We must be prepared to face complexity.

H. KISSINGER, THE NECESSITY FOR CHOICE: PROSPECTS OF AMERICAN FOREIGN POLICY 2 (1961). It is a warning that has not lost its urgency for either world politics or the rule of law.