

Heribert Franz Koeck

Alfred Verdross –
A Visionary of Contemporary Doctrine
and Practice of International Law*

Introductory remarks

Distinguished colleagues,
Ladies and Gentlemen,

Prof. Witkowski who was kind enough to present us to you in this honouring way referred to the proclamation of the state of emergency and of martial law that took place in Poland on the 13th of December 1981, exactly 29 years ago.

Let me tell you that we have always admired the courage of those who have made Poland a beacon of civil resistance against an oppressive system within the communist block eight years before those communist regimes began to falter and finally broke down. This courage of the Polish people was certainly an important fact which contributed – together with other facts and persons, not to forget the Polish pope – to the dawn of freedom and democracy in those parts of Europe which so long suffered from oppression. We shall always keep all these persons and the sacrifices they made in high respect.

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I. Starting point: the era of positivism and of pure theory of law

Alfred Verdross, born in 1890,¹ entered the field of the doctrine of public international law at a time when that doctrine was completely under the influence of legal positivism. A good example for this situation is the fact that the Consultative Committee set up by the Council of the League of Nations in 1920 for the purpose of working out the Statute of the Permanent Court of International Justice (envisaged in Article 14 of the League of Nations Covenant and the predecessor of the International Court of Justice which is the principal judicial organ of the United Nations founded in 1945) was almost exclusively composed of jurists who had received their legal formation under the impact of legal positivism.

The only exception was the US American expert General House. In the United States, legal positivism was never widely accepted and was therefore not able to establish itself in American legal doctrine, a fact which even Hans Kelsen, the most famous representative of legal positivism in the twentieth century, had to experience when he fled from Nazi-scourged Europe during the Second World War to the United States and later on taught in Berkley, where he became full professor in the Political Science Department

¹ For more recent publications on the life and work of Alfred Verdross, cf. Heribert Franz Koeck, *Leben und Werk des österreichischen Rechtsgelehrten Alfred Verdross*, in: 42 *Zeitschrift für öffentliches Recht* 1991, p. 31 et seqs.; Heribert Franz Koeck, *Alfred Verdross – Ein österreichischer Rechtsgelehrter von internationaler Bedeutung*. Schriftenreihe der Niederösterreichischen Juristischen Gesellschaft, Vol. 56, Vienna 1991; *Heribert Franz Koeck, Vita ed opera del giurista austriaco Alfred Verdross*, in: Otto Kresten/Adam Wandruszka (eds.), 34/35 *Römische Historische Mitteilungen* 1992/93, p. 299 et seqs.; Ignaz Seidl-Hohenveldern, *Alfred Verdross (1890-1980)*. Biographical Note with Bibliography, in: 6 *European Journal of International Law* (1995), p. 103 et seqs. See also, especially in connection with the topic dealt with in this paper, Herbert Schambeck, *Alfred Verdross als Rechtsphilosoph und die Wiener Rechtstheoretische Schule*, in: Peter Fischer/Margit Maria Karollus/Sigmar Stadlmeier (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung. Festschrift für Heribert Franz Koeck*, Vienna 2009, 527 et seqs.

but was never invited to teach in the Law School. The reason for the immunity of American legal thinking against positivism was the case-law system it shared and still shares with all countries of the Anglo-American law family. The case-law system requires a pragmatic approach to legal problems on the basis of common sense; and for legal positivism, common sense is as little a legal category as is justice.²

The same should have been true for the British doctrine of public international law. If the latter inclined to a more positivist approach, than just for the positivist principle that for the sovereign state everything that was not expressly prohibited was permitted; because this principle was too practical an axiom for the British Empire to renounce it and to forgo the advantages connected with it. This explains the early rejection of systems of international law based on natural law thinking, like those of Hugo Grotius³ and Cornelius van Bynkershoek,⁴ by British courts. A good example is offered by the case *The Renard*,⁵ where Judge Marriott said for the English High Court of Admiralty, discussing the time for which a vessel might remain in enemy hand prior to recapture, without loss of title by the original owner: “The Court observed that there is something ridiculous in the decisive manner each lawyer, as quoted, has given his opinion. Grotius might as well have laid down, for a rule twelve hours, as twenty-four; or forty-eight, as twelve. A pedantic man in his closet dictates the law of nations; everybody quotes, and nobody minds him.”⁶

² Cf. Hans Kelsen’s *Reine Rechtslehre* (Pure Theory of Law), the second edition of which (Vienna 1960) contains a lengthy annex devoted to demonstrating that there is no justice outside of or even above positive law (p. 357 et seqs.).

³ Cf., in particular, his opus *De jure belli ac pacis*, Paris 1625, which procured for him the title of “father of the doctrine of the law of nations.”

⁴ He wrote various treatises on the law of the sea and the law of war. Complete editions of his works were published after his death; one in one volume at Geneva in 1761, and another in two volumes at Leiden in 1766

⁵ 1 Hay & M. 222, 224, 1 Rsc. P.C. 17 (1778)

⁶ Quoted from William W. Bishop, Jr., *International Law. Cases and Materials*, 3rd ed., Boston-Toronto 1971, p. 38.

With regard to positivism, British doctrine is in fact ambiguous. In domestic law, positivism was never embraced by the majority of writers; and John Austin, an English positivist writer of the nineteenth century who regarded law as a command of a superior, and who could figure as a predecessor of Hans Kelsen, although the latter probably never learned about the former, did not find acceptance by his fellow scholars. Of course, this might also have been caused by the fact that it is difficult to explain how customary law, so important in the Anglo-American legal system, can be understood as a command of a superior, because the latter notion corresponds to statutory law rather than to law arising from custom.⁷ It was only a hundred years later that the Austrian scholar and justice at the Constitutional Court Karl Wolff who as Hans Kelsen stood for a positivist theory of law offered a possibility to trace back the binding force of customary law to the command of a superior; he did so by introducing the notion of *Zusinnbarkeit* (*imputability*) and declaring that everything you could expect the sovereign to want to be observed must be regarded as law;⁸ and it is imputable to the sovereign that he wants customary law to be as much observed as statutory law.

A. Naïve and critical positivism

But back to Verdross! Being a disciple of Hans Kelsen whose seminars he had attended during his legal studies at the University of Vienna, Alfred Verdross, too, was impressed by the latter's theory of law. Kelsen's position was that of radical positivism. However, he wanted to be distinguished from the (what he called) naïve positivism of those preceding him and claimed to be a critical positivist.⁹ In his opinion, the difference between naïve legal positivism and

⁷ *The Province of Jurisprudence Determined*, London 1832; *Lectures on Jurisprudence*, 3rd ed., London 1865.

⁸ Cf. Karl Wolff, *Grundlehre des Sollens. Zugleich eine Theorie der Rechtserkenntnis. Ein Buch für Juristen und Philosophen*, Innsbruck 1924, p. 9 et seqs.

⁹ Cf. *Reine Rechtslehre*, in particular p. 223 et seqs.

critical legal positivism lay in the fact that naïve positivists took positive law as it was without further examining the reason for its binding force and contented themselves with the fact that positive law was regularly enforced against those who resisted it, while he himself tried to go to the bottom of the question.

Since Hans Kelsen was an agnostic and therefore not able to derive the binding force of law from a command of God, either given expressly (*ius divinum positivum* – positive divine law) or implicitly laid down in creation and therefore to be found in the nature of man and society, and therefore in the principles of what is traditionally called the law of nature (*ius divinum naturale* – natural divine law),¹⁰ and since he thus refused to take recourse to the law of nature,¹¹ he had to admit that he was not able to give a real basis for the validity and the binding force of law. Kelsen recognised that enforcement of positive law was sufficient to constitute positive law as an effective order; but effectivity was a mere fact and could not explain why the individual should have an obligation to conduct himself in a manner in conformity of law, and why (e.g.) state organs should have an obligation to enforce the law against those who refused to conduct themselves in such manner. For him, the fear of sanctions was also only a fact, and he held the opinion that no law could arise out of a mere fact. (The only exception he would have permitted was a command of God; but since he declared himself unable to recognise the existence of God, for him this possibility did not exist.) Consequently, Kelsen was an opponent to natural law thinking¹² and reproached its adherents with an inadmissible mixing up of the to-be and the to-ought.¹³

¹⁰ Cf. *Reine Rechtslehre*, in particular p. 389 et seqs.

¹¹ Cf. *Reine Rechtslehre*, in particular p. 435 et seqs. and *passim*.

¹² Cf. Herbert Schambeck, Alfred Verdross als Rechtsphilosoph und die Wiener Rechtstheoretische Schule, in: Peter Fischer/Margit Maria Karolus/Sigmar Stadlmeier (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung. Festschrift für Heribert Franz Koeck*, Vienna 2009, p. 527 et seqs., at 537 et seq.

¹³ Cf. *Reine Rechtslehre*, in particular p. 5 et seqs., p. 215 et seqs., and p. 429 et seqs.

B. Pure theory of Law

In his theory of law which he himself called the pure theory of law, Kelsen wanted to avoid any reference to the being. Consequently, he had to look for a basis for the validity and force of law that had no connection to the real world. Of course, Kelsen had to recognise that such a basis could also not have a reality, either, and that the basic norm upon which all his legal order rested was therefore not a real but only a fictitious one.

For his basic norm, Kelsen chose the designation “hypothetical basic norm”. This term is, however, somewhat misleading, because by hypothesis we usually understand something which has not yet been proven but which admits of verification or falsification.¹⁴ Kelsen probably did not like to call his basic norm a fictitious norm, perhaps because doing so would have constantly reminded of the fact that his theory of law had no foundation in reality. However, by speaking of a hypothetical instead of a fictitious basic norm the impression could be created that Kelsen’s basic norm might still have some reality and might therefore be able to give a real basis to the law although, of course, this was not the case. It would go too far to say that Kelsen intended such impression for those who would not be ready to engage in legal theory, but he put up with it.

Kelsen’s basic norm was, of course, an empty shell¹⁵ that could be filled with whatever contents one liked. Even Kelsen, however, could not avoid any connection between the to-be and the to-ought. In order not to make legal theory a mere theoretical speculation

¹⁴ A hypothesis (classic Greek: *ὑπόθεσις*, *hypóthesis* = ‘supposition’, ‘pre-condition’, ‘basis’) is a statement which may be valid but so far has not yet been verified or falsified. As a rule, a hypothesis is considered an assumption that can either be proved by logical reasoning or at least can be supported by empirical experience, or which can be refuted by the same means. Cf. Nicolas Rescher, *Hypothese*. III., in: Joachim Ritter (Hrsg.), *Historisches Wörterbuch der Philosophie*, Bd. 3, Darmstadt 1974, p. 1266.

¹⁵ In a certain way, this approach reminds of the beginning of Hegel’s opus on logic where he states “Das reine Sein und das reine Nichts ist also dasselbe” (“The pure being and the pure nothing is just the same”). Cf. Georg Wilhelm Friedrich Hegel, *Wissenschaft der Logik I*, Werke, Vol. 5, Frankfurt/Main 1969, 83.

without any practical background, Kelsen reserved the notion of law for a legal order that would be, as a rule, either obeyed or enforced. By doing so, Kelsen admitted that it would not make sense to deal with legal orders that are not effective, although he insisted that no one could be compelled to do so from a scholarly point of view.

Kelsen's basic norm cannot fulfil the most important function of such a norm, namely to give reality to the obligatory force of the law and of its claim to obedience; nor can it explain why the individual should put up with being exposed to law enforcement. Thus, Kelsen, too, ends up in a practical positivism which is in no way different from that of the naïve positivists he so despised.

II. The relationship between domestic law and international law

If Kelsen's approach is unproductive with regard to the fundamental question of law – the question of justice – the logic of his legal theory is still compelling if exercised within a closed system of positive law. Thus, Kelsen's theory was of no small influence on Verdross, even if the latter was still striving for his own fundamental position in legal philosophy. This influence of Kelsen's thinking is demonstrated in one of the first publications of Verdross, in which he took up the problem that seemed to arise from an alleged separation of domestic law and international law.

A. Dualism

1. THE DUALISTIC THEORY

The problem had become urgent after Heinrich Triepel, in his Book "Völkerrecht und Landesrecht" (The Law of Nations and the Law of States)¹⁶ published in 1899, had contended that public inter-

¹⁶ Leipzig 1899.

national law and domestic law were two completely separate legal orders, as was allegedly shown by the different procedures for the creation of norms, by the different addressees of international and domestic norms, and by different objects of regulation. This position which has become to be known as dualism aimed at demonstrating domestic law as an autonomous order upon which international obligations would have no impact. Triepel's theory was caused by the need to answer the question what to do if there should arise a conflict between domestic law and international law.

According to Triepel, such a conflict was not possible, because bodies of rules one of which was enacted by state legislation, was directed to human beings, and regulated internal matters of a state while the other was created by states either through custom or through treaty, was directed to states, and regulated international matters, could not possibly get into conflict.¹⁷

2. FLAWS OF THE DUALISTIC THEORY

However, problems giving rise to such questions do have, more often than not, a basis in reality, here: the (actual or potential) conflict between domestic law and public international law. It was therefore necessary to question Triepel's arguments in favour of a strict separation of the law of the state and the law of nations. If you do so it appears that – while the creation of norms and the addressees of norms are in fact different in the two legal orders – this is not, or rather: not exclusively, the case with regard to the matters forming the object of regulation. It appears that – leaving aside for the moment any additional considerations about the relationship between the two legal orders – domestic law and public international law do indeed overlap.¹⁸ This is the case in all areas which are regulated, partly at least, by both international law and domestic law. It is easy to demonstrate the existence of such areas;

¹⁷ Cf. Peter Fischer, Heribert Franz Koeck, *Völkerrecht*, 6th ed., Vienna 2004, p. 42.

¹⁸ Ibidem, p. 43. Cf. also Karl Josef Partsch, International Law and municipal law, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. II, Amsterdam etc. 1995, p. 1183 et seqs.

and the most prominent examples are the legal position of diplomatic (and consular) personnel,¹⁹ and the treatment of aliens.²⁰

(a) In the field of diplomatic immunity

A good example is served by the Austrian Act of 1 August 1895 on the Introduction of the Law on the exercise of the function of the courts and the jurisdiction of courts in matters of private law (so-called Jurisdiction Act) in its present version.²¹ Article IX, paragraph 2 reads as follows: “Domestic jurisdiction extends to persons enjoying immunity under public international law, if and inasmuch these persons submit themselves voluntarily to the domestic courts...” This is in blatant contradiction to Article 31 of the Vienna Convention on Diplomatic Relations of 1961,²² according to which diplomats “enjoy immunity from the criminal jurisdiction of the receiving state and are entitled to immunity from the latter’s civil and administrative jurisdiction.” Although there exist, as regards immunity in matters of private law, some exceptions,²³ voluntary submission by the diplomat himself is not comprised by these exceptions. The immunity from jurisdiction of diplomatic agents may only be waived by the sending State.²⁴

¹⁹ Cf. Peter Fischer, Heribert Franz Koeck, *Völkerrecht*, p. 271 et seqs.; E. Denza, *Diplomatic Agents and Missions, Privileges and Immunities*, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. I, Amsterdam etc. 1992, p. 1040 et seqs.

²⁰ Cf. Peter Fischer/Heribert Franz Koeck, *Völkerrecht*, p. 150 et seqs.; Rainer Arnold, *Aliens*, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. II, Amsterdam etc. 1995, p. 102 et seqs.

²¹ Imperial Official Journal 110/1895 as amended.

²² (Austrian) Federal Official Journal 1966/66.

²³ “He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of: (a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission; (b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State; (c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” Article 31, paragraph 1, sub-paragraphs a–c.

²⁴ Article 32, paragraph 1.

Thus, if the diplomat himself waives his immunity, this is not valid under international law. Therefore, court proceedings against such a diplomat in case of himself having waived his immunity, as permitted by Article IX, paragraph 2 of the Introductory Law to the Austrian Jurisdiction Act, without the sending state having also waived the diplomat's immunity would be a violation of public international law.

(b) In the field of treatment of aliens

Another example is the treatment of aliens, i.e. of nationals of another state who stay on the territory of the host state. With regard to them, a number of Latin American states have held the position that aliens cannot expect better treatment than that meted out to their own nationals, and that, therefore, equivalent treatment was to be considered the standard under international law.²⁵

This argument, typical for countries with a low standard of administration of justice, met with opposition from the United States as well as from the European countries, which were of the opinion that every individual staying in whatever state was entitled to treatment corresponding to human dignity and that such treatment was therefore the minimum standard required by international law;²⁶ it comprises adequate protection against assault, the right to conclude contracts of everyday life and access to courts and administrative authorities including fair proceedings. Compliance with this minimum standard which today coincides with universally binding human rights²⁷ is a claim of the state of origin against the host state and can be enforced by the exercise of diplomatic pro-

²⁵ Cf. Peter Fischer/Heribert Franz Koeck, *Völkerrecht*, p. 151 et seq.

²⁶ *Ibidem*, p. 152.

²⁷ Cf. Louis Henkin, Human Rights, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. II, Amsterdam etc. 1995, 886 et seqs.; Juan Carillo Salcedo, Human Rights, Universal Declaration (1948), in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. II, Amsterdam etc. 1995, 922 et seqs.; and Gérard Cohen Jonathan, Human Rights Covenants, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. II, Amsterdam etc. 1995, p. 915 et seqs.

tection.²⁸ Thus, if a state does not grant treatment of minimum standard – whether by an act of legislation, or by the practice of courts and administrative authorities – this legislation or practice is in violation of public international law.

B. Monism

1. THE MONISTIC THEORY

If it is a fact that the law of nations and the law of the state can be in conflict, it is necessary to look for a solution. The answer given by Kelsen in this regard was an argument of compelling logic. If both legal orders – domestic law and international law – were to be regarded as “law” that they had to be part of one and the same legal system. The position that domestic law and international law were something totally different was thus untenable already from the point of principle. Dualism as propagated by Triepel was thus substituted by monism.²⁹ Moreover – and this also is required by logic – a legal system cannot contain real antinomies, i.e. contradicting norms which both can claim validity. Rather, it must be possible, in any legal system, to eliminate antinomies, be it by interpreting both norms in a harmonising way, be it by removing the antinomy by way of derogation.³⁰

²⁸ Cf. Wilhelm Karl Geck, Diplomatic Protection, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. I, Amsterdam etc. 1992, p. 1045 et seqs.

²⁹ To avoid any misunderstanding, it should be noted that the terms monism and dualism, as used in international legal doctrine, have nothing to do with the notions behind the terms as used in philosophy and theology where they indicate systems based on only one principle (either the spirit or the matter) or on two principles (spirit and matter).

³⁰ Cf. again Peter Fischer, Heribert Franz Koeck, *Völkerrecht*, at. p. 43 et seq.

2. THE QUESTION OF PRIMACY

This, of course, poses the next question: which of the two conflicting norms has to yield? Or, more generally spoken: which of the two legal orders takes precedence?

(a) An open question for legal theory

This question cannot be answered by logic alone, and Kelsen therefore was of the opinion that, from the point of view of his theory of law, both the primacy of domestic law and the primacy of international law were tenable. Of course, the question of primacy of one or the other legal order is not only a question of normative logic and thus cannot finally be answered within a closed legal theory based on nothing more than a hypothetical basic norm. Here, it only depends on the formulation of that hypothetical basic norm which legal order takes precedence; and everyone is free to formulate the hypothetical basis norm according to his preference.

(b) The need to answer the question in practice

Verdross, however, realised that from the point of view of a domestic organ which has to decide in the domestic context the question of the relationship between domestic law and international law has to be decided one way or the other. Even today, hundred years later, we cannot give any different answer. If since then we have made progress then only in the sense that the domestic organ has to construe its own national law as much as possible in conformity with international law; but it is generally recognised that such construction of domestic law in conformity with international law has its limits and does not always permit to remove the conflict between the law of the state and the law of nations.

(i) Primacy of domestic law

Since at the time Verdross regarded the overcoming of dualism as propagated by Triepel the primary objective, he thought the easiest way to do it was to have domestic law refer to international law. In this way international law was so-to-say received into dome-

stic law and thus itself became the basis for the decision of the domestic organ.³¹ By doing so, Verdross was able to demonstrate that even for a domestic organ international law was not irrelevant in principle.

However, to construe monism with primacy of domestic law has a decisive disadvantage. Such construction either has to break up the single legal system into as many independent systems as there are states, each state determining from its own point of view whether and to what extent it wants international law to be respected by its organs. Or the construction has to try and maintain the unity of the legal system in such a way as to delegate international law by the domestic legal order of one state but have all other domestic legal orders delegated by international law. Since no legal order can be considered to delegate another conflicting legal order unless all antinomies are resolved or removed by way of derogation of norms of the delegated order by norms of the delegating order, primacy of national law over international law means that the domestic law of the state that is taken as the starting point is at the apex of the entire legal system, while international law is the layer just beneath and all other domestic legal orders form the lowest layer, because they depend from international law from which they deduce their existence and which is the framework within which they have to remain.

Such a construction is as unsatisfactory as the attempt, made at the time, to save the geocentric system – against the heliocentric system revived by Nicolaus Copernicus – by having all other planets circling around the sun but having the sun, together with all its other planets, then circling around the earth.³² Such construction

³¹ Vgl. Alfred Verdross, *Zur Konstruktion des Völkerrechts*, in: *Zeitschrift für Völkerrecht*, 1914, p. 329 et seqs.

³² Such a “compromise” between the geocentric and the heliocentric theory was the system of Tycho de Brahe, in which the sun circles around the earth while – as in the system of Copernicus – the other planets circle around the sun. The Jesuit astronomers in Rome were, with regard to Tycho de Brahe’s system, sceptical right from the beginning; however, as the controversy went on and the church took stricter disciplinary actions against those supporting Copernicus’ system, the Jesuits adopted the

suffers from an inherent contradiction: Why should *one* domestic law take primacy over international law while international law takes primacy over all *other* domestic laws? Moreover, such construction is also not practicable, because who should authoritatively decide which domestic legal order one has to start from? This shows that monism with primacy of domestic law, though not splitting up the single legal system is multiplying it by the number of states; we would then have as many single legal systems as there are states; and all these legal systems would differ in principle by the different hierarchy of the legal orders thus combined, and in fact by the substantive differences of the respective norms.

(ii) Primacy an open question

A combination of the law of the state and of the law of nations from the point of view of domestic law might have been a more realistic approach at the time before World War I when each state watched over its own sovereignty and was able, if it wanted to ignore international law, to invoke theories which altogether questioned the latter's existence or binding force. In this context, it will suffice to refer to the concept of Georg Wilhelm Friedrich Hegel, who denied the existence of the international community as a reality of its own and therefore its capacity to have a law of its own; consequently, Hegel declared international law to be nothing else than domestic law *ad extra* (as compared to ordinary domestic law that takes effects *ad intra*), and since it was but domestic law its existence depended on the will of the state. It therefore ceased to exist, or to exercise binding force, as soon as the state decided to not anymore regard itself to be bound by it.³³ As compared to this concept, the monistic approach to international law, even with the primacy of one state's own domestic legal order, was some step forward, if not in principle than at least from the psychological point of view.

system of Tycho de Brahe which became almost obligatory after 1633. Cf. Tycho Brahe, in: WIKIPEDIA. *Die freie Enzyklopädie*, http://de.wikipedia.org/wiki/Tycho_Brahe.

³³ Cf. Peter Fischer, Heribert Franz Koeck, *Völkerrecht*, p. 44.

a. EXCURSUS. THE RELATIONSHIP BETWEEN DOMESTIC LAW AND INTERNATIONAL LAW IN THE WEIMARER REICHSVERFASSUNG OF 1919
 Verdross soon realised that a sensible monistic system could only be construed by accepting the primacy of international law. It was only the First World War and Verdross' service in the Austrian Foreign Office during the early years of the new republican era that delayed his taking up of the problem in a comprehensive way.

Yet, as a member of the Austrian mission in Berlin at the time when the German Reich was in the course of giving itself a new constitution which, because of the city where the constitution was drafted, namely Weimar, afterwards was called the Weimarer Reichs-Verfassung 1919, he wrote an article about the relationship between international law and domestic law and made suggestions for the permanent recognition of the former by the latter.³⁴ Verdross thereby influenced the provision in the new German Constitution that dealt with the Germany's position towards international law. This provision, namely Article 4 of the Weimarer Reichsverfassung,³⁵ read as follows: "Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts." ("The generally recognised rules of International Law are considered binding parts of the law of the German Reich").

b. EXCURSUS. THE RELATIONSHIP BETWEEN DOMESTIC LAW AND INTERNATIONAL LAW IN THE AUSTRIAN FEDERAL CONSTITUTION OF 1920
 It is interesting to note that the new Austrian Federal Constitution of 1920 (Bundes-Verfassungsgesetz 1920) contained a similar provision in Article 9: "Die allgemein anerkannten Regeln des Völkerrechts gelten als Bestandteile des Bundesrechtes." ("The generally recognised rules of international law are considered binding parts of federal law.") This similarity between Article 4 of the Weimarer Reichsverfassung and Article 9 of the Austrian Constitution is easily explained by the fact that Hans Kelsen was involved on the drafting of the new Austrian constitution; so he well under-

³⁴ Cf. Alfred Verdross, *Reichsrecht und internationales Recht. Eine Lanze für Art. 3 des Regierungsentwurfes der deutschen Verfassung*, *Deutsche Juristenzeitung*, Vol. 27, 1919, p. 291 et seqs.

³⁵ Corresponding to Article 3 of the Draft Constitution; cf. *supra*, fn. 34.

stood the idea pursued by his disciple Verdross in suggesting the inclusion of such a provision in national constitutions, namely to do away once and for ever with problems arising from conflicts between international law and domestic law.

Yet, for Kelsen even the inclusion of such a provision was no definite answer to the theoretical question of whether the single legal order was to be construed with primacy of international law or with primacy of domestic law. Kelsen argued that such a provision was open for different interpretation. For those who favoured the primacy of international law, the provision was but the formal recognition of the fact that the state was bound by international law; those, however, who stuck to the primacy of domestic law, could construe the provision as an act of delegation: international law was only binding because domestic law referred to it.

In fact, the provision in question cannot be used as an argument in either direction. It does not deal with the relationship between the state and the international community as such; and it gives no opinion on whether the state is bound by international law with or without its own will. The provision deals with the handling of international law in the internal order of a state; and it is a command directed to all state organs to apply international law in the same way as they apply domestic law. Yet, even in this limited understanding the provision gave no definite answer to the question of how to apply international law in the domestic field, as will be shown *infra*.

(iii) Primacy of international law

Only a few years after the adoption of the Weimarer Reichsverfassung and of the Austrian Federal Constitution with their respective reference to international law, Alfred Verdross, who in the meantime had been appointed Professor at the University of Vienna, in 1923 published the book *Die Einheit des rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung* ("The unity of the legal cosmos based on international law as its constitution").³⁶ In this book he propagated the monistic theory with the primacy of

³⁶ Tübingen 1923.

international law as the only reasonable approach to the problem of the relationship between the law of the state and the law of nations. Only three years later, in 1926, Verdross elaborated this view in more detail in another book entitled *Die Verfassung der Völkerrechtsgemeinschaft* (“The constitution of the international legal community”).³⁷

The first of these two books is still strongly influenced by legal theory and is focused on the question of how to bring international law and domestic law together in a single legal system free from antinomies and corresponding to the classic principle *natura amat simplicitatem* which in this context requires that system to be construed as simply as possible. According to Verdross, this can only be done by regarding the law of nations as the framework which at the same time grants and circumscribes (and thereby limits) the sovereign rights of each state. According to this theory, all states are subject to international law; and no state may consider itself above international law.

The second book, while still interested in the legal theory’s requirement of a legal system without inherent contradictions, has another accent. In this book, Verdross describes the constitution of the international community as it presented itself between the two World Wars, in more detail. In a certain sense, the second book is the application of the theoretical approach developed in the first book to the practical aspect of a functioning international community.

3. RADICAL OR MODERATE MONISM?

If Kelsen had paved the way for a monistic legal theory, and if Verdross had applied the monistic approach to the relationship between international law and domestic law in theory and in practice, and if Kelsen agreed with Verdross that in practice only monism with primacy of international law made sense, there still remained an aspect to be clarified. Was domestic law that was incompatible with international law null and void right from the

³⁷ Vienna–Berlin 1926.

beginning? Or was it only open to annulment in the course of special proceedings which had to be instituted for this particular purpose?

(a) Radical monism

Kelsen was a purist. Therefore, he advocated a radical form of monism and declared any norm of domestic law that was incompatible with international law to be null and void. This seemingly clear-cut approach has, however, some practical difficulties which I always exemplify for my students by the following invented case.

(i) Excursus. The case of *The immune dog*

Let's assume that there is a woman walking a dog in a park. At the entrance to the park there is a sign that orders dogs to be put on a leash. In the park, every lawn has a sign showing a dog in an unmistakable position indicating that a lawn is not a toilet for dogs. This all notwithstanding, the woman unleashes the dog, and the dog straightaway runs into the next lawn and does its business.

At this moment, the woman is approached by a policeman who has watched this illegal conduct. The policeman sets about to fine the woman for trespassing. However, she tells him in a condescending manner: "My dear man, I am the cook of the Chinese ambassador. This dog belongs to the ambassador's wife. It is immune. So please don't bother us any longer."

As you will understand, the policeman is in a difficult position. Of course, he knows about diplomats and their immunity. However, he is at a complete loss with regard to the question, whether the dog of the ambassador's wife would also enjoy immunity, and, more particularly, whether the cook could claim a kind of derivative immunity deriving from the dog.

(ii) Conclusions from the Case of *The immune dog*

This invented case shows that you cannot expect some inferior state organ to be so well versed in general international law as to be able to decide on the spot whether a particular norm of domestic

law has or has not been superseded by a norm of international law and therefore is or is not applicable anymore. So the sensible thing for that state organ is to apply its own domestic law and to leave the resolution of a possible conflict with international law to the international level. If the wife of the Chinese ambassador should feel offended by the fine imposed on her cook, she can complain to her husband, and the husband can make a demarche in the Austrian foreign office. Then the question will be sorted out on the level suited for like complaints; and if the policeman should indeed have violated the immunity of the dog or the cook, this will lead to an apology by the Austrian Minister for European and International Affairs and, perhaps, to a knackwurst for the dog.

(b) Moderate monism

It is for this reason that Verdross favoured the latter approach which has come to be known as moderate or structured monism.³⁸ In fact, even Article 9 of the Austrian constitution was interpreted in a way that corresponded to that moderate monism.

As we will recall, Article 9 provides that “[t]he generally recognised rules of international law are considered binding parts of federal law.” Now federal law exists, according to the hierarchy of laws, on various levels: on the constitutional level (constitutional laws and constitutional provisions in simple laws), on the level of simple or ordinary laws, and on the level of regulations. “Federal law” is therefore a general term that comprises all these different kinds of federal law.

This resulted in a controversy about the rank of international law adopted by, or transformed into, Austrian law. From the point of view of the original purpose of the provision it could be argued that strict conformity of Austrian law to international law can only be reached if international law has a rank superior to constitutional law. Only in this way immediate precedence of international law over domestic law could be secured.

³⁸ Cf. Alfred Verdross, *Völkerrecht*, 5th Vienna 1964, p. 111 et seqs.

Such a solution, however, seemed impractical for the reason given above. Therefore, the first (and therefore kind of authoritative) commentary to the Austrian Federal Constitutional Law, written by Hans Kelsen, Georg Fröhlich and Adolf Merkl,³⁹ interpreted the term “federal law” in Article 9 as meaning, not federal constitutional law nor federal regulations, but simple federal law. Consequently, the generally recognised rules of international had no precedence over federal constitutional law but were on the same level with ordinary federal law. In addition; and to even avoid that the generally recognised rules of international law would take precedence over ordinary federal law it was argued that as between rules of international law and rules of domestic law the derogatory principle of *lex posterior derogat legi priori* was applicable, with the national legal rule to be considered as the *lex posterior*.

The result of this construction was that a state organ had always to apply domestic law if there was any, regardless of whether or not it was in conformity with international law. If another state considered itself violated by such application of Austrian law, it was for it to raise the matter on the diplomatic level. Should it then turn out that the Austrian law and its application was not in conformity with international law, this would be a matter of Austria’s international responsibility; and the conflict would be resolved by means of settling international disputes. In the end, Austria might be obliged to give satisfaction, pay damages and, of course, amend its law in question to bring it in line with its international obligations.

In the meantime, moderate monism seems to have been widely accepted by the members of the international community. It is easier to handle and nevertheless fulfils the demands of monism that conflicts between the law of the state and the law of nations must be resolved on the basis of the latter.

³⁹ Hans Kelsen, Georg Fröhlich, Adolf Merkl, *Die Bundesverfassung vom 1. Oktober 1920* (1922). Reprint with a foreword by Robert Walter, Vienna 2003.

III. From legal theory to legal philosophy

However, Alfred Verdross realised that monism with the primacy of international law was not only a question of legal theory or of the most simple manner to construe the single legal system. It also corresponded to the natural demands of men as of states, namely that conflicts should be settled in peace and on the basis of a law that applied to all of them alike.

A. The quest for justice

This requirement might have been fulfilled by Kant's definition of law according to which law has the function to make the freedom of the one compatible with the freedom of the other on the basis of a general law.⁴⁰ However, Kant's definition is not sufficient because what man longs for is not equality but justice; and injustice even if equally meted out to all is not acceptable. Therefore, Verdross contended that the idea of law was justice; and that therefore both the domestic and the international legal order had to strive for justice.⁴¹

B. The *philosophia perennis*

Having thus turned to substantive legal philosophy,⁴² Verdross looked for a system that was able to formulate justice in a way satisfactory for man because elaborated from the nature of man

⁴⁰ "Das Recht ist also der Inbegriff der Bedingungen, unter denen die Willkür des Einen mit der Willkür des Anderen nach einem allgemeinen Gesetze der Freiheit zusammen vereinigt werden kann." Immanuel Kant, *Metaphysik der Sitten. Rechtslehre. Einführung in die Rechtslehre*, Werke, Vol. VII, p. 337.

⁴¹ Cf. Alfred Verdross, *Völkerrecht*, 5th ed. Vienna 1964, p. 13 et seqs. ("Die Rechtsidee").

⁴² Cf. Herbert Schambeck, Alfred Verdross als Rechtsphilosoph und die Wiener Rechtstheoretische Schule, in: Peter Fischer, Margit Maria Karollus,

and society, of state and international community. He found this system in the tradition of what Leibniz has called the *philosophia perennis*,⁴³ the everlasting philosophy, going back to famous ancient thinkers⁴⁴ like Plato⁴⁵ and Aristotle,⁴⁶ introduced to the Latin world by Cicero⁴⁷ and elaborated by Christian theologians like Augustine⁴⁸ and Thomas Aquinas.⁴⁹ This system, which had been at the basis of natural law doctrine of modern times, first applied by the representatives of the School of Salamanca⁵⁰ to the relationship between Christian and non-Christian people and later on adopted, on the basis of the latter's writing,⁵¹ by Hugo Grotius,⁵² Samuel Pufendorf,⁵³ and Christian Wolff⁵⁴ (only to name the most important scholars of the seventeenth and eighteenth century). It was only in the course of the nineteenth century that natural law thinking had to give way, first to the historic school of law and thereafter to positivism.

Sigmar Stadlmeier (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung. Festschrift für Heribert Franz Koeck*, Vienna 2009, 527 et seqs., at p. 532 et seqs.

⁴³ Gottfried Wilhelm Leibniz, *Letter to Remond*, 26 August 1714; cf. Alfred Verdross, *Abendländische Rechtsphilosophie*, 2nd ed. Vienna 1963, p. 137.

⁴⁴ Cf. Alfred Verdross, *Grundlinien der antiken Rechtsphilosophie*, 2nd ed. Vienna 1948, p. 60 et seqs.

⁴⁵ *Ibidem*, p. 69 et seqs.

⁴⁶ *Ibidem*, p. 126 et seqs.

⁴⁷ Cf. Alfred Verdross, *Abendländische Rechtsphilosophie*, 2nd ed. Vienna 1963, pp. 48 et seqs.

⁴⁸ *Ibidem*, p. 62 et seqs.

⁴⁹ *Ibidem*, p. 71 et seqs.

⁵⁰ *Ibidem*, p. 92 et seqs.

⁵¹ Cf. Ernst Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts. Studien zu den "Controversiae illustres" des Fernandus Vasquius (1559)*, Berne 1949, Chapter II: Die Spanische Schule und Grotius., p. 9 et seqs. Cf. also Heribert Franz Koeck, *Der Beitrag der Schule von Salamanca zur Entwicklung der Lehre von den Grundrechten*, Berlin 1985, p. 23 et seqs.

⁵² Cf. Alfred Verdross, *Abendländische Rechtsphilosophie*, p. 112 et seqs.

⁵³ *Ibidem*, p. 128 et seqs.

⁵⁴ *Ibidem*, p. 138 et seqs.

C. The failure of legal positivism

However, positivism, indifferent to the demands of justice and readily utilisable by all kinds of regimes, inhuman and totalitarian ones not excluded, could not give an answer to the most fundamental questions of peace, freedom and welfare. That legal positivism had failed was demonstrated by World War I; but it was so deeply rooted in the international legal doctrine of the time that even the Covenant of the League of Nations⁵⁵ and the Statute of the (then) Permanent Court of International Justice⁵⁶ reflected its impact.

D. The revival of natural law thinking

1. IN THE THEORY OF INTERNATIONAL LAW

In contrast, Verdross joined, and soon became the spokesman, at least in the German-speaking part of Europe, of those scholars who worked on the renaissance of natural law thinking in the international field.⁵⁷ In his legal philosophy, Verdross revived the ideas of Thomas Aquinas, Francisco de Vitoria and Francisco Suárez, on the common good⁵⁸ – peace and security, freedom, and

⁵⁵ By incorporating, instead of the doctrine of just and unjust war (*bellum iustum et iniustum*), positive prohibitions of war, which were easily circumvented. Cf. Heribert Franz Koeck, Peter Fischer, *Das Recht der Internationalen Organisationen*, 3rd ed Vienna 1997, p. 169 et seqs.

⁵⁶ Cf. Peter Fischer, Heribert Franz Koeck, *Völkerrecht*, 6th ed. Vienna 2004, p. 69; the “general principles of law” as listed as a subsidiary source of international law in Article 38, No. 1, lit. c, of the Statute, were but an attempt to avoid any reference to natural law or justice.

⁵⁷ Cf. Herbert Schambeck, Alfred Verdross als Rechtsphilosoph und die Wiener Rechtstheoretische Schule, in: Peter Fischer, Margit Maria Karollus, Sigmar Stadlmeier (eds.), *Die Welt im Spannungsfeld zwischen Regionalisierung und Globalisierung. Festschrift für Heribert Franz Koeck*, Vienna 2009, p. 527 et seqs., at 540 et seq.

⁵⁸ Cf. Alfred Verdross, *Abendländische Rechtsphilosophie*, p. 78 et seqs.

welfare – and its effects on the international community. In doing so he found these ideas best applied to modern problems in the social teaching of the Catholic Church which from thereon were of great influence on his thinking.⁵⁹

As a scholar who propagated natural law thinking of a Christian sort, Verdross was a dark horse (or should we say: a white raven?) in the academic world of the nineteen-twenties and -thirties; and when Nazi Germany occupied Austria, Verdross was forbidden to give lectures in legal philosophy.

2. IN INTERNATIONAL PRACTICE

It was only after World War II that natural law thinking became again the basis of international law, if not consciously than in practice. Experiences with the total war waged by Nazi Germany and Japan, and with the abuse of the notion of law for totalitarian ends in total disregard for human dignity, brought a return of politics to traditional values of justice.

Thus, Verdross' monism with the primacy of international law and his concept of justice as the idea behind law found reflection in the Charter of the United Nations. In the Charter's preamble, "the peoples of the United Nations" declare their determination "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and

⁵⁹ Cf., e.g., Alfred Verdross, Grundlagen und Grundsätze des Völkerrechts in christlicher Schau, in: *Schönere Zukunft*, Vol. XIII, No. 16, 1938, p. 385 et seqs.; Alfred Verdross, *Die Entstehung der christlichen Völkerrechtslehre und ihre Entfaltung durch die Päpste sowie durch das Zweite Vatikanische Konzil*, „Ruf und Antwort“, Schriftenreihe des Cartellverbandes der katholischen österreichischen Studentenverbindungen, des Cartellverbandes der Katholischen deutschen Studentenverbindungen und des Schweizerischen Studentenvereins, Heft 8, Vienna 1969; and Alfred Verdross, Erneuerung und Entfaltung der klassischen Völkerrechtslehre durch Pius XII., in: Herbert Schambeck (ed.), *Pius XII. zum Gedächtnis*, Berlin 1977, p. 703 et seqs.

of nations large and small, to promote social progress and better standards of life in larger freedom”⁶⁰ and, to this end, “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”⁶¹

IV. From bonum commune to bonum commune humanitatis

Verdross, who was a member of the Institut de droit international, also became a member of the International Law Commission and a judge at the European Court of Human Rights. In Austria, his teachings were dominant, and he is regarded the founder and head of the Viennese School of international law and legal philosophy based on natural law thinking.⁶² Even after he had to retire from his chair when reaching the age limit, as an *emeritus* he continued to be prolific in his writing based on a sound philosophical basis⁶³ and on a stupendous knowledge of state practice.⁶⁴ One of the most important ideas then presented by him was the

⁶⁰ Cf. Charter of the United Nations, Preamble, paragraphs 1, 2 and 4.

⁶¹ Cf. Charter of the United Nations, Preamble, paragraph 3.

⁶² The other Austrian scholar who contributed to the renaissance of natural law thinking, not so much in the area of international law, but in the area of domestic law, was not primarily a jurist but a theologian, namely Johannes Messner. Cf. his *opus magnum* *Das Naturrecht. Handbuch der Gesellschaftsethik, Staatesethik und Wirtschaftsethik*, 7th ed. Berlin 1984.

⁶³ Apart from his *Abendländische Rechtsphilosophie* (Occidental Legal Philosophy) which already has repeatedly been quoted, cf. Alfred Verdross, *Statisches und dynamisches Naturrecht*, Freiburg/Br. 1971, showing that natural law is not static but dynamic and therefore suited to correspond to the need of a developing society.

⁶⁴ Apart from his main opus, *Völkerrecht* (International Law), the first edition of which was published before World War II, and four further editions after the war, cf. Alfred Verdross, *Die Quellen des universellen Völkerrechts*, Freiburg/Br. 1973 (a system of the sources of international law).

extension of the notion of the *bonum commune*, the common good of men, traditionally regarded the *raison d'être* of the state and its law to the notion of *bonum commune humanitatis*, the common good of mankind, to be regarded the *raison d'être* of the international community and its law, the law of nations.⁶⁵

He lived to see that considerations of natural justice played an ever greater role in international relations. This is no wonder, given the fact that since the nineteen-sixties the international community had to come to grips with the process of decolonisation⁶⁶ and the problems of the developing countries,⁶⁷ two challenges which could not have met by just referring to traditional legal concepts and by making feats within a closed system of legal theory, however brilliant.⁶⁸ The adoption of the New International Economic Order by the General Assembly in 1974,⁶⁹ together with a Plan of Action and a Charter of Economic Rights and Duties of States,⁷⁰ bears witness to this paradigmatic change in international law,⁷¹ as does the fact

⁶⁵ Cf. Alfred Verdross, *Der klassische Begriff des bonum commune und seine Entfaltung zum bonum commune humanitatis*, 28 *Österreichische Zeitschrift für öffentliches Recht* (1977), p. 143 et seqs.

⁶⁶ Cf. Albert Bleckmann, *Decolonisation*, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, Vol. I, Amsterdam etc. 1992, p. 972 et seqs.

⁶⁷ Cf. A.A. Fatouros, *Developing States*, in: Rudolf Bernhardt (ed.) *Encyclopedia of Public International Law*, p. 1017 et seqs.

⁶⁸ According to Alfred Verdross, only international law based on considerations of justice could fulfil this task. Cf. Alfred Verdross, Heribert Franz Koeck, *Natural Law: The Tradition of Universal Reason and Authority*, in: R.St.J. MacDonald/D.M. Johnston (eds), *The Structure and Process of International Law* (1983), p. 17 et seqs.

⁶⁹ Cf. Christian Tomuschat, *New International Economic Order*, in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. III, Amsterdam etc. 1997, p. 578 et seqs.

⁷⁰ Cf. Ernst-Ulrich Petersmann, *Charter of Economic Rights and Duties of States*, in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I, Amsterdam etc. 1992, p. 561 et seqs.

⁷¹ Cf. Peter Fischer, *Gestaltwandel im Internationalen Wirtschaftsrecht*, in: Waldemar Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende*, Vienna 2002, p. 209 et seqs.

that the Security Council has come to regard serious and persistent violation of human rights as much a ground for sanctions against a state as the threat or use of force.⁷²

V. Formal legal theory and substantive legal philosophy

For the longer part of his academic activities, and for the overwhelming part of his doctrinal writings,⁷³ Alfred Verdross has been convinced that legal theory is valuable but not sufficient for answering the really important questions of law, state, and the international community. In the course of one of the numerous talks it was my privilege to have with him during the last years of his life (he died in 1980), he once stated: “It is a fact that only substantive legal philosophy is really worthwhile, isn’t it?”

I regard this statement part of the legacy he left to us.

⁷² Cf. Heribert Franz Koeck, *Legalität und Legitimität der Anwendung militärischer Gewalt. Betrachtungen zum Gewaltmonopol der Vereinten Nationen und seinen Grenzen*, in: 54 *Zeitschrift für öffentliches Recht* 1999, p. 133 et seqs.

⁷³ For a comprehensive list of Alfred Verdross’ publications, see Hans R. Klecatsky, René Marcic, Herbert Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross*, 2 vols., 2nd ed. Vienna 2010.