

# The Contribution of Alfred Verdross to the Theory of International Law

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## I. Introductory (and Personal) Remarks

To write about Alfred Verdross's contribution to the discipline of international law poses a particular challenge for me. This is due to a variety of reasons. First, Alfred Verdross and I were close friends. We met for the first time in November 1967, when Verdross was 77 and I was 26 years old. A few months before, as an assistant in public law at the University of Innsbruck, I had submitted an article to an Austrian law journal dealing with a particularly neglected aspect of the relationship between Austrian constitutional law and international law.<sup>1</sup> Alfred Verdross was a member of the editorial board of this *Journal*. As I remember, at that time, an academic newcomer in the field at an Austrian law faculty was more or less expected to devote some publications to certain 'classic' topics and, the sooner the better, pronounce his or her credo on subjects like Kelsen's Pure Theory of Law or monism versus dualism. Having been initiated to these issues at Vienna's antipodes, in Innsbruck, I had apparently not taken them as seriously as was to be expected because I was told that at the meeting of the journal's editorial board at which my manuscript had been considered, Verdross had not at all been pleased with some views I had expressed. I then got the friendly advice to pay a visit to Verdross and demonstrate that I was no iconoclast by nature. I did so and presented myself at Verdross's apartment in Döbling. We had hardly exchanged a few words when I realized that I had found a father figure, and not only academically. I presume that for Verdross, on his part, I was more like a grandson. Contrary to what could have been expected from the unpromising start just described, Verdross turned out to be an extremely liberal 'educator'. He must soon have realized that I had neither a predilection nor the mind to accompany him to the lofty grounds of legal philosophy. And so he chose me as a junior partner for his last great - and decidedly

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1 B. Simma, 'Probleme um den Art. 145 B.-VG.', 91 *JuristischeJillät.er* (1969) 257.

empirical, practice-oriented - literary venture into international law, the *Universelles Völkerrecht*. In this book Verdross deliberately kept the philosophical underpinnings of positive law - his particular concern and strength - to a minimum because, as he told me, he was quite aware that providing *Universelles Völkerrecht* with an explicit and elaborate natural law foundation could have affected the reception of our book by all those who were opposed to the idea of natural law or simply did not care about it.<sup>2</sup>

Thus, to describe and assess the theoretical/doctrinal contribution of a scholar who not only has been a great and fatherly friend but together with whom one has also written a treatise - designed by Verdross to be the *summa* of his international legal thought - is a highly problematic undertaking. One has to grapple with a lack of intellectual (and, in my case, also emotional) distance. But even discounting my personal relationship, 'distance' vis-à-vis Verdross's ideas was not easily to be accomplished in the world of Austrian international legal thinking in which I grew up and in which everybody was exposed to and, to a greater or lesser degree, influenced by the teachings of the Viennese master.

A second difficulty, to which I have already alluded, lies in the fact that I am an outsider to the philosophy of law, including the tradition of natural law. My position towards the great schools of legal philosophy is rather eclectic: I consider that none of them can give an all-embracing, definite explanation of, or justification for, the phenomenon of law, but I am also convinced that they do not exclude each other, that, on the contrary, each of them can unveil and illuminate aspects of international law which remain inaccessible or off-limits to the other(s). Within this spectrum of functions, natural law arguments fulfil the task of setting limits to the validity of legal norms, of depriving them of their claim to authority, whenever they evidently and grossly contradict the postulates of justice.<sup>3</sup> But to me it does not matter whether, ultimately, such limits are conceived in legal or moral terms; I consider the 'conscience of mankind'<sup>4</sup> or 'elementary considerations of humanity'<sup>5</sup> imperative for international law, irrespective of whether these phenomena are cast in the language of natural law or not. I will return to this issue when I deal with the contribution of Alfred Verdross to the doctrine of *ius cogens*.

- 2 This pragmatic attitude must not be mistaken for a weakening of Verdross's natural law philosophy; cf. the strong statement to this regard in his last (co-) publication before his death: Verdross and Köck, 'Natural Law: The Tradition of Universal Reason and Authority', in R.S.U. MacDonald and D.M. Johnston (eds), *The Structure and Process of International Law* (1983) 42: 'It is the firm conviction of the authors of the present study that it will not be possible to solve the present and acute problems of the international community, especially the problems of maintaining world peace and bringing about the necessary development of the Third World, without having due regard to the principles and norms of natural law to which the long tradition of universal reason and authority refers us'.
- 3 U. Fastenrath, *Lücken im Völkerrecht* (1991) 37; *id.*, 'Relative Normativity in International Law', 4 *EJIL* (1993) 329.
- 4 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports (1951) 23.
- 5 *Corfu Channel*, ICJ Reports (1949) 22.

To mention a third difficulty: some of Verdross's ideas and conceptions changed considerably in the course of the more than six decades of his scholarly activity; some of them at a rather early stage, as for instance, his view on the basis of obligation of international law, others towards the end of his life, such as his position about the relationship between general international law and the organized international community.<sup>6</sup> The same is valid, maybe even more so, for Verdross's philosophical views which were formed and changed again in a constant dialogue with some of the leading streams of contemporary philosophy and social theory. We have, therefore, to be heedful of which 'Verdross' we are talking and writing about because he was never afraid to give up a former stand or adapt it to new insights.

This dialogical, discursive, style of Verdross's philosophical-theoretical thought also points to his greatest strength and, I would submit, to a lasting merit of his work: Whenever Alfred Verdross dealt with an opposing view, he did not simply refute it but always attempted to arrive at some form of synthesis, reconciling apparent opposites on a higher level. To the people who knew Verdross, this trait must appear as a direct reflection of his personality which was warm, conciliatory, and never offensive. If I had to find a formula encapsulating the characteristics of Alfred Verdross's contribution to legal science and philosophy, I would call him a master of *synthesis*: of law and philosophy, of natural law and positivism/empiricism. In fact, those of Verdross's ideas which turned out to have the greatest impact on the doctrine of international law are all thoroughly predicated on legal philosophy: the meaning and origin of general principles of law, the establishment of *ius cogens*, and his monist construction of the relationship between international law and municipal law. I submit that this is precisely what distinguished Verdross most from the other leading public international lawyers of his epoch. Such a permanent grounding of legal thought in philosophy and social theory has almost disappeared nowadays, overtaken by more or less highly specialized legal argumentation which sidesteps the need for such a philosophical basis. This is as strange as it is perilous because, quite obviously, the adequacy and stability of international law must depend more strongly on an underlying philosophy than that of domestic law. But the handful of philosophical minds in our profession today appear to steer away from the great substantive questions which Verdross confronted all his life, in favour of legal hermeneutics, linguistic approaches to the law, or the deconstruction of legal texts. Verdross (would have) followed such approaches with interest and his characteristic tolerance but he would soon have inquired about the relevance of all this for the vital issues of substance. For himself, he never accepted that such questions were beyond reach.

In this vein, Verdross was more strongly interested in the philosophical than in the political foundations of international law. Or, let us say, he chose to make the former more explicit than the latter. However, Verdross was anything but apolitical.

6 See for instance, *Völkerrecht* (5th ed., 1964) 136; *Universelles Völkerrecht* (3rd ed., 1984) *infra* note 31, at 72 §91, and *infra* page 43.

Whether his political judgments were always sound, is a different question. In this regard - and also in view of Anthony Carty's extensive study in this issue of the *European Journal* — a word has to be said about Verdross's position towards Italian Fascism, the authoritarian corporatist regime in Austria 1934-1938, and National Socialism in Germany. Looked at today, it is certainly surprising - or should I say disappointing? - that in the mid-thirties Verdross still described Mussolini as a defender of Christian values,<sup>7</sup> and the National-Socialist doctrine of international law as anti-imperialistic and federalist.<sup>8</sup> In hindsight, this was a grave error indeed. But maybe for a person of Verdross's background and upbringing - Catholic, conservative - it was not uncommon at that time to view Fascism and National-Socialism as bulwarks against Communism.<sup>9</sup> It had, after all, been Mussolini who reinstated the Vatican as a territorial sovereign in the Lateran Treaty of 1929. And let us not forget that the Catholic church was quick in coming to terms with the Nazi regime, and that the *Reichskonkordat* concluded between the Holy See and Adolf Hitler as early as 1934 did much to legitimize the Third Reich in the eyes of devout Catholics like Verdross. More generally, and more closely related to Verdross's professional sphere, until 1938 the Third Reich scored one success after another in its foreign policy, its respective activities not only tolerated but viewed with surprising sympathy by official circles abroad.<sup>10</sup>

As to Austro-Fascism, one of its theoretical foundations had been provided by the social philosophy of Othmar Spann, which had exercised a considerable influence on Verdross in the 1920s,<sup>11</sup> and the corporatist system which it introduced had also been propagated by Pope Pius XI in his social encyclical 'Quadragesimo anno' of 1931. However, such ideological affinities did not prevent Verdross from speaking out against the unconstitutionality of the Dollfuß regime.<sup>12</sup> After the *Anschluss*, Verdross was suspended from all teaching assignments; later, he was allowed to resume the teaching of international law, but not that of legal philosophy. During World War II, Verdross served as an alternate judge of the German Prize Court of Appeals.<sup>13</sup> When Verdross told me about this activity he added with a

7 See A. Verdross, *Völkerrecht* (1st ed., 1937) 28.

8 *Ibid.*, 29.

9 See the Preface to the first edition of *Völkerrecht*, *supra* note 7, V.

10 See, e.g. P. Hoffmann, *Widerstand, Staatsstreich, Aftertax. Der Kampf der Opposition gegen Hitler* (4th ed., 1983) 34: 'Während die Nationalsozialisten in Deutschland ihre Revolution vorantrieben, konnten sie außenpolitische Erfolge und Ansehen in einem Umfang einheimen, wie es ihren demokratischen Vorgängern niemals beschieden gewesen war. Scheinbar unaufhaltsam trotzten sie den ehemaligen Kriegsgegnern Stück um Stück Revision des verhassten Versailler Vertrages ab, womit Hitler eines seiner zugkräftigsten Versprechen erfüllen konnte. Niemand rührte sich 1935, als Hitler die allgemeine Wehrpflicht wieder einführte, im Gegenteil. Während Hitler Seite um Seite des Versailler Vertrages zerriß, pilgerten ständig prominente ausländische Besucher nach Deutschland, ließen sich von Hitler Audienzen gewahren'.

11 See Carty, 'Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law', this issue.

12 For details see Verosta, 'Alfred Verdross - Leben und Werk', in F.A. Frh. v. d. Heydte *et al.* (eds), *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross* (1960) 1; also referred to by I. Seidl-Hohenveldem, this issue.

13 See also Seidl-Hohenveldem, this issue.

certain satisfaction that after their victory in 1945, the Allied powers had left the judgments of this court intact - a court that, according to him, had served as a refuge from collaboration with the Nazi regime for a number of prominent lawyers.

To dwell on the topic of the ideas and forces which had an influence on Verdross's thinking, the Catholicism I have just mentioned provided a fitting, if not essential, foundation for his natural law philosophy as well as for his universalistic view of international law. But Verdross had not started out as a natural lawyer. Rather, in his early years, he had been fascinated by neo-Kantian philosophy as applied to the world of law by Hans Kelsen.<sup>14</sup> In the early 1920s he detached himself from merely formal legal theory, however, and turned his attention towards substantive issues of legal philosophy. Influenced by contemporary *Wertphilosophie* (Brentano, Scheler, Hartmann) and more specifically by the Spanish school of international law (Vitoria and Suarez), Verdross soon took the decisive step towards natural law which informed his further theoretical and philosophical work.<sup>15</sup> What he retained from the Viennese School of legal formalism was undoubtedly its chief merit, namely the highly developed analytical framework for dealing with problems of positive law. It is precisely this combination of value-oriented philosophy and Kelsenian clarity of legal thought that makes the writings of Verdross so appealing.

Besides his Catholic faith and its 'natural' philosophical companion, there were other factors influencing Verdross. For instance, I am convinced that the social and constitutional experience of the Austro-Hungarian empire constituted a determining factor both for the formalist approach to the law advocated by the Viennese School and culminating in Kelsen's Pure Theory of Law, and for Verdross's universalism. I am further convinced that the trauma of World War I, the ensuing collapse of Austro-Hungary and the hope in the newly established League of Nations, had a heavy impact upon Verdross's theory of international law. These experiences probably found their most obvious expression in the monist construction of the relationship between international law and national law. Monist theory, as developed by Verdross, granting the primacy within the hierarchy of legal orders to that of international law, is nothing but universalism applied to positive law. After all, no less a 'purely legal' observer than Hans Kelsen has stated with all due clarity that, while subjectivist-imperialist ideologies will opt for the primacy of national law in this regard, objectivist-pacifist ideologies will declare themselves in favour of the primacy of international law.<sup>16</sup> While Kelsen left this choice to the respective political conviction of the observer, for Verdross there was no choice here from the beginning.

14 Cf. Verosta, *supra* note 12, at 13; Mock, 'Die Erschließung der materialen Rechtsphilosophie durch Alfred Verdross', in H. Miehsler *et al.* (eds), *Ius humanitatis. Festschrift zum 90. Geburtstag von Alfred Verdross* (1990) 14; Köck, 'Leben und Werk des österreichischen Rechtsgelehrten Alfred Verdross', 42 *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1991) 34.

15 On this development see in more detail the essays cited in note 14 and the article by Truyol y Serra in this issue.

16 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd ed., 1928) 314.

Within the legal philosophy and the theory of international law of the first half of the twentieth century, Alfred Verdross was one of the leading combatants in what probably was the last great battle between natural law and legal positivism. Which side won, is difficult to say. Of course, the war itself still lingers on. But within international law, as I have mentioned, the little theoretical-philosophical attention the discipline can muster is focused on other issues of a merely formal-analytical nature. However, ultimately, there is no escape from the issue of natural justice. The universalistic philosophy of international law ranging from the Spanish authors of the Golden Age<sup>17</sup> to the works of Alfred Verdross is in need, therefore, of being introduced into debate on the current political movement from individualism towards the recognition of a true international community.<sup>18</sup>

In the present essay, I will first take a closer look at the universalistic conception of international law onto which Verdross built and which he developed further. Following this, I shall describe his theory of moderate monism, his understanding of the general principles of law and, finally, his paving the way for the acceptance of an international *ius cogens*.

## II. Universalism and Community

The universalistic conception of international law which Verdross adopted<sup>19</sup> is rooted in the Stoic-Christian view that mankind as a whole forms a moral-legal unity anchored in natural law. The Stoics had defined this community as a cosmopolis; Cicero had referred to the *societas humana* which, proceeding from the family, expands into a community embracing all of mankind.<sup>20</sup> The first hint of a subdivision of this community into states can be traced to St. Augustine, according to whom it would be better for humanity to consist of a plurality of states organizing a plurality of peoples (*regna gentium*) coexisting as peaceful neighbours, instead of the Roman Empire.<sup>21</sup> The clearest exposition of the universalistic conception can be found with the Spanish scholars of the School of Salamanca, however. Its founder, Francisco Vitoria, proceeded from the Aristotelian-Stoic-Thomistic assumption that men are social beings by their very nature, and concluded accordingly that stably organized peoples (*gentes*) shared this characteristic and, hence, like human individuals, were in need of a legal order governing their mutual relations, namely the '*ius inter omnes gentes*'. For Vitoria, the community of states is thus universal by nature; he referred to it as '*una respublica*', with the purpose of the general well-

17 See Verdross and Köck, *supra* note 2, at 19.

18 See P. Allott, *Eunomia* (1990); Tomuschat, 'Obligations Arising for States Without or Against their Will', 241 *Hague Recueil des Cours* (1993 IV) 209; Simma, 'Bilateralism and Community Interest in International Law', *ibid.* (1995 forthcoming).

19 He dealt with it in most of his writings in the field of philosophy of (international) law, too numerous to be quoted here. Cf. the bibliography *infra*.

20 *De officiis*, I, Ch. 7. Cf. A. Verdross, *Abendländische Rechtsphilosophie* (2nd ed., 1963) 46.

21 *De civitate Dei*, IV, Ch. 15.

being of all human beings (*bonum commune omnium*).<sup>22</sup> Francisco Suarez developed Vitoria's ideas further in a classic exposition which was so influential on Verdross that he virtually adopted it as the *Leitmotiv* of his entire international legal thinking. It deserves therefore to be quoted in full:<sup>23</sup>

However divided into different peoples and kingdoms it may be, mankind has nevertheless always possessed a certain unity, not only as a species, but also, as it were, as a moral and political unity, called for by the natural precept of mutual love and mercy, which applies to all, even to the foreigners of any nation. Therefore, although a given Sovereign State, Commonwealth, or Kingdom, may constitute a perfect community in itself, nevertheless, each of these States is also, in a certain sense ... a member of that universal society; for never are these States, when standing alone, so self-sufficient that they do not require some mutual assistance, association and intercourse, at times for their greater welfare and advantage, but at other times because of some moral necessity or lack, as is clear from experience. For this reason, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association. And although this is to a large extent effected by virtue of natural reason, such natural reason is not provided in sufficient measure and in a direct manner. Hence, it was possible for certain special rules of law to be introduced through the practice of these same nations. For, just as in one State or province law is introduced by custom, so with the human race as a whole it was possible for laws to be introduced by the habitual conduct of Nations.

The universalistic community-oriented doctrine pronounced in Suarez' text was also followed by Hugo Grotjus<sup>24</sup> and in Christian Wolffs '*civitas maxima*'.<sup>25</sup>

From the 17th century onward, this universalistic line of thought has been sharply opposed by an individualistic concept of international law and relations. It is rooted in the conviction that law may be established only by an authority above and superior to its subjects. Since, however, states are not subject to any supranational authority, the only rule that can prevail between them is the law of nature. Thus, Thomas Hobbes argued that states still existed in a pre-social situation of potential or actual war (*bellum omnium contra omnes*):

Persons of Sovereign authority ... are in continual jealousies, having their weapons pointing, and their eyes fixed on one another... which is a posture of war.<sup>26</sup>

For Hobbes, states enjoy a 'right of nature', that is, the freedom to use their strength at discretion in order to preserve their own existence.<sup>27</sup> In contrast to this, the Hobbesian law of nature' mentioned above is nothing but a rational insight showing what is necessary for the preservation of the human species, namely to strive for

22 *Relectio de Indis*, III, Tit 5, leg. 4; *De potestate civili*, 13, 21.

23 From: *De legibus ac Deo legislatores* II, Ch. 19,9. My translation is based on (but not identical to) that provided in Verdross and Köck, *supra* note 2, at 20.

24 See, *De iure belli ac pacis* (1625), Prolegomena, 6, 17, and II, 20, §44,1. Cf. Verdross, *supra* note 20, at 112.

25 See, *Jus gentium methodo scientifica pertractatum* (1764), Prolegomena, §§8,10-20. For a comment cf. Verdross, *supra* note 20, at 138.

26 *Leviathan*, I, Ch. 13. See Verdross, *supra* note 20, at 112.

27 *Ibid.*, *Leviathan*, I, Ch. 14.

peace as far as possible, and if this cannot be achieved, to conclude treaties of alliance and arbitration, because only thus can self-preservation be secured.<sup>28</sup> A similar view was expressed by Baruch Spinoza, for whom rights can only exist on a basis of power; indeed right and power coincide.<sup>29</sup> For Hegel, too, law is founded on a will which is superior to that of its subjects. But since international law cannot base itself on a will superior to that of the individual states but only on different sovereign wills, it constitutes in reality only an 'external state law'. Absolute power on earth therefore rests with the people organized in a state and existing in sovereign autonomy *vis-à-vis* other states.<sup>30</sup>

To his exposition of Hegel's philosophy of law as applied to international law, Verdross adds two remarks, however.<sup>31</sup> First, he points out that Hegel himself had stated that the peoples of Europe constitute a family, whereby their mutual behaviour is modified to the better. Verdross further emphasizes that Hegel's intention was to describe the state of affairs prevailing in his time; in no way did he intend to exclude a further development of international law.

Despite this benevolent interpretation, the fact remains that Hegel's individualistic conception of international law as each sovereign state's 'external state law', based upon its self-commitment and nothing more, exerted a powerful influence on 19th century legal positivism, especially in Germany. Thus, one of the leading public international lawyers of that epoch, Georg Jellinek, vigorously defended the view that the basis of obligation of international law was provided by such self-commitment (*Selbstverpflichtung*)?^ Taken to its logical conclusion, this theory must necessarily lead to the doctrine of superiority, or primacy, of national law over international law; a view dissolving the unity of international law into a variety of 'externally-orientated imperatives' (*hinausgerichtete Imperative*)?^ I will return to this issue in the next section of the paper.

In *Universelles Völkerrecht*, Alfred Verdross sums up the controversy between the universalistic and individualistic conceptions of international law in a characteristically fair, conciliatory manner.<sup>34</sup> He states that both conceptions have a sound core but miss each other's arguments. The universalistic view takes as its starting point the *normative* idea of the moral unity of mankind, that is, an ethical 'ought'; whereas the individualistic conception concentrates on certain *factual* situations but overrates their importance for the legal system by drawing attention exclusively to the mutual rivalry of states and overlooking the common interest that all peoples have in the preservation of peace. Verdross admits that the universalistic theory commits a mistake in the opposite direction because it merely contemplates the social nature of states and neglects their factual conduct. Verdross emphasizes

28 *Ibid.*, Ch. 15.

29 *Tractatus politicus* (1678) Ch. 2, §4; Verdross, *supra* note 20, at 119.

30 G. J. Hegel, *Rechtspfilsophie* (1821) §§330 et seq.

31 A. Verdross and B. Simma, *Universelles Völkerrecht* (3rd ed., 1984) 15, §20.

32 G. Jellinek, *Die rechtliche Naur der Staatenverträge* (1880) 2,45.

33 Thus, M. Wenzel, *Juristische Grundprobleme I: Der Begriffdes Gesetzes* (1920) 397.

34 *Universelles Völkerrecht*, *supra* note 31, at 16, §21.



that any realistic theory of law must consider both aspects, particularly with regard to international law, because, in spite of the increasing organization of the international system, states continue to confront each other as before, heavily armed, and frequently violating essential rules of international law. '*So bleibt es oft "beim Sollen"*'<sup>35</sup> (the situation often does not move beyond the 'ought'). For Verdross, the two philosophies genuinely complement one another; the universalistic conception is normative in its nature, the individualistic conception is sociological. The latter describes the actual situation, while the former points to the objective towards which states ought to strive in order to establish the foundations for permanent peace. Here, Verdross refers to Immanuel Kant who appeals to the states 'to participate in a league of nations; in it, each state, even the smallest, could expect to its security to be respected and its rights honoured, not because of its own might or its own legal judgment, but exclusively due to the great league of nations [Foedus Amphictyonum], to might effected through unity and decisions based on the laws of united will'.<sup>36</sup>

Aside from such philosophical discourse, I would submit that both Kelsen and Verdross, writing in the 1920s, posited their Kantian, universalistic conceptions of international law and their monist theories (purely formal with Kelsen, attached to material values *qua* natural law in the case of Verdross) with an implicit political agenda: that of countering Hegelian individualism translated into legal theory by Jellinek and, thus, of strengthening the idea of an international rule of law organized in the Geneva League of Nations in its fight against the ideology of 'might is right' that had led to the catastrophe of World War I.<sup>37</sup> In this respect, the two Viennese scholars buttressed the case, and supported the cause, of political liberalism, to which Verdross otherwise, after having joined ranks with the Catholic conception of natural law, could not have been totally sympathetic.

I will illustrate my point by referring to an incident which took place immediately after World War I and which, in retrospect, seems to encapsulate the struggle between the two philosophies of international law.<sup>38</sup> In November 1918, Alfred Verdross, at that time a member of the Viennese foreign office, had been posted with the Austrian mission in Berlin. In this capacity he followed closely the deliberations leading to the adoption in 1919 of the constitution of the Weimar Republic. During those deliberations, a proposal was made to include in the new constitution a provision effecting the automatic incorporation of international law as

35 *Ibid.*, 17.

36 I. Kant, *Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht* (1784) 7th sentence (my own translation).

37 I arrived at this conclusion following several discussions with Anthony Carty. In his contribution to this issue, Carty presents an explanation of the philosophical grounding and rationale of Verdross's universalism which is very different from my own interpretation. However, again, in light of the Viennese master's great capacity of synthesis and reconciliation of ideas, I would submit that Verdross saw no difficulty in combining these thoughts.

38 Cf. on the following, Verdross, 'La validità del diritto internazionale nel campo intemo secondo il diritto costituzionale germanico e austriaco', *Accademia Nazionale dei Lincei* (ed.), *Adunanze straordinarie per il conferimento dei PremiA. Feltrinelli* (1976) Vol. II, Fasc. 1,13.

an integral part of German law. This proposal was inspired by the famous formula in William Blackstone's 'Commentaries on the Law of England', according to which

[t]he law of nations ... is here adopted in its full extent by the common law, and is held to be part of the law of the land.

Blackstone had gone on to say that

those acts of parliament which have from time to time been made to enforce this *universal law* ... are not to be considered as introductive of any new rule, but merely *as declaratory of the old fundamental constitutions of the Kingdom: without which it must cease to be a part of the civilised world?*<sup>39</sup>

This sentence embraces quite admirably the universalistic doctrine described earlier and was, for this very reason, chosen as a model for the respective provision of the Weimar Constitution which, according to the proposal of the German Government, was to read: "The universally recognized rules of international law are part of the law of the *Reich*."<sup>40</sup> However, in the further course of the parliamentary deliberations, this wording was changed into the following, entirely different formula: 'The relations of the German Reich with foreign States are regulated by international treaties, by the universally recognized rules of international law, and, if the Reich becomes a member of the League of Nations, by the provisions of the latter'.<sup>41</sup> In contrast to the original formula, this new text read like a manifesto of Hegel-inspired individualism, suggesting that Germany could somehow freely choose to subject her foreign relations to the rules of international law. At this stage, Verdross quickly reacted and published an article in a leading law journal, in which he pleaded for a return to the earlier wording, pointing out that the validity of international law for inter-State relations could not depend upon any recognition on the part of state constitutions; that, indeed, no choice existed in this regard from the outset, and that the only matter left open to constitutional regulation in this area was the concrete determination of the status of international law within the municipal legal order.<sup>42</sup> The voice of the young Austrian observer was heard and the parliamentary Constitutional Commission, referring explicitly to the reasoning put forward by Verdross, returned to the original government proposal defended by him, which entered into force as the famous Article 4 of the Constitution of the Weimar Republic.

Since that time, constitutional provisions following the model of Article 4 and thus recognizing the binding force of universal international law not only on the

39 Quoted after Verdross, *supra* note 38, at 15 (emphasis added by Verdross).

40 'Die allgemein anerkannten Regeln des Völkerrechts gelten als Bestandteil des deutschen Reichsrechts'.

41 'Für die Beziehungen des Deutschen Reiches zu auswärtigen Staaten sind die Staatsverträge, die allgemein anerkannten Regeln des Völkerrechts und, wenn das Reich in den Völkerbund eingetreten ist, dessen Bestimmungen maßgebend\*.

42 Verdross, 'Reichsrecht und internationales Recht. Eine Lanze für Art 3 des Regierungsentwurfes der deutschen Verfassung', 24 *Deutsche Juristenzeitung* (1919) 291.

international but also at the domestic level, have proliferated. Some of them go as far as investing international law with a rank superior to that of municipal legislation or even constitutional law. This development may be interpreted as a victory of the universalistic doctrine of international law over the individualism culminating with Hegel and Jellinek, at least in the world of the 'ought'. The same observation can be made with regard to the increasing acceptance of the Charter of the United Nations as the written constitution of the international community, and the virtually unanimous recognition of the priority of obligations under the UN Charter over other international commitments. Both of these ideas were pioneered by Verdross;<sup>43</sup> the Charter-as-constitution view informs and determines the entire system of his last treatise, *Universelles Völkerrecht*.<sup>44</sup> But again, of course, there is no denying the fact that also with regard to the Charter, in Verdross's phrase, the situation all too frequently does not move beyond the 'ought' - *es bleibt beim Sollen*. Despite such setbacks, however, I think it is fair to say that in contemporary international law the universalistic blueprint originally drawn up by natural law philosophy is slowly but steadily being turned into a reality. Thus, positive international law is moving in the direction of the 'ought' delineated by the school to which Verdross adhered. It is currently involved in a fundamental process of transformation from a mere *ius inter potestates* to a legal order for mankind as a whole.<sup>45</sup> By way of conclusion, let me quote the maxim which Verdross borrowed from St. Augustine in order to define the conditions for a genuine and peaceful international community in the very last sentence of *Universelles Völkerrecht*: '*In necessariis unitas, in dubiis libertas, in omnibus caritas*' (unity in essential matters, freedom in non-essential ones, charity in everyding).<sup>46</sup>

## HI. International Law and Municipal Law: Verdross's Theory of Moderated Monism

Verdross's views on the relationship between international law and national law did not develop in a linear, straightforward manner that can be described easily. He changed them several times in his early years, and after he had arrived at his theory of moderated (*gemäßigter*) monism, he kept refining it in a constant dialogue with dualist voices during his entire lifetime.<sup>47</sup> Therefore, in the present paper I have to limit myself to little more than a presentation of Verdross's theory in its definite

43 Cf. 'The Charter of the United Nations and General International Law', in G.A. Lipsky (ed.), *Law and Politics in the World Community* (1953) 153; 'General International Law and the United Nations Charter', 30 *Internationale Affairs* (1954) 342; *Völkerrecht* (5th ed., 1964) 136; *Die Quellen des universellen Völkerrechts* (1973).

44 *Universelles Völkerrecht*, *supra* note 31, Preface VII and *passim*.

45 *Ibid.*, 916, §1351.

46 *Ibid.*, 917.

47 For a particularly illustrative example see, 'Die normative Verknüpfung von Völkerrecht und staatslichem Recht', in M. Imboden *et al.* (eds), *Festschrift für Adolf J. Merkl* (1970) 425.

form and to refer the reader to an earlier publication for a more comprehensive picture.<sup>48</sup>

International law as an autonomous concept dates back to early modernity. However, it was only at the end of the 19th century that a theory developed which not only distinguished between international law and municipal law but completely separated them. This theory is known as Dualism (or Pluralism). Its main proponents were Heinrich Triepel in Germany and, following him, Dionisio Anzilotti in Italy.<sup>49</sup> They defended a radical separation of international law and domestic law not only on the grounds that each of them had different sources and addressed different subjects but also on the basis of the consideration that municipal acts contrary to international law could nevertheless continue to claim binding force within the domestic legal system of the state concerned. According to a graphic summary of the essence of the dualistic theory, international law and municipal law relate to each other like two circles 'which at most touch one another but never overlap'.<sup>50</sup> Thus, a conflict between them in the true sense of the word can never arise because such conflicts between rules belonging to different legal systems are impossible. The two systems can only relate to each other by the one referring to rules of the other (*renvoi*).

Obviously this theory contrasts sharply with the Hegelian view of international law constituting each sovereign state's 'external state law', a system merely of self-commitment accepted voluntarily by states within their respective municipal legal orders. Such a view can be called monist because it considers international law to be nothing but a specific part of municipal law, granting superiority, or primacy, to the latter.

However, the monism represented by Verdross rests upon fundamentally different premises, namely on a specific adoption of the universalistic conception of international law which I have described in the preceding section. On this basis, it advocates the unity of international and domestic law, with international law enjoying primacy. The roots of this theory emerged almost simultaneously in The Netherlands, France and Austria. Its first representative in our century was the Dutchman Hugo Krabbe. Reviving the teachings of Vitoria and Suarez described above, Krabbe conceived of municipal legal orders as branches of the universal legal order of mankind with the latter regulating the competences of the individual municipal systems. Hence, for Krabbe, international law is not a law between states but a *supranational* law anchored in a universal legal conscience.<sup>51</sup> A similar opinion was held by Léon Duguit,<sup>52</sup> whose most renowned student, Georges Scelle, reached the conclusion that international law overrides any municipal law

48 Simma *et al.*, 'Der Beitrag von Alfred Verdross zur Entwicklung der Völkerrechtswissenschaft', in *lus humanitatis*, *supra* note 14, at 24.

49 Cf. on the latter the 'European Tradition' section in this *Journal*, 3 (1992) 92-162.

50 H. Triepel, *Völkerrecht und Landesrecht* (1899) 111 (my own translation).

51 H. Krabbe, *Die Lehre der Rechtssouveränität* (1906); *id.*, *De moderne staatsidee* (Dutch, 1915).

52 L. Duguit, *Traité de droit constitutionnel* (1921) 551.

conflicting with it (*le droit international prime le droit étatique*)<sup>P</sup> Initially, Hans Kelsen, too, qualified municipal acts contrary to international law as being void within the sphere of municipal law.<sup>54</sup>

While these variants of the monist theory fuse international and national law<sup>55</sup> and thus may be seen as going to the other extreme of the dualism advocated by Triepel and Anzilotti, Verdross's views, in their definite form, assume a much more subtle and moderate form. Verdross refutes the main contentions of dualism by pointing out, first, that municipal legal systems may provide that international treaties and customary law also constitute sources of domestic law, and second, that international law *may* grant international legal rights and obligations directly to individuals. Hence, there are no essential, unsurmountable differences between international and domestic law in this regard. Of more critical concern is the question of whether conflicts between the two systems are possible and, if the answer to this is positive, whether such conflicts will destroy the unity of the systems upon which monism bases itself. Here, in a fashion typical of his realism and conciliatory spirit, Verdross maintains the relative autonomy of international law and municipal law and consequently admits that conflicts between the two systems may indeed arise. At the same time, however, Verdross demonstrates that such conflicts are not definitive because their resolution is possible *if* international legal procedures are applied. Hence, conflicts between a state's internal law and its obligations under international law are no more a threat to the assumption of the unity of the two systems than conflicts arising within municipal legal orders between constitutional provisions and ordinary legislation, and ordinances, or between laws and administrative decisions or court judgments. For such cases, developed legal systems will provide procedures through which these conflicts are resolved in favour of the higher norm. The situation is essentially the same in our international/domestic law conflict scenario: a State injured by an internationally wrongful act may demand the restitution of the *status quo ante*, that is, first and foremost the termination of the illegal activity concerned. For its part, the perpetrator of the delict is under a legal obligation to proceed to such restitution or reparation. If it does not comply, the injured party may have recourse to pacific countermeasures to enforce its claims. Further, under international law each state is obliged to take all measures necessary for the effective domestic implementation of its international obligations. In those instances where a conflict between international and national law is brought before an international court or arbitral tribunal, the primacy of international law over domestic law is even more evident because these institutions will regard municipal laws as mere facts to be assessed as

53 G. Scelle, *Manuel élémentaire de droit international public* (1943) 21. On Scelle see the 'European Tradition' section in this *Journal*, 1 (1990) 193-249.

54 H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920) 146. Kelsen renounced this view in 1932, see, 'Unrecht und Unrechtsfolge im Völkerrecht', 12 *Zeitschrift für öffentliches Recht* (1922) 481.

55 Cf. G. Scelle, 'Régies générales du droit de la paix', 46 *Hague Recueil des Cours* (1933 IV) 353: 'Le monisme est fusion plus que hiérarchie'.

to their legality *vel non* under international law.<sup>56</sup> Thus, if the conflict is resolved at the level of international law, the validity of domestic law contrary to international law will always be of a provisional nature only, and the conflict will be resolved in favour of the international norm. An unchallenged operation of domestic law will therefore be possible only within the limits set up by international law.<sup>57</sup>

According to Verdross, the temporary, provisional, validity of domestic rules contrary to international law is simply a consequence of the *decentralized* structure of international law, which leaves it up to states to regulate as a matter of essentially domestic concern their relationship with their own municipal organs. Hence, states can direct their municipal organs to apply rules contrary to international law until these are suspended or invalidated as a consequence of international procedures.<sup>58</sup> This can be quite efficient because it will frequently be open to doubt whether a municipal norm is contrary to international law, or is considered as such by the state affected through its application. Consequently, the issue will first have to be resolved by international legal procedures.<sup>59</sup>

Obviously, the representatives of the dualistic approach also recognize that international law is superior to states insofar as they are under an obligation to apply its precepts. On the other hand, they contest the assertion that in addition to the states themselves, their municipal legal systems are also subordinate to international law. According to Verdross, such a separation of states from their respective legal systems is untenable, however, because states are human and territorial communities which are internally integrated by virtue of a legal order. In this context, it is irrelevant whether a written constitution exists or whether an unwritten constitution is effectively applied. In both instances, the decisive aspect is that a legal order has effectively established itself in the social life of the community concerned. Thus, somebody '*qui actu regif*' is a state organ as well.<sup>60</sup>

Finally, Verdross returns to his universalistic conception of international law when, after admitting that mankind does not constitute a universal *inter-human* legal community, he stresses that states and other international legal entities are, however, parts of the community bound together by universal international law, a community comprising the whole of mankind. As a result, the community of states also needs a constitution which links its members, even if this constitution predominantly regulates relations between sovereign powers and not, as in a statal community, relations between human beings. In addition, while recognizing the constitutional autonomy of states, international law today does exert considerable influence on the internal legal system of states and aims at the promotion of the rule of law within

56 Thus, the Permanent Court of International Justice emphasized in its Advisory Opinion on the *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory* that 'A State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law'. Series A/B, No. 44 (1932) 24.

57 Cf. A. Verdross, *Völkerrecht* (5th ed., 1964) 113.

58 See, *Universelles Völkerrecht*, *supra* note 31, at 56 §73.

59 *Ibid.*

60 *Ibid.*, 58, §74.

them, by obliging them to promote human rights (cf. Article 56 of the UN Charter).<sup>61</sup>

#### IV. The Key Role of General Principles of Law

Within the theory of sources of international law, Verdross undoubtedly made his most important and lasting contribution in the sphere of the 'general principles of law'. This is not to diminish the importance of his other work on international law-making, as, e.g., on the variety of modes of formation of customary international law,<sup>62</sup> on the law-making function of General Assembly resolutions<sup>63</sup> or on informal consent as the original, overarching source of international law.<sup>64</sup> But Verdross's work on general principles deserves a special place for two reasons. The first one is the sheer quantity of his writings on the subject. Aside from the substantial chapters in his treatises on this subject, Verdross produced a stream of about 30 contributions throughout his life in which he continually engaged in the testing, revision and development of his views against a background of intervening practical developments and differing doctrinal voices. Second, and more importantly, the central tenets of Verdross's natural law philosophical basis come to the fore more clearly here than they do in his writings on legal philosophy proper. With his theory of general principles, the Viennese master joined the last great battle between the proponents of legal positivism and those of natural law, which took place in our discipline during the inter-war period. If one wants to take sides in this grand debate and to subscribe to Hersch Lauterpacht's famous dictum about general principles delivering *un coup mortel au positivisme*,<sup>65</sup> it was above all Alfred Verdross who contributed to this victory by firmly anchoring natural law thought in the essentially positivist, voluntarist, theory of the sources of international law.

Legal positivism or voluntarism could only recognize international treaties and customary international law as law-creating processes, that is, as manifestations of state will (or consent) about future behaviour.<sup>66</sup> Then, after World War I, Article 38(1)(c) of the Statute of the Permanent Court of International Justice shook the positivist view and gave rise to a heated doctrinal as well as philosophical debate. This provision obliged the World Court to apply in the disputes submitted to it

61 Ibid, 58, §74.

62 'Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts', 29 *ZaöRV* (1969) 635; *Die Quellen des universellen Völkerrechts* (1973) 114.

63 'Kann die Generalversammlung der Vereinten Nationen das Völkerrecht weiterbilden?', 26 *ZaöRV* (1966) 690.

64 *Die Quellen des universellen Völkerrechts*, *supra* note 62, at 20, 36; *Universelles Völkerrecht* (1st ed., 1976, 258; 3rd ed., 1984, 323 §§518 et seq.).

65 Lauterpacht, 'Règles générales du droit de la paix', 62 *RdC* (1937 IV) 164.

66 Cf., for instance, D. Anzilotti, *Cours de droit international* (1929) 73; L. Oppenheim, *International Law* (2nd ed., 1912) 22; H. Triepel, *supra* note 50, at 30.

besides treaties and custom, 'the general principles of law recognised by civilised nations'.

The origin of this provision can be traced to a proposal by Baron Descamp, the President of the Committee set up by the Council of the League of Nations to prepare a Statute for the newly-established Permanent Court. Descamp had first suggested accepting 'the rule of objective justice' (*la norme de la justice objective*) as a subsidiary source of international law to the extent that it had been reflected in relevant uniform doctrine and in the legal conscience of civilized nations.<sup>67</sup> This wording, however, turned out to be too unclear for the other members of the Committee and was replaced by the formulation *les principes généraux de droit reconnus par les nations civilisées*.<sup>68</sup> By adopting this formula, the Committee intended to express two considerations: firstly, that treaties and customary law did not exhaust international law and that, consequently, a complementary source of international law was necessary; secondly, that even in such a case the Court would not have complete freedom when determining the law, but would be bound by principles of law which had already gone through a process of objectification. Lastly, the Committee was also of the opinion that its proposal did not introduce a new source of law but simply confirmed the practice of international tribunals as hitherto developed and applied.<sup>69</sup>

The protagonists of legal positivism reacted to Article 38(1)(c) of the Statute by attempting to downplay its theoretical importance. Thus, Anzilotti, while conceding that the provision constituted an exception to the principle that States could only be bound by products of their own sovereign will, regarded judicial decisions on the basis of general principles not as decisions made on the basis of international law but as judge-made law created by way of analogy, the international judge hereby assuming the role of the legislator.<sup>70</sup>

Against such views, Verdross endeavours to prove that the positivist assumption of all international law emanating from the consent of States is not based on experience but on a sort of metaphysics.<sup>71</sup> He does so by demonstrating that in the practice of international arbitral tribunals general principles of law had been applied as crystallizations of international justice for several centuries; in other words, that the positivization of general principles as a source in Article 38(1)(c) of the PCIJ Statute constituted anything but a revolutionary innovation. Thus, in international state and arbitral practice, positive international law never figured as a closed consent-based system but from the very outset drew from and referred to principles whose legal validity was not established but pre-supposed by positive law.<sup>72</sup> For

67 Procès-verbaux of the Proceedings of the Committee, 324.

68 Ibid., 334.

69 Ibid., 310 and 316.

70 D. Anzilotti, *supra* note 66, at 117. For the views of HSrle and Kopelmanas see Simma *et al.*, *supra* note 48, at 36.

71 See, 'Die allgemeinen Rechtsgrundsätze im Völkerrecht', in *Cesellschaft, Staat und Recht, Festschrift Hans Kelsen zum 50. Geburtstag* (1931) 356.

72 See, *Völkerrecht* (5th ed., 1964) 22.



Verdross, the validity of such general principles stemming from universal recognition of certain legal values is a sociological precondition of the very existence of international law.<sup>73</sup> These principles derive from the shared legal conscience (*Rechtbewußtsein*) of the peoples of the world, which Verdross regards as anchored in natural law.<sup>74</sup> Thus, says Verdross, if a *Grundnorm* (basic norm) in the Kelsenian sense had to be formulated, it would not have to be merely hypothetical, or fictitious, as Kelsen was constrained to assume, but it could very well be filled with concrete normative substance, namely that of the fundamental principles of law. Such a *Grundnorm* could then read as follows: The subjects of international law ought to behave as prescribed by the fundamental legal principles deriving from the social nature of human communities as well as by the rules of international treaty and customary law created on the basis of such principles.<sup>75</sup>

This view of the functions of general principles differs fundamentally from the very limited and rather technical role assigned to them by mainstream positivism. It is important, therefore, to take a closer look at what Verdross precisely understands by such principles, and how he categorizes them. Here, we encounter an essential distinction between two kinds of general principles.<sup>76</sup>

The first category consists of those fundamental principles which are inherent to all legal systems, in the sense that without their recognition such systems simply could not, or hardly, function. Thus, they are pre-supposed by treaties and customary law, such as the 'elementary considerations of humanity' referred to by the International Court of Justice in the *Corfu Channel* case,<sup>77</sup> or the requirements of good faith (*bona fides*). These principles stand above consent-based international law in the sense that they have the character of *ius cogens*: no international treaty or customary rule contradicting such principles could acquire legal force.<sup>78</sup> It is this first category of general principles which is essential to Verdross's entire international legal *Weltanschauung*; to use a term of the computer age, the interface between man-made and natural law.

The second category of 'general principles' corresponds to the meaning given to the third formal source enshrined in Article 38 by mainstream international law doctrine. It denotes principles derived from concurrent rules to be found in all developed legal systems. Such concurrence shows that the principles in question

73 See *ibid*; 5, 12.

74 Cf. 'Die allgemeinen Rechtsgrundsätze im Völkerrecht', *supra* note 71, at 358 (also quoted in Simma *et al.*, note 48, at 37).

75 *Völkerrecht*, *supra* note 72, at 24: 'Wenn daher die völkerrechtliche Grundnorm formuliert werden soll, so muß sie aussagen, daß sich die Völkerrechtssubjekte so verhalten sollen, wie es die fundamentalen Rechtsgrundsätze, die sich aus der sozialen Natur der menschlichen Verbände ergeben..., und die auf ihren Grundlagen erzeugten Normen des Vertragsrechts und des Gewohnheitsrechts vorschreiben...'

76 See, *Völkerrecht* (5th ed., 1964) 12, 22, 147; *Universelles Völkerrecht* (3rd ed., 1984) 394 (§616) 414 (§644etseq.).

77 ICJ Reports (1949) 22.

78 On the concept of international *ius cogens* developed by Verdross, see the following section of the present contribution.

have been generally recognized in domestic law (*in foro domestico*). Consequently, if they are transferable to the realm of international relations, they can be applied to international problems by way of analogy because - and to the extent that - no rule of treaty or customary law has yet emerged as a more concrete *lex specialis* covering the pertinent question. Verdross lists a great number of such principles applied by international courts and tribunals.<sup>79</sup> However, Verdross here again emphasizes the foundation of these non-technical principles in the very idea of law (*Rechtsidee*) and their emergence from a true source of international law.<sup>80</sup>

Let me mention in concluding this section that Verdross considers acceptance of our principles *in foro domestico* as only one possible method of objectively validating their existence. In his last contributions to the theory of sources, he used this insight to provide, e.g., certain resolutions/declarations of the UN General Assembly with a possible place within the sources triad embodied in Article 38.<sup>81</sup> Using the same approach, he reconciled his theory of informal, spontaneous, consent with the positivist view on modes of international law-making.<sup>82</sup>

## V. 'Forbidden Treaties': The Breakthrough of *Ius Cogens*

Verdross's writings on the substantive limits of the freedom of States to conclude treaties present another example of how his stand on issues of philosophy of law determined his views on concrete international legal questions. For natural law adherents, the claim that in international law, too, there exist certain norms that cannot be derogated from by the will or consent of States *inter se*, will meet with no objections. In fact, even an observer sceptical *vis-à-vis* the possibility of natural law constituting anything like an operative, directly applicable system of rules, might concede that, if natural law considerations were to have any place in legal discourse, it might be that of setting limits to the validity of certain norms of positive law, of depriving them of their claim to authority, whenever they evidently and grossly contradict the postulates of justice.<sup>83</sup>

For strict positivists, even though considerations of the morality *vel non* of State behaviour to be regulated in consensual instruments will of course be relevant in the extra- or meta-legal sphere, such arguments will not be acceptable as legal arguments proper, carrying legal consequences such as, for instance, the nullity of

79 See, for instance, *Universelles Völkerrecht*, *supra* note 76, at 380 (§597) et seq.

80 In this sense already Verdross, 'Les principes généraux du droit dans la jurisprudence internationale', 52 *RdC* (1935II) 205.

81 Taking up an idea of his disciple, Karl Zemanek, cf. *id.*, 'The United Nations and the Law of Outer Space', 19 *Year Book of World Affairs* (1965) 199. See Simma, 'Die Erzeugung ungeschriebenen Völkerrechts: Allgemeine Verunsicherung - klärende Beiträge Karl Zemaneks', in K. Ginther *et al.* (eds), *Völkerrecht zwischen normativem Anspruch und politischer Realität. Festschrift für Karl Zemanek zum 65. Geburtstag* (1994) 95, 109.

82 See, *Die Quellen des universellen Völkerrechts*, *supra* note 62, at 128; *Universelles Völkerrecht*, *supra* note 76, at 331 (§526) 384 (§602) 386 (§606) 411 (§639).

83 See, *supra* text accompanied by note 3.

treaties, as long as they are not transformed into prescriptions of positive international law by way of custom or treaty.<sup>84</sup>

Verdross joined the debate in a series of articles published in the mid-1930s.<sup>85</sup> Partly basing himself on the work of F. A. von der Heydte and J. Jurt,<sup>86</sup> he emphasized time and time again that, like all other legal systems, international law also includes - indeed, must by necessity include - certain norms which, as an integral part of the *ordre public* of the international community, may not be repealed or changed by agreements between a smaller circle of states. Verdross drew attention to the fact that until the rise of legal positivism the existence of such peremptory rules was not disputed; natural law scholars had always defended the view that positive international law rested on immutable norms (*ius necessarium*)<sup>P</sup> For him, law and morality are interdependent by necessity and a 'general principle of law' undoubtedly exists belonging to the fundamental, peremptory category outlined in the preceding section which prohibits States from concluding treaties which are *contra bonos mores*.

This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can therefore, admit treaties ... which are obviously in contradiction to the ethics of a certain community.<sup>88</sup>

Verdross then proceeds to the determination of the content of such a general principle. As a first step, he argues that

everywhere such treaties are being *contra bonos mores* which restrict the liberty of one contracting party in an excessive or unworthy manner, or which endanger its most important rights.<sup>81</sup>

Everywhere treaties are regarded as immoral which force one contracting party into a situation which is in contradiction to the ethics of the community.<sup>90</sup>

84 Cf. for instance, Ch. Guggenheim, *Trattato di Diritto internazionale publico*. Vol. I (1953) 57; G. Morelli, *Nozioni di diritto internazionale* (7th ed., 1967) 60; Schwarzenberger, 'International Jus Cogens?', 48 *Texas Law Review* (1965) 455.

85 See, 'Forbidden Treaties in International Law', 31 *American Journal of International Law* (1937) 571, where in note 3 Verdross quotes his earlier publications on the subject. These views were informed not only by the philosophical impulse of the natural lawyer that Verdross had by now become but also by a quite specific legal-political issue, namely that of the validity of the 1919 Paris Peace Treaties. How persistently this problem was on Verdross's mind may be illustrated by the fact that when, in 1979, the present author invited the Viennese master for a visiting lecture in Munich (which turned out to be the last public lecture of his life), Verdross insisted on speaking on precisely this topic.

86 Von der Heydte, 'Die Erscheinungsform des zwischenstaatlichen Rechts: ius cogens und jus dispositivum im Völkerrecht', 16 *Zeitschrift für Völkerrecht* (1932) 461; J. Jurt, *Zwingendes Völkerrecht* (1933).

87 See his reference to Heffter, *Das Europäische Völkerrecht der Gegenwart* (8th ed., 1888) 185, in, for instance, *Universelles Völkerrecht* (3rd ed., 1984) 328 §524.

88 'Forbidden Treaties in International Law', *supra* note 85, at 572.

89 *Ibid.*, 574 (italics omitted).

90 *Ibid.*

Following this, Verdross goes on to ask what are the moral tasks states have to accomplish in the international community, as a universally recognized ethical minimum. In his view, such a minimum includes the following functions:

maintenance of law and order within the states, defence against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad.<sup>91</sup>

As a consequence, treaties which prevent a state from fulfilling one of these essential tasks must be regarded as immoral.

On this basis, Verdross gives the following list of immoral and, consequently, void treaties:

1. Treaties binding a state to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honour or the property of individuals on its territory.
2. Treaties obliging a state to reduce its army in such a way as to render it defenceless against external attacks.
3. Treaties obliging a state to close its hospitals or schools, to extradite or sterilize its women, to kill its children, to close its factories, to leave its fields unploughed, or in other ways to expose its population to distress.
4. Treaties prohibiting a state from protecting its citizens abroad.<sup>92</sup>

Half a century after the drawing up of this list while some elements contained in Verdross's enumeration would have to be modified, or could only be read in a certain limited way, I submit that this list still encapsulates the core of rights *iuris cogentis* appertaining to sovereign states. What modern international law has added to it is an emphasis on peremptory *obligations* on states. In this regard it might be illuminating to compare the principles of *ius cogens* formulated by Verdross in 1937 with his last treatment of the issue in the third edition of *Universelles Völkerrecht*, which was published several years after Verdross's death but whose statements on *ius cogens* bear his unmistakable mark. There, a distinction is drawn between peremptory rules contained in general international law aside from the United Nations Charter and the new *ius cogens* introduced by the Charter. The examples given of treaties contravening the first category bear a close similarity to the 1937 list:

1. Treaties by which two states bind themselves to interfere in the rights of third states; for example, by stipulating that assistance should be given in an unlawful war.
2. Treaties obliging a state to restrict its freedom of action to an extent of incapacitation and inability to honour its duties under international law, for example, by limiting the powers of its police force and thus rendering the maintenance of public order impossible.<sup>93</sup>

91 Ibid, (italics omitted).

92 Ibid., 574-576.

93 *Universelles Völkerrecht* (3rd ed., 1984) 332, §527.

To this are to be added the principles of *ius cogens* introduced by the UN Charter. The most important principle in this regard is the prohibition of the threat or use of force in international relations, because the maintenance of international peace constitutes the ultimate purpose of the world organization.

The second principle of a peremptory nature in the law of the United Nations concerns the respect for fundamental human rights, based on the inherent dignity of the human person and owed to all without distinction as to race, sex, language or religion. Verdross stresses that those rights include not only the classic civil and political liberties but economic, social and cultural rights as well.

Finally, a treaty would also violate the *ius cogens* of the Charter if two or more states thereby committed themselves to prevent a people from exercising its right of self-determination.<sup>94</sup>

Lack of space prevents description here of the recent breakthrough of the idea of *ius cogens*, culminating in its reception by the Vienna Convention on the Law of Treaty and later codification enterprises. But I think it is fair to say that the views expressed by Verdross before World War II foreshadowed the solution<sup>95</sup> hammered out in the UN International Law Commission and by now generally accepted by the international community. It is also well-known that the articles embodied in the 1969 Convention limit themselves to a consensual concept that does not go to the heart of the matter because a substantive definition of *ius cogens* would have been too closely connected to natural law philosophy to be universally acceptable. However, the conception of *ius cogens* will remain incomplete as long as it is not based on a philosophy of values like natural law. In this regard, what Verdross's ideas offer is a natural link between the *ius cogens* rules now codified and one possible philosophical foundation.

## VI. Concluding Remarks

Within the limited space allowed by the present essay I have been able only to detail those of Verdross's ideas which formed the core of his work, where his religious and philosophical convictions had the strongest and most tangible impact on his treatment of positive international law, where Verdross put his heart, so to speak. Let me instantly add, however, that Verdross's strong religious and philosophical convictions never affected his empirical realism and the extreme precision with which he traced international practice and assembled it within a theoretical framework of almost unparalleled consistency. Indeed, I would submit that it is precisely the combination of empirical reliability in the treatment of positive international law and the firm philosophical basis underlying his doctrinal work

94 Ibid., 75-7 (§§96-7).

95 To use an expression by the ILC member A. Tabibi, cf. Simma *et al*, *supra* note 48, at 41 where the influence of natural law, thinking on the genesis of Articles 53 and 64 of the 1969 Convention is traced.

which distinguishes Verdross from most of his contemporaries. A more comprehensive record of Verdross's theoretical achievements would also have to deal with his theory of state competences, particularly his distinction between territorial sovereignty (*territoriale Souveränität*) and territorial jurisdiction and control (*Gebietshoheit*), which is critically assessed by Benedetto Conforti in the present issue;<sup>96</sup> his successful effort to obtain acceptance of the rule according to which treaties are to be interpreted in the light of general international law, first in the *Institut de Droit international* and later, in the International Law Commission's work on the law of treaties;<sup>97</sup> his development of the theories of 'quasi-international agreements' (*quasi-völkerrechtliche Verträge*)<sup>98</sup> and of 'internes Staatsgemeinschaftsrecht';<sup>99</sup> his juridical explanation and classification of the scope of the *domaine reserve* of states in the light of the practice of UN organs to turn formerly domestic issues into matters of international concern<sup>100</sup> and, finally, Verdross's theoretical grounding of the permanent neutrality of his beloved Austria.<sup>101</sup>

Through his long-standing membership of the International Law Commission, Verdross found himself in a position where he could contribute many of his ideas to the international codification process even more directly than through the influence of his scholarly writing. As a judge of the European Court of Human Rights in Strasbourg, he participated in the formative phase of the most advanced system for the protection of human rights worldwide. Within the German-speaking countries, Alfred Verdross shaped international legal thinking in a way unparalleled in the past and, almost certainly, also in the future. As such his work forms an influential part of the history of European legal and social thought of this century.

96 Verdross expanded this theoretical distinction and applied it to a concrete situation in the following collaborative effort: A. Verdross, B. Simma, R. Geiger, *Territoriale Souveränität und Gebietshoheit. Zur völkerrechtlichen Lage der Oder-Neisse-Gebiete* (1980); *id.*, 'Territoriale Souveränität und Gebietshoheit', 31 *Österreichische Zeitschrift für öffentliches Recht und Völkerrecht* (1980) 223. Since then, I have had the opportunity to rely on the distinction in my practical work on other controversial territorial issues, in which I always found it extremely helpful.

97 Cf. Uibopuu, 'Interpretation of Treaties in the Light of International Law', 40 *Yearbook of the A A A.* (1970) 22.

98 See the bibliographical references in, 'Der Beitrag ...', *supra* note 48, at 52 n. 178.

99 See, *Universelles Völkerrecht*, *supra* note 93, at 3 §3.

100 See the references in, 'Der Beitrag...', *supra* note 48, at 52 n. 180, and *Universelles Völkerrecht*, *supra* note 93, at 161.

101 References in, 'Der Beitrag...', *supra* note 48, at 52 n. 182.