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German Legal Scholarship as Reflected in Hague Academy Courses on Public International Law

By Robert Kolb

A. Introduction

Devoting some interest to German – and more generally national – legal scholarship in the Hague Academy courses is a rewarding, if considerable, undertaking. The Hague Academy was created in 1923 in the wake of the rising hopes international law prompted in a more ordered and peaceful world after the war-torn years, one of the hallmarks of this spirit being the creation of the League of Nations.\(^1\) The Academy was established with the financial and logistical help of the Carnegie Foundation for International Peace through the arm of its powerful internationalist Secretary General, Professor James Brown Scott. It was meant to bring together students, policy-makers, staff members, politicians, and all other interested persons, mainly the élites, from all over the world. The aim was to create an international spirit; to provide research and learning facilities (e.g. through the famous library); and to allow those persons to learn about international law and the ways it is seen through the various personal and national lenses. The hope was to further a variety of scientific thinking in a unity of aim and commitment. Article 2 of the Statute of 1923 provided that: “[The Academy] constitue un centre de hautes études de droit international (public et privé) et des sciences connexes pour faciliter l’examen approfondi et impartial des questions se rattachant aux rapports juridiques internationaux.” Pluralism of thinking through the national or cultural legal traditions was certainly an aim of the Academy. It was perceived as the only way to reach some common understanding and to abate artificial barriers among nations. However, on one point the Academy has been most scrupulous and

keenly attentive since its beginnings: the quest for impartiality of the lecturers. That was the reason why in 1923, for the time being, it decided to exclude the laws of war from the topics accepted for lecturing. It was felt that the recent World War was still too present in peoples’ minds and rendered difficult any reading in “the impartial and objective spirit that the Academy wants to promote.”

Is there any specificity of German style or content in the Hague Academy courses on public international law questions? We may feel free not to distinguish too sharply between German and Austrian courses, since there is a common intellectual basis. Certainly, the Vienna School around Hans Kelsen has specificities, but the fact that it also belongs to a common German-world intellectual background can hardly be cast into doubt. Conversely, a series of German legal scholars left Germany at a certain time of their life and assimilated elsewhere to the point that it is difficult to count them as purely “German.” This is the case, for example, of Georg Schwarzenberger who left Germany in the 1930s and established himself in London. Another example is that of Wolfgang Friedmann’s emigration to the US. Such authors will not be included here mainly for reasons of space. Some introductory remarks are warranted at this stage.

First, one may note that the German and Italian legal scholarship of 1923–1939 proceed from a common basis, namely a theoretical legal analysis around the general concepts of the law. This can be seen as an outflow of the old Allgemeine Rechtslehre of the nineteenth century. The concepts analyzed are e.g. “State,” “contract (treaty),” “legal person,” “responsibility,” “imputation,” “source,” “will,” etc. These terms are deconstructed and put into new systematic relationships. The French teaching of the same period concentrates on classification rather than on conceptual analysis. As the German school it has also a more theoretical flavor than the Anglo-Saxon school, but its main research is to explain legally the interactions within the international society and to give to international law as a whole a scientific construction. At the other end, one finds the Anglo-Saxon scholarship, which proceeds from more pragmatical bases considering questions, problems, cases, legal answers. The main asset is here the “problem” and not the “concept.” The tendency is thus to proceed upside down, starting from a concrete problem and trying to find its proper legal clothing. These contrasts have to a large extent faded away in a lengthy and slow process since 1945.

2 See Préface, RdC 1 (1923), vii: “dans l’esprit objectif et impartial dont l’Académie entend s’inspirer.”
However, one may note the particular density and theoretical *aisance* of the interwar period courses of German authors. *Heinrich Triepel*’s³ and *Hans Kelsen*’s⁴ courses on the relationships between internal and international law are outstanding examples, where the line and flow of reasoning is at once powerful, subtle, precise and unbroken, like in a Mozartean piece of music.

*Second*, much of the specific German feel of the courses has been lost through the translations. Before the Second World War all the courses were translated into French. Thenceforth, both English and French were accepted languages for publications at the Academy. Thus, before and after the war, German courses were not published in their original language. It is a unique characteristic of the German language that it fails to be fully translatable into another language. The genius of German consists in its ability to state in a short sentence a universe of extremely densely packed messages. It proceeds vertically, each sentence being a black hole of energy and concentration, at once conceptual and relational. The French language is quite different. It hardly sustains such a compact density and generally proceeds horizontally, through chains of sentences linked by words such as "*par conséquent*" or "*en effet*." There is no doubt that a great density can also be obtained thus. But it is rather a density of the whole rather than a density of the single unit. English is situated in between. If one compares original German legal texts (if well written) and their translations into the two other indicated languages, one often has the impression that an essential momentum of the text has been lost. The author of these lines remembers having this lively impression when comparing the *Bruno Simma* Commentary on the law of the Charter of the UN in its German version and its first English edition.⁵ It comes to no surprise that the translations of the Hague Academy also to some extent modified the characteristics of text, taking away some of its original aspects. Moreover, not all the translations have been a success.

*Third*, one may notice that – perhaps more than authors from other States – the German scholars were from the beginning teachers of "public law" rather than simply of public international law. This proceeds from the organizations of

³ *Heinrich Triepel*, *Les rapports entre le droit interne et le droit international*, RdC 1 (1923), 73, 77 et seq.

⁴ *Hans Kelsen*, *Les rapports de système entre le droit interne et le droit international public*, RdC 14 (1926), 227, 231 et seq.

the professorships in Germany. However, it may have its deeper root in the fact that Germany consolidated late as a national State and has been for the bigger part of the nineteenth century a loosely organized confederation, with the several States having a *jus tractatus* and *legationis* among themselves. Within this federal structure, internal and international law were intermingled. Thus, it comes to no surprise that many great courses of the early days, such as those of Heinrich Triepel or Hans Kelsen already quoted, are typically courses on international law discussed in relation with the law of a confederation of States (monism or dualism): *jus confederationis maxima vel non*. One knows for instance that a significant part of Hans Kelsen’s doctrine is based on the idea that international law and national law are part of a single legal system, since the legal order cannot contradict itself: internal law cannot require something different from international law if both are to be taken simultaneously as legal orders and not as orders of different type (legal, moral). But if that is true, then international law and internal law necessarily interact to the same extent as federal law and state law. International law is part and parcel of a federalization of the world, of the emergence of a *civitas maxima*. Overall, it may thus not be by accident that the most popular theme for German special courses before the war was the relationships between the internal and the international legal order. This theme was taught three times, by Heinrich Triepel (1923), by Hans Kelsen (1926) and by Gustav A. Walz (1937).

*Fourth,* one may notice a significant decline of German courses at the Hague Academy during the years 1947 to 1973 and an only partial recovery thereafter. Certainly the more or less ambiguous position of some leading German scholars during the Nazi régime (*e.g.* Friedrich Berber, Georg Dahm) led the Academy Curatorium not to invite them. An exception was made for the pacifists like Hans Wehberg, having emigrated from Germany, and not being suspected at all of any type of sympathy for the Nazi régime. However, it is interesting to note that the significant decrease of public international law courses by Germans was not equally reflected in a decrease of private international law courses. In this area, the continuity has remained unbroken. There were at least roughly twenty important courses on public international law given by German authors during the period from 1923 to 1939 (for a listing, see *infra*). In these seventeen years, two general courses of public international law were given by Germans; four if one includes Austrians. In the period since 1947, there have been approximately twelve important courses held by Germans, three of them being general courses.

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6 Kelsen (note 4), 263 *et seq.*
This is a significant decline. To be sure, this is not only due to the phenomenon of Nazism. Since 1947, many nations strove upwards in international relations and the number of qualified lawyers coming from all over the world dramatically increased. It is natural that the relative lecturing shares of each nation should have decreased. However, if one compares German with French invites after the Second World War, it is easy to see that the decline of German scholarship is something more real. Indeed, French scholarship did not decline in the same proportion, quite the contrary. If one just compares the number of general courses, there were three German and three Austrian ones in comparison to ten French and four Belgian ones.

Fifth, a general classification of the German courses leads to the following picture. In the period between 1923 to 1939, the content and spirit of the German lectures split into two main strands. This reflected the major ideological and political drift in German society in this troubled period. On the one hand there were those authors who strove to give international law, the League of Nations and the idea of peace a place. This group of “internationalists” split into two under-currents. A first current chose to construct international law as a system able to provide a global framework for international life. International law should not be any more a collection of single but unrelated rules emerging from \textit{ad hoc} practice of the States. On the contrary, it should be constructed as a mature and complete legal system, able to eliminate its gaps by systematic links. Thus, international law should be based on some form of a constitution. Mainly authors such as \textit{Alfred Verdross} (1927, 1929 and 1935) and \textit{Hans Kelsen} (1926, 1932) attempted such systematization. A second current went in the same direction by attaching more direct importance to concrete values rather than to systematic thinking. The main value of this time was the fight against war. This group of pacifists included mainly \textit{Walther Schücking} (1927), \textit{Hans Wehberg} (1925, 1928, 1931, 1934 and 1938) and the Norwegian \textit{Christian L. Lange} (1926).\footnote{\textit{Christian L. Lange}, Histoire de la doctrine pacifique et de son influence sur le développement du droit international, RdC 13 (1926), 171.}

In the opposing group, one finds authors influenced to some extent by Hegel’s legal philosophy. They tend to exalt the State as the highest realization of human spirit in history, knowing of no superior, and incapable by definition to have a superior. These authors tend to view international law as a sort of “external public law” of the State, or at least as order flowing from and hence subordinated to the will of the State. The late national unity in Germany and
Italy carried a heavy influence of Hegelianism in the philosophic and legal thought of these two countries (see Adolf Lasson in Germany or Bertrando Spaventa or even Benedetto Croce in Italy). In this circle, a strict voluntaristic positivism (no obligation of a State without its consent) and dualism between internal law and international law prevailed. One may put into this group, albeit with many shades, authors such as Erich Kaufmann (1935), Walther Schönborn (1929), Ernst Wolgast (1937), and also authors who finally deviated towards Nazism, where one sometimes feels shadows of völkisches Rechtsdenken, such as Gustav A. Walz (1937) or Carl Bilfinger (1938). Other authors clung to a State-centered positivism based on practical experience. In this regard they shared some of the basic premises of the Hegelian School, namely the practical preeminence of the State over all other subjects or phenomena. One may mention Karl Strupp (1930, 1934) in this group.

In the period between 1947 and today, German scholarship has not displayed such a sharp internal contrast any more. Rather, it moves on the safe ground of the Federal Republic’s Grundrechtsdemokratie and consequent generosity towards international integration and law. One of its distinctive benchmarks becomes the idea of international law as law of the “global human international community,” a process sometimes called “constitutionalization.” Two of the three general courses held by Germans after the war neatly display this change in paradigm. Hermann Mosler’s course of 1974 bears the telling title “The International Society as a Legal Community.” The Course of Christian Tomuschat of 1999 bears the not less explicit title “International Law: Ensuring the Survival of Mankind on the Eve of a New Century.” In the same vein, Bruno Simma’s 1994 course must be noted. It was titled “From Bilateralism to Community Interest in International Law.” We will come back to these aspects.

In one sentence, one may say that the content of German scholarship at the Hague Academy moved from a clash between “internationalists” (formal or material) and “nationalists” to an “international community-oriented” school of thought.

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8 Who was, however, much more moderate in his general course of 1935 than in his book Erich Kaufmann, Das Wesen des Völkerrechts und die Clausula rebus sic stantibus (1911).
B. Overview of German Courses

It may be useful at this point to give a general overview of German courses at The Hague in the form of a list. For the period between 1923 and 1939, there were the following courses:

*Heinrich Triepel*, Les rapports entre le droit interne et le droit international, RdC 1 (1923), 73–121.

*Hans Wehberg*, Le Protocole de Genève, RdC 7 (1925), 1–150.


*Hans Kelsen* (Austria), Les rapports de système entre le droit interne et le droit international public, RdC 14 (1926), 227–331.

*Rudolf Laun*, Le régime international des ports, RdC 15 (1926), 5–143.

*Alfred Verdross* (Austria), Le fondement du droit international, RdC 16 (1927), 247–323.

*Herbert Kraus*, La morale internationale, RdC 16 (1927), 385–539.


*Hans Wehberg*, Le problème de la mise de la guerre hors la loi, RdC 24 (1928), 147–306.

*Walther Schönborn*, La nature juridique du territoire, RdC 30 (1929), 81–189.

*Alfred Verdross* (Austria), Règles générales du droit international de la paix, RdC 30 (1929), 271–517.

*Josef L. Kunz* (Austria), L’option de nationalité, RdC 31 (1930), 107–176.

*Karl Strupp*, Le droit du juge international de statuer selon l’équité, RdC 33 (1930), 351–481.

*Karl Wolff* (Austria), Les principes généraux du droit applicables dans les rapports internationaux, RdC 36 (1931), 479–553.

*Heinrich Rauchberg*, Les obligations juridiques des membres de la Société des Nations pour le maintien de la paix, RdC 37 (1931), 83–204.

*Alfred Verdross* (Austria), Les règles internationales concernant le traitement des étrangers, RdC 37 (1931), 323–412.


Rudolf Blühdorn, Le fonctionnancement et la jurisprudence des Tribunaux arbitraux mixtes créés par les Traités de Paris, RdC 41 (1932), 137–244.

Hans Kelsen (Austria), Théorie générale du droit international public, RdC 42 (1932), 117–351.

Karl Strupp, Les règles générales du droit de la paix, RdC 47 (1934), 258–595.

Hans Wehberg, La police internationale, RdC 48 (1934), 1–132.

Herbert Kraus, Système et fonctions des traités internationaux, RdC 50 (1934), 311–400.

Alfred Verdross (Austria), Les principes généraux du droit dans la jurisprudence internationale, RdC 52 (1935), 191–251.

Erich Kaufmann, Règles générales du droit de la paix, RdC 54 (1935), 309–620.


Ernst Wolgast, Le diplomate et ses fonctions (décuits de la nature de l'organisation internationale publique du pouvoir externe de l'Etat), RdC 60 (1937), 243–370.


Viktor Bruns, La Cour permanente de Justice Internationale, son organisation et sa compétence, RdC 62 (1937), 547–671.

Hans Wehberg, La guerre civile et le droit international, RdC 63 (1938), 1–127.


In the period since 1947, one must mention the following courses, concentrating this time on the Germans, to the exclusion of the Austrians:9

Hans Wehberg, L'interdiction du recours à la force. Le principe et les problèmes qui se posent, RdC 78 (1951), 1–121.


9 Among the Austrian authors mentioned in the previous phase, Hans Kelsen and Alfred Verdross held further courses at the Academy in volumes 83 (Alfred Verdross, Idées Directrices de l'Organisation des Nations Unies, RdC 83 (1953), 1) and 84 (Hans Kelsen, Théorie du Droit International Public, RdC 84, 1, Kelsen being thus the only author in history to ever have held two general courses). Josef Kunz held a course in volume 88 on the crisis and transformation of International Law (Josef Kunz, La Crise et les Transformations du Droit des Gens, RdC 88 (1955), 1).
Hermann Mosler, L’application du droit international public par les tribunaux nationaux, RdC 91 (1957), 619–711.


Bernhard Graefrath (GDR), Responsibility and Damages Caused: Relationship between Responsibility and Damages, RdC 185 (1984), 9–150.


Christian Tomuschat, Obligations Arising for States Without or Against their Will, RdC 241 (1993), 195–374.


C. German Legal Scholarship at the Hague Academy: from “Constitutionalization” to “Communautarization” of International Law

The courses held at The Hague cover the twentieth century from 1923 up to its end. As it is known, politically this century starts in 1919, through the peace of Versailles. The courses thus testify to the developments and, indeed, to tectonic shifts within the doctrinal and practical conceptions of international law of the last century. Which shifts in understanding and construction of
international law were the most meaningful? The present writer has argued elsewhere\textsuperscript{10} that the main change has been twofold:

*Establishment of a System:* In the first part of the century (1919–1945) progressive authors essentially attempted to construct international law as a full-fledged legal order, *i.e.* as a complete system of law based on its own primary and secondary rules; on its own material rules and rules of construction (*e.g.* for filling the gaps). The main aim is to establish international law as a complete and autonomous legal system rather than as a haphazard collection of rules of political-legal prudence arising from some shapeless State practice. By the same token, the effort is to merge the scraps of particular rules into a system of general concepts that bear witness to the unity of the law.

*Community-commitment of the System:* In the second part of the century (1945–1999), the greatest challenge was to increase the "community-orientation" of international law. There was no longer really a quest for construction of the whole as a unitary system; the effort was rather bent to the content of the law in order to reduce all its particular norms to some fundamental requirements of a common (universal) weal. This was done by spelling out common core values of the international community and of all mankind. The aim was to insure a proper survival of mankind and create a more just world order. The common dangers of destruction by nuclear weapons, of totalitarian ruthlessness, of depletion of the environment, of instability due to poverty and conflict— all these factors cried out for a more effective world order based on international law. International law thus progressively becomes a mature system, inherently linked with the great questions and struggles of municipal constitutional law.

The German scholarship of public international law at the Academy is one of the best examples for illustrating this step from "constitutionalization"\textsuperscript{11} to "communautarization" of international law.

\textsuperscript{10} Robert Kolb, Réflexions de philosophie du droit international (2003), 5 et seq., 19 et seq.

\textsuperscript{11} It will be noted that we do not use this word here in the most common sense of contemporary legal literature. On this concept, see infra.
I. German Legal Scholarship between 1923 and 1939 at the Hague Academy: State-Centered Versions versus Community-Centered Versions

1. General Outlook

In the nineteenth century, the predominance of positivism had different consequences in the internal and in the international sphere. Positivism was the result of a triple evolution:

1. The codification of the dictates of "natural law" in a series of codes of private law, and in constitutions for public law. Once codified in codes or constitutions, its principles and rules ceased to be the object of theoretical speculation. They became the objects of scientific analysis and of technical exposition. Positive construction of the data took the place of philosophical speculation over the best society and the best law.

2. The huge attractions of natural sciences producing purportedly exact results and permitting great technical progresses. Their method, which is observation of facts, consequently became an example for all sciences. Positivism proposes an objective vision of the reality. It limits the scientific cognizance to observable facts: verum ipsum factum. In the realm of law, such observable facts are laws emanated in a specific procedure or acts of will by the subjects of the law. The will is an observable fact of reality. Justice, righteousness, or any older natural law concepts are not.

3. The nineteenth century saw the rise of the national and democratic State. Hence, the idea of an autonomous "will" of the nation-State, and eventually of its people, became a first paradigm or a dogma. From there, it is only one step to proclaim that the nation-State is the highest realization of the objective spirit; that the State can only bind itself and that it remains bound only so long as it chooses to be bound; that war is a glorious enterprise for vital peoples in the eternal adventure of development of their life conditions and culture; that the tribunal of history will recognize the righteousness of those who finally win since what is real is necessarily reasonable and just. This is the extreme version of Hegelianism. Concentration on the "will" means founding the law on a particular fact. This is the hallmark of positivism.

The effects of positivism were dramatically different in the municipal and in the international society: to sum up, "order inside, anarchy outside," *i.e.*, civil society inside, natural society outside. First, this type of authoritarian positivism resulted in a consolidation of power within the States. The civil society, formed under the galvanizing forces of common and superior organs, brought social peace and prosperity. It led in the nineteenth century to a prolonged phase of tranquility and stability. The result of positivism in the international system was the opposite. The will of the State imposed itself on its subjects in its domestic sphere because relative to those subjects, it was superior. But its will cannot impose itself on the other States in the international arena since among themselves, the States are in a position of juxtaposed equality. If each State is equally sovereign, it cannot be bound by the will of other States but only by its own will. In this fact of normative independence we may precisely envision the State as a sovereign. Consequently, we are led to a conception of a law unable to be imposed from the "outside;" it can only be made by agreement from the "inside." International law is "autonomous" not "heteronomous." There is no force in lawmaking and consequently applying the law. Such a society is bound to a form of anarchy. This approach squares the old circle of maximum freedom, dreamed of by Jean-Jacques Rousseau, each subject "obeying" only its own free will. Conversely, it is obviously sufficient not to want (or not to want any more) in order not to be bound (any more).

This sovereignty-positivism model led thus to a double result, first on the level of power (political) and second on the level of sources (legal):

1. the consecration of anarchy in international relations where no superior will could impose some degree of law and order;¹³

2. the fragmentation of the legal phenomenon, since a legal obligation between States was held to exist only when the States created a rule by concurring wills. This explains why some archipelagic insular legal provisions confront an ocean of space devoid of legal rules (or filled with uncertain and controversial rules). This space is naturally handed over to States’ power politics.

The legal doctrine of the beginning of the twentieth century (and especially the German one) split into a current developing the old State-centered

¹³ See already Immanuel Kant who, in his "Project of Perpetual Peace"(1795) notes that the traditional international law is deprived of any legal force since it is not subjected to the control and sanction of a common superior: Article 2 of the Final Provisions for a Perpetual Peace.
German Legal Scholarship as Reflected in Hague Academy Courses

positivistic construction, while attempting to refine it and to give it more coherence, and another current, attempting reform by proffering a critique on the assumptions of legal positivism.

For that critical school, progress could be achieved only if one rejected a whole series of ideas: that of (absolute) sovereignty; that of binding force of a legal rule only on the basis of individual "wills" of States; that of a limitation of international law to power-oriented State-units; and finally that States cannot be subjected to some form of international organization. Moreover, the first principles of the law able to provide some guiding unity had to be uncovered. The first step to take was then to construct international law as a system based on some unity and superior to municipal law. If international law is superior to internal law, both must perforce be part of the same system (monism). Otherwise it could not be ensured that the international rule prevails over the national one. The unity of the system has sometimes been construed through the idea of an "international constitution." The book by Alfred Verdross, Die Verfassung der Völkerrechtsgemeinschaft (1926), is one of the most powerful exposés of the new approach. International law is there exposed – typical for the Vienna School – as a system based on its proper material, spatial, temporal and personal scope of application. It represents the supreme system according to which the jurisdictional powers (compétences) of States are granted and delimited. Thus, international law is constructed as a global and encompassing system. The starting point of legal thinking is not any more the State (sovereignty), but some form of international society or community.

This effort is shared to some extent by a series of positivistic authors. They tried to use the concepts legated by the old Allgemeine Rechtslehre for con-

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14 The Allgemeine Rechtslehre concentrated on the exploration of the a priori fundamental legal concepts such as "legal norm," "legal person," etc., and on the fundamental structure of the legal relations, "causality," "validity," "will," etc. The content of the law was neglected as being a political and not a scientific question. Names such as those of Adolf Merkel, Karl Binding, Ernst Rudolf Bierling, Carl Bergbohm or Felix Somló are attached to this school of law. See Walter Wilhelm, Zur juristischen Methodenlehre im 19. Jahrhundert (1958); Andreas Funke, Allgemeine Rechtslehre als juristische Strukturttheorie (2004). This school of thought had a parallel and was nourished by the private law school of the Begriffsjurisprudenz derived from neo-Pandectism. See Werner Krawietz (ed.), Theorie und Technik der Begriffsjurisprudenz (1976); Elemer Polay, Ursprung, Entwicklung und Untergang der Pandektistik (1981), 32 et seq.; Karl Larenz, Methodenlehre der Rechtswissenschaft (6th ed. 1991), 19 et seq.; Hans-Peter Haferkamp, Georg Friedrich Puchta und die Begriffsjurisprudenz (2004); Thomas Henkel, Begriffsjurisprudenz und Billigkeit: zum Rechtsformalismus der Pandektistik nach G. F. Puchta (2004).
structuring or reinforcing the international legal order. *Pacta sunt servanda*, the notion of responsibility, that of legal personality, and others, as already noted in the introduction, allowed for the elevation of the degree of abstraction of international law and refined its analysis according to common tools. If one looks into the manuals of the nineteenth century, one finds lengthy explanations split in many volumes and compiled from the scraps of certain rules. Thus, for example, the conditions of every State (sovereign, semi-sovereign, vassal, protected, etc.) are discussed on their own. The very concept of the “State” providing a unique tool is not developed. The same could be said of many other areas. The settlement of disputes is not conceptualized as such; neither is the law of responsibility. Both are left to extra-legal devices, namely diplomacy and war. The use of force is in effect not legally restricted. International law by and large just registers the fact that force is used for *jus in bello* issues and leaves its justification to policy.

Political and sociological events obviously contributed and prepared that shift in thinking. The conception of international society evolved dramatically at the end of the nineteenth century: new States were accepted in the “international community,” which was perceived as a close club of members getting the benefits of *jus publicum europaeum*, and slowly the idea of a global human society developed. The old idea that the “savage tribes and barbaric States” were not part of the international society (or community) disappeared. The League of Nations would be the hallmark of the new idea of a “universal international community” able to formulate and to put into the balance sheets the needs and aspirations of all peoples on a basis of equality. Some parallelism between the State and an international organization is thus created: the League has deliberating and executive arms, albeit in an embryonic state. A World Court is created through the PCIJ. Closer interdependence melts away the distances: telephones, telegraph, airplanes and other devices bring people together who were in the past separated by light-years. Hence, the political and social life strives towards uniformization. This background furthers the conception of international law as unifying. Moreover, it highlights all the material gaps in the system of international law, which the scholars and political forces then try to fill.

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15 As has been said by an eminent specialist: “[The League of Nations] was the first effective move towards the organization of a world-wide political and social order, in which the common interests of humanity could be seen and served across the barriers of national tradition, racial difference, or geographical separation. […] It was always, in success and failure alike, the embodiment in constitutional form of mankind’s aspirations towards peace and towards a rationally organized world.” Francis Paul Walters, A History of the League of Nations (1952), 1 and 3.
In a sense, one may say that the basis of the reasoning has been reversed. Whereas in the nineteenth century, more often than not, the work of the jurist had been perceived as bound to classify all the facts of observation, now, in the twentieth, the attempt is to think of the necessary bases and contents of an international legal order with a view to insure its proper functioning and its improvement for the common weal. The step is thus from “registration,” *i.e.* mirroring a state of fact, to “social engineering,” to development of the legal order. With this new teleological approach, the limits of positivism were crossed.

We must obviously be attentive to the fact that this innovatory school of thought shares its place with proponents of the more traditional view. In order to give those “sovereignists” their proper place, we shall start the following section with them, before moving to the critics who sought a fresh start.

2. State-Centered (Sovereignist) Views: Prolonging the Lines of Tradition

We may start our enquiry with the German authors prolonging the lines of the old positivistic and State-centered school. Thereby, we shall not forget to ask on what points those lecturing at The Hague made innovative strides.

In the second part of the nineteenth century – by a progressive merging of elements of Hegelianism and analytical jurisprudence (*Allgemeine Recht­lehre*) – the most powerful German scholars on international law started from the assumption that a State can bind itself only through its unilateral will: *Selbstverpflichtungslehre*. The stamp of this doctrine is that international law emanates from constitutional law. It is created by organs of municipal law according to the powers given to them by their internal law to perform acts relevant for international relations (*i.e.* to express the consent of the State to be bound by an international obligation). International law is then the result of the agreements concluded through a series of “self-obligations” of the States. But then international law not only flows from municipal law, but is also, logically, subordinated to it. Authors such as *Carl Bergbohm*¹⁶ and *Georg Jellinek*¹⁷ had propounded this most restrictive view of an international legal order.¹⁸ In the

¹⁶ *Carl Bergbohm*, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (1877), 39.
¹⁷ *Georg Jellinek*, *Die rechtliche Natur des Staatsvertrages* (1880), 6 *et seq.*
¹⁸ See *Jean Spiropoulos*, *Le fondement du droit international*, Revue de droit interna­tional 9 (1929), 98 *et seq.*; *Truyol y Serra/Kolb* (note 12), 61 *et seq.*
period from 1923 to 1939, this position had been completely abandoned. The German authors at the Academy following the positivistic tradition rejected the idea of unilateral submission to international law through acts controlled by constitutional law. In his course of 1923, Heinrich Triepel recalled his theory of the “Vereinbarung.” According to it, a specific type of collective compact establishing the binding nature of agreements (pacta sunt servanda) creates international law. This original compact furnishes the basis for all the subordinate substantive norms of international law adopted through the medium of concrete agreements. The assumption of this school of thought is that international law can be created only through agreements. The agreement is thus once the constitutional basis of international law (Vereinbarung) and the vehicle for the adoption of concrete provisions. There is here some restriction on the reach of positivism: the agreement remains the sole source of international law (which is positivistic); but at the same time some norm superior to the single wills of States is projected (pacta sunt servanda at least; this goes beyond strict positivism). From there it is only one step to recognize that the norm pacta sunt servanda cannot depend on any empirically binding will, since the binding nature of the will is precisely already supposed in the norm pacta sunt servanda. Thus, there is here a significant shift towards some form of “objective” international law: (1) in more progressive constructions through the instrumentality of one or two fundamental norms, not dependent upon the will of States, but rather supposed in order to give legal meaning to the expression of their wills (e.g., pacta sunt servanda); (2) in the others, through the idea that some fundamental “agreement” is the basis of international law, rather than a series of unilateral and unconnected acts of self-commitment.

In this sense, the lecturers of the Hague Academy represent a developed and more mature positivism than that of their fathers. In their revised doctrine, the seeds for the demise of strict positivism were obviously included. If at least some fundamental norms are independent from the will of States, the foundation of international law cannot be simply and exclusively voluntary.

If an “agreement” is the basis of international law, this legal order distinguishes itself strictly from the internal legal order. International society is based on coordination of equals (hence the agreement as its sole source) whereas municipal society is based on subordination of individuals to the State (hence the law, loi, or statute as its main source). International society is a society of

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19 Triepel (note 3), 82–83, passage quoted hereafter in the text.
States and some other powers; municipal society is premised on the relations of individuals with the State and among themselves. To a coordinative society of equal powers responds a subordinative society of unequal public and private entities. From there flows the idea of dualism: international law and municipal law are two entirely separated legal orders. Positivism as to law creation is thus accompanied (1) by a limited concept of legal personality (only States are subjects of international law, *jus inter gentes*) and (2) dualism between the legal orders.

These are the hallmarks of one wing of German scholarship at the Hague. Let us give the floor to some passages illustrating this approach. In his lecture of 1923, Heinrich Triepel expresses himself as follows on the basis of international law (will and dualism):

Nous appelons droit, dans le sens objectif, un ensemble de règles juridiques. Or une règle juridique est le contenu d’une volonté supérieure aux volontés individuelles, manifestée en vue de limiter les sphères des volontés humaines qui lui sont soumises. La formation de la règle juridique est ainsi une déclaration de volonté, déclaration d’après laquelle quelque chose doit devenir un droit. Nous nommons source juridique la volonté dont la règle juridique dérive. Dans le droit interne la source de droit est en premier lieu la volonté de l’État lui-même. De même dans la sphère des relations entre États, la source de droit ne peut être qu’une volonté émanant d’États. Mais il est évident que cette volonté, qui doit être obligatoire pour une pluralité d’États, ne peut pas appartenir à un seul État. Ni la loi d’un État par elle seule, ni des lois concordantes de plusieurs États, n’ont qualité pour imposer aux membres égaux de la communauté internationale des règles obligatoires de conduite. Mais si la volonté d’aucun État particulier ne peut créer un droit international, on ne peut imaginer qu’une seule chose: c’est qu’une volonté commune, née de l’union de volontés particulières, se trouve capable de remplir cette tâche. Peut seule être source du droit international, une volonté commune de plusieurs ou de nombreux États. Nous regardons comme moyen de constituer une telle unité de volontés la ‘Vereinbarung,’ terme dont on se sert dans la doctrine allemande pour désigner les véritables unions de volontés, et les distinguer des ‘contrats’ qui sont, d’après nous, des accords de plusieurs personnes pour des déclarations de volontés d’un contenu opposé. Nous trouvons cette ‘Vereinbarung’ dans les traités par lesquels plusieurs États adoptent une règle qui doit régir leur conduite d’une façon permanente. Peu importe que ces traités soient conclus entre un grand nombre d’États, comme par exemple la Convention de Genève, l’Acte de Congo, l’Acte anti-esclavagiste, la Déclaration de Paris sur le droit maritime, les conventions de la Haye et beaucoup d’autres, ou qu’ils soient conclus seulement entre deux ou trois États, pourvu qu’ils renferment des règles juridiques, c’est-à-dire du droit objectif. Mais il se peut aussi que les États participants donnent à entendre par des actes concluants qu’ils veulent être liés par une certaine règle. On parle ordinairement en ce cas d’une déclaration ‘tacite’ de volonté. Une partie importante du droit international a été créée de cette manière; on la désigne habituellement du nom de droit international coutumier.
Si les déductions qui viennent d’être faites sont exactes, la conclusion suivante résulte: le droit international public et le droit interne sont non seulement des parties des branches du droit distinctes, mais aussi des systèmes juridiques distincts. Ce sont deux cercles qui sont en contact intime, mais qui ne se superposent jamais. Puisqu’il est impossible qu’il y ait jamais une ‘concurrence’ entre les sources des deux systèmes juridiques.

In his general course of 1934, Karl Strupp expresses himself as follows on agreements as foundations of international law (while being critical of the Ver einbarung-theory):

Dans presque tous les ouvrages qui traitent cette matière on s’est accoutumé à parler d’au moins deux sources du droit des gens, l’une étant la coutume et l’autre le trait international (traité écrit). Cette manière de voir est frappante. Car si les États sont égaux entre eux et s’il n’existe pas de supérieur leur dictant ses lois, pas de pouvoir majoritaire non plus, on ne peut parvenir qu’à la conclusion: pas de droit international sans des volontés concordantes, sans un traité.

And:

De ce qui précède, on peut tirer la conclusion suivante: il y a deux sortes de pacte tacites, le pacte tacite au sens étroit que j’appellerai ‘pactum tacitum simplex,’ et le pacte tacite que j’appellerai ‘pactum tacitum qualificatum.’

J’entends par le premier un pacte qui se distingue d’un traité écrit, traité proprement dit, simplement par la forme. On peut même se l’imaginer conclu par signes. On pourrait penser aux conventions qui se font entre commandants doués d’un tel pouvoir, explicitement ou implicitement, sur une partie d’un champ de bataille. Ces conventions ont pour but de faire cesser temporairement les hostilités, en vue, par exemple, de l’ensevelissement des morts et de l’enlèvement des blessés. Le signal de cette courte interruption est donné par drapeau blanc. La seconde forme du trait tacite, le ‘pactum qualificatum,’ a un caractère plus compliqué [it is international customary law].

Some authors at the Academy still give to the State metaphysical clothing which takes the form of a perfect and achieved form of human culture fighting for its historical place in the world. It is in the general course of Erich Kauf mann that one feels this approach, albeit in a much more veiled and moderated way than in his book of 1911 on the Clausula Rebus Sic Stantibus. With this author, one of the last German representatives of Hegelianism expresses himself in the Hague Academy. When reading the whole course, it is impossible not to...

20 Triepel (note 3), 82–83.
21 Karl Strupp, Les règles générales du droit de la paix, RdC 47 (1934), 258, 301.
22 Ibid., 303.
23 Kaufmann (note 8).
admire the profound philosophical and historical culture of the author, which may render it difficult to understand some passages of the course for more than one modern reader. Profoundly influenced by the formation of the German State, he identified himself with the national idea and thus with the doctrine of Hegel. There remains throughout his text some penetrating taste of the "objective spirit," which transcends history, single events, wars and treaties. It operates like an enormous staple keeping together and giving sense to unfolding human action. While in his youth he had adhered to the primacy of internal law over international law (in accordance with his Hegelian premises), in the later part of his life he accepted the idea of some international community and law higher to the single States, albeit limiting that "common law" to the minimum necessary for an orderly coordination of independent States. From that time onward, Erich Kaufmann would constantly be seeking some form of dialectic equilibrium between two opposite extremes of sovereignism and internationalism. The Hegelian footprint can be felt in the following passage of his general course of 1935:

Toute analyse approfondie des réalités conduit à des éléments idéaux qui, bien que non palpables par les sens extérieurs et loin de n’avoir qu’une existence subjective et psychologique, sont d’ordre objectif et constitutifs des phénomènes réels: il s’agit de catégories réelles d’ordre général et éternel, de formes substantielles inhérentes aux substances particulières et individuelles. Uniquement lorsqu’on se rend compte de la pénétration réciproque de ces deux sortes de substances, de l’héritage de la raison dans la réalité et de la participation de la réalité à la raison, relations sur lesquelles le monde réel repose, on évite de considérer comme absolu ce qui n’est que relatif et de relater ce qu’il y a de dabsolu dans toute relativité existante. Une vue purement statique est aussi pernicieuse pour la compréhension de la réalité qu’une vue purement dynamique: seule une vue qui sait réparer et rejoindre, d’une part, les éléments constants et statiques et, d’autre part, les éléments dynamiques et se déployant, selon le temps et l’espace, dans le cadre de formes constantes, permet de saisir la réalité. Le pseudo-idéalisme, qui ne voit dans les éléments spirituels constants que des abstractions analytiques, est aussi erroné qu’un pseudo-idéalisme, qui n’y voit que les produits d’esprits subjectifs. De la même façon, un pseudo-réalisme, qui nie l’existence objective d’éléments idéaux (psychologisme), ou qui ne reconnaît comme réel et objectif que ce qui peut être saisi par les sens extérieurs (sensualisme), ou ce qui appartient au monde matériel, voire économique ( matérialisme), est incapable de saisir les véritables réalités. Un véritable réalisme et un véritable idéalisme sont si peu exclusifs l’un de l’autre qu’ils se confondent plutôt dans la même manière de voir: l’éternel dans le passager, et le passager sous l’aspect de l’éternel.

24 There are such profound sentences as the following in the text: "‘Vivre’ dignement exige une perpétuelle μελετή αναπτομαι; la ‘vie’ ne peut sérieusement être comprise que sous l’aspect de l’omniprésence de la ‘mort.’" Erich Kaufmann, Règles générales du droit de la paix, RdC 54 (1935), 309, 522.
Ce réalisme idéaliste ou idéalisme réaliste retiendra toujours le fait que le droit international est le corps de règles de droit dans le cadre desquelles l’histoire moderne joue. L’établissement ou l’invention de règles qui entraveraient l’évolution historique doit être dénué de succès et rester futile; ne peuvent être acceptées comme règles de droit international que des règles qui visent tant les nécessités nationales que les exigences de la communauté internationale.\textsuperscript{25}

On the primacy of the State, one may, for example, recall the following passage:

Le droit à l’existence signifie qu’aucune obligation ou restriction de son indépendance ne peut être imposée à un État, qui pourrait compromettre les bases de sa vie et de sa viabilité; les États ont le droit d’opposer à toute réclamation aboutirait à ce résultat l’exception de la viabilité.\textsuperscript{26}


There are essentially two types of community-centered German doctrines the Hague lectures during the inter-war period. \textit{First}, there is the Vienna School with Hans Kelsen, Alfred Verdross and Josef Kunz, amongst others. Its main aim has been to elaborate the “constitutional” principles allowing the international legal order to be envisioned as one single coherent legal system close interconnected to the municipal law of the States through the idea of normative hierarchy. \textit{Second}, there is a pacifist school with authors such as Hans Wehbe or Walther Schücking.\textsuperscript{27} They sought to develop international law towards a more complete and thorough body of rules allowing for the creation of conditions of social order, justice and redistribution, as well as, mainly, to keep the peace by international institutional action (sanctions).

\textsuperscript{25} Ibid., 319–320.

\textsuperscript{26} Ibid., 577. See also the heavy account of the State as power on 348 et seq.; \textit{Eri Kaufmann} also considers the patrimony of the State to be part and parcel of its constitutive elements (392 et seq.): the State is at once power and wealth, and both may be protected against the outside. For a fuller account of this course, see \textit{Robert Kolb}, \textit{I cours généraux de droit international public tenus à l’Académie de droit international La Haye} (2003), 138 et seq.

\textsuperscript{27} As to the life and work of Hans Wehbe and Walther Schücking, see \textit{Fra Bodendiek}, Walther Schücking und Hans Wehbe – Pazifistische Völkerrechtslehre der ersten Hälfte des 20. Jahrhunderts, \textit{Die Friedens-Warte} 74 (1999), 79 et seq.
a) Vienna School

This is not the place to give a full account of the Vienna School of Law or of its doctrine of international law.\textsuperscript{28} We may concentrate on its major aspects in writings of Hans Kelsen\textsuperscript{29} and Alfred Verdross.\textsuperscript{30}

Hans Kelsen sought to construct a legal system on the strict scientific premises of formalism and relativism. Hence, the conception of positive law had to be freed from any specific content in order to become a perfect mechanism (like a Swiss watch) instead of being the expression of a contingent ideology. Only the form, not the content, can be scientifically described. Hans Kelsen concentrates – in a sort of rebirth of an Allgemeine Rechtslehre enriched with a philosophical quest for completeness and unity – on the fundamental concepts of the legal order and on their relationships. To him the only scientific way to understand the law is to uncover its essential unity. If the legal system were not unique, there would potentially exist unsolvable contradictions within its body, one norm requiring an actor to do one thing and another norm requiring from him, at the same time, to do something different. These contradictions could not be solved, since one norm can directly interact legally with another only if they are part of the same system. However, interactions and contradictions of norms of different systems are possible to the extent that both norms are not of the same type, \textit{e.g.} not both legal. A contradiction could consequently only mean that the concurring norms are not on the same footing; are not both legal. Thus, if there were contradictions, only one norm could apply as being legal (positive law), the other being in such a case necessarily non-legal (\textit{e.g.} moral). The principle of non-contradiction within one and the same class of norms is indeed an inescapable precept of logic applicable also to normative sciences. Hence, the legal order must be uniform through all its parts.

But if the preceding is true, international law and internal law are necessarily of the same type. They are legal norms addressing specific injunctions to individuals to do or abstain from doing something. Then, the only way to scientifically coordinate both is to understand them as being hierarchically ordered. For this

\textsuperscript{28} A fuller account and many references can be found in Truyol y Serra/Kolb (note 12), 77 \textit{et seq.}

\textsuperscript{29} See the contributions in EJIL 9 (1998), 287 \textit{et seq.}

\textsuperscript{30} See the contributions in EJIL 6 (1995), 32 \textit{et seq.}
reason as well as for others, the legal order reflects a great pyramid rooted in a hypothetical Grundnorm. Politically, that version ends up with a vision of world federalism. But does that not imply an international legal order superior to the municipal legal orders? Is international law not necessarily superior because only it – being more “ecumenical” and thus all encompassing – is able to perform the function of delimiting the spatial and other scopes of application of the various national legal orders? Hans Kelsen hesitated to finally commit himself to that view. He maintained that the only safe scientific principle was that of unity and of non-contradiction. Thus, a conception where municipal law is supreme is in his eyes a scientifically valid alternative to the construction giving primacy to international law. Supremacy of municipal law does not explain satisfactorily all facts of international life and leads to awkward results. But, according to Hans Kelsen, the choice is here necessarily ideological and cannot be scientifically justified. The normative pretense of the legal science rooted in the separation of Sein and Sollen explains that the validity of a theory cannot be tested with regard to the facts, i.e. by adopting the one that better explains the facts of international life. This explains why Hans Kelsen would not accept the argument that the extent States in fact recognize the existence of international law and to the extent international law can exist as an objective legal system only if it has primacy over municipal law, then international law must inescapably have superior force. This would be measuring a Sollen to a Sein.

These aspects of monism and principium unitatis, primacy of municipal or international law, but also the rejection of the principle of sovereignty, of concepts such as “legal personality of the State” or “subjective rights,” the identification of the State and the legal order, the sanction as the constitutive element of the law, are the characteristic and specific features of the pure law-doctrine.

Let us give the floor to Hans Kelsen to see how he argues some of these points, i.e. the vision of law as an order organizing sanctions in case of violations of the norms it poses:

31 E.g. Hans Kelsen maintains a quite strict separation of Sein and Sollen, which implies that the validity of a norm can flow only from another norm and never from a fact. Then, any norm is founded on a higher norm which regulates its emergence. One thus ends up with a pyramid, culminating in a hypothetical supreme norm.

32 But it has been convincingly argued that Hans Kelsen in fact reasons always on the basis of the primacy of international law, on which his entire system is premised; see Alfred Rub, Hans Kelsens Völkerrechtslehre (1995), 435.
Le droit est un ordre de contrainte: les normes constitutives d'un ordre juridique prescrivent la contrainte. Elles déterminent les conditions auxquelles seules la contrainte physique peut, doit être employée par un homme envers un autre. Si la société ne connaissait plus la contrainte, le règlement des actions humaines cesserait d'être du droit. Celui-ci est, en effet, caractérisé par la manière dont il s'efforce de provoquer la conduite souhaitée: il fait d'un acte de contrainte la conséquence de la conduite contraire (contraire à la conduite souhaitée).

Telle est en effet la forme essentielle de toute règle de droit: unir deux faits, dont l'un est la conduite socialement nuisible, “l'illicite (Unrecht),” et l'autre, la sanction (Unrechtsfolge).

Lorsqu'on présente le droit comme un ensemble de normes qui rendent obligatoire l'action socialement désirable (par exemple: on en doit pas voler, on doit rendre les sommes empruntées en temps voulu), il n'y a là qu'une manière abrégée de dire qu'un acte de contrainte devra intervenir dans l'hypothèse d'une conduite contraire (contraire à l'action socialement désirable).

Dire que, juridiquement, on ne doit pas voler et que l'on doit rendre les sommes empruntées, cela revient à dire que le voleur doit être puni – le débiteur défaillant exécuté. La norme juridique est premièrement le jugement hypothétique qui fait d'un acte de contrainte la sanction d'un fait illicite. Et ce n’est qu'à titre secondaire, par voie de déduction, que la norme juridique peut être formulée comme prescrivant l'action conforme au droit et qui évite l'application de la contrainte. Car ce n’est que parce qu’un fait est rattaché dans une règle de droit à un acte de contrainte qui en doit être la conséquence qu’il est, juridiquement parlant, illicite, que cette conséquence est une sanction et que le contraire de ce fait-condition doit être considéré comme juridiquement obligatoire.33

International law is primitive because its sanctions are decentralized:

Le droit international général présente ainsi, sur tous les points essentiels, les caractéristiques d'un ordre juridique primitif:

1. Formation fondamentalement coutumière des normes juridiques générales; le droit né de traités conclus entre deux ou plusieurs Etats repose sur la règle qui est d'origine coutumière: Pacta sunt servanda. Le droit édicté par voie de traité n'a ainsi qu'un caractère secondaire;

2. Absence d'organes spécialisés, et pour la législation, et pour l'application des sanctions;

3. Responsabilité collective et responsabilité pour résultat.34

33 Hans Kelsen, Théorie générale du droit international public, RdC 42 (1932), 117, 124 et seq.
34 Ibid., 131.
On the fact that international law, by delimiting the scope of application of the municipal legal orders, renders possible a legal coexistence of States (this being its only inevitable function):

Il en résulte que, dans la mesure où on considère l’ensemble de normes traditionnellement appelé droit international comme formant un ordre suprême, le domaine de validité de cet ordre ne peut, a priori, être limité dans aucune direction. C’est précisément ce qui distingue l’ordre juridique international des ordres juridiques internes ou étatiques, qui sont au contraire généralement considérés comme limités dans toutes les directions possibles. Bien plus, en posant l’ordre juridique international comme un ordre juridique supérieur aux États, on doit y trouver le principe de la limitation de la validité des ordres juridiques étatiques – et on doit voir en cette limitation la fonction essentielle de l’ordre juridique international. Car ce n’est qu’en tant qu’il remplit cette fonction que deviennent possibles la coexistence pacifique de plusieurs États, la validité simultanée de plusieurs ordres étatiques.  

La coordination des différents droits étatiques provient de ce qu’ils apparaissent quant au fondement de leur validité, comme délégués par le droit international; quant à leur domaine de validité, comme délimités par lui. Et la coordination ne résulte qu’en cela. Les droits étatiques, ou les collectivités juridiques constituées par eux – les États – sont des entités juridiques, ordonnées sur un même plan, parce que et en tant que par rapport au droit international, ils sont juxtaposés et non superposés. Ils sont juxtaposés parce que et en tant qu’ils sont tous situés au-dessous du droit international et au-dessous de lui seul; parce qu’ils ne sont situés au-dessous d’un autre ordre juridique, et en particulier au-dessous d’aucun ordre étatique; parce qu’ils sont en ce sens, immédiatement soumis au droit international. On exprime ce fait que les ordres juridiques étatiques coordonnés entre eux sont subordonnés immédiatement au droit international, par la notion de ‘souveraineté’ d’État.

On the fact that all norms address themselves necessarily to a single subject:

Comme tout droit, le droit international est donc, lui aussi, une réglementation de la conduite humaine. C’est à l’homme que s’adressent les normes du droit international; c’est contre l’homme qu’elles dirigent la contrainte, c’est aux hommes qu’elles remettent le soin de créer l’ordre. Si le droit international édicte des droits et des obligations (il doit le faire s’il est un ordre juridique), ces droits et ces obligations n’ont qu’a être imposées aux actions humaines. Car une obligation qui n’est pas l’obligation d’un homme quelconque à une conduite déterminée ne sera pas une obligation; et de même un droit qui ne consisterait pas en une force, compétence ou capacité, qui ne consisterait pas en une action humaine quelconque, ne sera pas un droit. S’ils ne se référaient pas à la conduite d’un homme quelconque, droits et devoirs ne seraient donc que des formules vides, tout simplement des mots sans signification.

35 Ibid., 140.
36 Ibid., 188–189.
Le droit ne peut donc obliger ou habiliter que des individus et non des personnes, qui, en tant que personnes juridiques, doivent être nettement distinguées des individus concrets. La 'personne' en tant que sujet de droits et d'obligations n'est que l'expression personnisée de l'unité d'un système de normes réglementant des actions humaines, de l'unité d'un ordre total (Etat) ou partiel (autres personnes juridiques et 'personnes physiques'). (Voir et comparer mon Allgemeine Staatslehre, 1925, p. 62 et suiv.).

La personne juridique en ce sens est un concept auxiliaire, une expression de la théorie juridique destinée à permettre une exposition plus sensible; ce n'est pas une réalité du droit positif ou de la nature. Quand on dit qu'une personne – en particulier ce qu'on appelle une personne juridique – a un droit ou une obligation, cela signifie que le droit ou l'obligation qui a pour contenu la conduite d'un homme déterminée par un certain ordre, est imputée à cet ordre lui-même. La personne n'est pas autre chose que l'ordre personnifié lui-même, qu'un système de normes qui établissent des droits et des obligations: un complexe de droits et d'obligations, qui sont ceux de certains individus; seulement c'est l'ordre en question qui détermine ces individus.37

On the monistic approach to the law:

De nos précédents développements d'ordre général, il résulte qu'en adoptant la thèse dualiste sur les rapports du droit interne et international, on s'interdit absolument de reconnaître simultanément caractère obligatoire aux règles de l'un et de l'autre système.38 S'ils sont différents comme découlant de deux sources différentes [...] il faut renoncer à en déduire la validité d'un seul et unique principe. [...] [S]’il faut considérer droit étatique et droit international comme deux ensembles entièrement distincts de règles, le juriste qui se tient sur le terrain de l'ordre juridique interne, pour qui les normes en sont valables, doit exclure de son domaine d'investigations la validité des normes du droit international. Si ce dernier est rapporté à une source absolument différente de celle du droit étatique, s'ils n'ont pas de principe commun, il existe aussi peu pour le juriste dont nous parlons que la morale, et réciproquement. Et en effet, la construction dualiste, poussée jusqu'à ses dernières conséquences, aboutit à faire de ce qu'on appelle le droit international tout simplement une sorte de morale ou de droit naturel, et non pas un droit véritable, au sens

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37 Ibid., 142-143.
38 The reason for this is given elsewhere: "Lorsque deux ordres ont le même objet, c'est-à-dire lorsque certaines de leurs normes tout au moins se rapportent au même objet, en particulier lorsqu'elles règlent la conduite des mêmes individus, il peut y avoir contrariété entre eux, c'est-à-dire conflit de normes. Tel est le cas lorsque l'un des systèmes ordonne une chose que l'autre interdit. [...] Si on admet que les deux systèmes de normes sont simultanément valables, la contradiction est, du point de vue logique, radicalement insoluble. Il est logiquement aussi absurde d'affirmer à la fois qu'il faut faire telle ou telle chose et qu'il ne faut pas la faire, que de poser à la fois qu'A est A et qu'il est non-A. Car le principe logique qu'une chose ne peut pas à la fois être et ne pas être, le principe d'identité s'applique aux normes aussi bien qu'aux faits naturels. On ne saurait concevoir logiquement, donc admettre scientifiquement que deux règles contraires soient l'une et l'autre valables. Un tel point de vue est a priori exclu des sciences normatives [...]” Kelsen (note 4), 267.
plein du mot, au sens où l’on qualifie le droit interne de ‘droit positif.’ […] Il y a plus. Si la construction dualiste ne permet pas de comprendre d’un même point de vue le droit international et le droit interne, un seul ordre étatique sera réellement valable, celui sur lequel le juriste appuie ses recherches, c’est-à-dire celui sur lequel le juriste appuie ses recherches, c’est-à-dire celui de l’État auquel il appartient […] ; ce n’est pas seulement le droit international qu’on devra ignorer, mais aussi tous les ordres étatiques étrangers, comme n’ayant pas de lien, pas de commune mesure avec lui; ils ne sauraient, non plus que le droit international, constituer des systèmes juridiques valables. […] [Il faut admettre] la coexistence d’Etats coordonnés et juridiquement égaux, c’est-à-dire de systèmes de droits interne dont le droit international délimite les champs respectifs d’action sous le rapport de l’espace, du temps, des personnes et des sujets; mais une telle conception suppose qu’on admet l’existence d’un droit international qui délimite ainsi juridiquement, donc délègue ces droits internes. 39

One may notice, in these last sentences, the “constitutional” unifying and coordinating function ascribed to international law. The fight between “constitutionalization” based on a civitas maxima ideal and egoistic nationalistic State-centered sovereignty doctrines is dramatically expressed in the last pages of the course of 1926. These pages are extraordinarily dense. 40 According to Hans Kelsen, the preference for primacy of international law or municipal law is an ideological question, based simultaneously on philosophical and political aspects. First, the philosophical background: primacy of municipal law (thus sovereignism) is based on subjectivism, on the idea of the world as an outward projection of the “I.” Primacy of international law is based on objectivism, i.e. the insertion of the “I” in a world of shared and multiples “I’s” taken as a starting point. Thus, in the latter, an objective link between the subjects is established through admission of a universal reason and unifying legal order. Second, the political point: primacy of municipal law is based on the political premise of imperialism, of unlimited State freedom and sovereignty. This leads to fight, to international anarchy and to unbridled competition. Primacy of international law is based on the idea of pacifism, i.e. of peaceful cooperation of human societies through the bond of a legal order objectively delimiting their powers. Such an approach seeks and is able to create the conditions of a peaceful and ordered international community. And Hans Kelsen finally indicated very clearly to which view he personally leaned, not as a scientific message, but as a personal political-ethical commitment: the primacy of international law, objectivism and peace. His political aim was the creation of a form of World State. This would only be possible if the social conscience of peoples in the

39 Ibid., 276–280.
40 Ibid., 321–326.
future transcended national borders in order to become a universal conscience of humankind. Hence, the very concept of sovereignty must be rejected: “[L’]idée de la souveraineté de l’Etat national a fait jusqu’à présent [...] obstacle à toutes les tentatives pour organiser l’ordre international, pour créer des organes spécialisés pour l’élaboration, l’application et l’exécution du droit international, en un mot pour transformer la communauté internationale [...] en une civitas maxima, au plein sens du mot.”

“Constitutionalization” here reaches its apogee.

From this axiological conclusion, there is only one step to Alfred Verdross. Contrary to Hans Kelsen, Alfred Verdross saw the foundation of international law in a set of ultimate values, ultimately in a renewed concept of natural law. This natural law culminates in the idea of a civitas maxima, of a community of peoples organized through international law in an ordered and peaceful way so that they can live in conditions of sociality proper to their physical and moral being. From this general sociality of man flows a province of necessary international law, based on the very existence of coordinated States (e.g. pacta sunt servanda, nullity of immoral obligations, justice, but also the delimitation of the scope of the various municipal legal orders, etc.). At a lower stage, one finds the rules of positive international law as they are developed at a given time in a given society. Jus necessarium is complemented by jus positivum (vel arbitrarium, in the old sense); this is the rebirth of a classical conception. The doctrine of Alfred Verdross allies in a personal way the grandiose precision and austerity of the Vienna School with components of the natural law tradition. It thereby breathes ethical content into the formal architectures of systematic thinking. It is essentially a doctrine of equilibrium between form and content. The following passage is revealing as to the value-basis of international law. It moreover accounts for its supreme “constitutional” function:

La base de cette science nouvelle est la conviction de l’unité morale du genre humain, pressentie déjà dans l’antiquité, mais affirmée d’une façon nette seulement par le christianisme. Pour celui-ci, la fraternité de tous les hommes n’est qu’une conséquence du monothéisme. Car si les êtres humains dépendent du même Dieu, ils ont tous une base commune qui les unit en une société humaine universelle. Cette pensée a été formulée par la doctrine médiévale dans l’adage bien connu: “conjunctio hominum cum Deo est conjunctio hominum inter se.” Cela veut dire que tous les hommes forment une unité par la soumission commune à Dieu qui les lie ensemble.

Par le développement du christianisme, l’idée universaliste pénétra également dans le cadre de la vie politique qui graduellement prit connaissance de cette vérité mo-

\[41\] Ibid., 326.

\[42\] On his doctrine, see Truyol y Serra/Kolb (note 12), 123 et seq.
rable. Ainsi se développe au Moyen Age par l’action de l’Église l’idée d’une vas
communauté qui embrasse tous les peuples chrétiens. Cette idée était cependant
encore tout imprégnée de l’idéal politique de l’empire Romain, c’est-à-dire du rêve
d’une monarchie universelle.

Mais vers la fin de cette époque, l’idée universaliste se purifia en se débarrassant
ces accessoires historiques. Ainsi naquit dans l’esprit de François de Vitoria,
professeur de théologie à l’université de Salamanque et membre de l’ordre des
Dominicains, l’idée d’un droit strictement universel, c’est-à-dire d’un droit liant
seulement les États chrétiens entre eux, mais tous les États de l’humanité. Car pour
lui la justice internationale n’est pas réservée à la chrétienté seule, mais elle revient
t à l’humanité tout entière. Par cette conception, Vitoria tire les conséquences juridiques
du dogme central du christianisme qui ne fonda pas la fraternité humaine sur l’unité
de religion, mais sur l’idée que tous les hommes, sans distinction de race, de langue
ou de religion, ont en Dieu le même père. 43

b) Pacifist School

The second mainstream German teaching at The Hague reaches similar results
by a different itinerary. The “pacifist” school of thinking of Walther Schücking
and Hans Wehberg did not seek to erect an advanced system based on transcedental
speculation as did the Vienna School. It rather concentrated directly on substantive
values which international law – as the law of humankind 44 – had to perform in order
to realize a peaceful and ordered international society. Walther Schücking
may here be taken as an example. We will regretfully not dwell on the courses
of Hans Wehberg (the most often invited German author at the Academy)
for reasons of space. Walther Schücking had never been a radical pacifist. But
he always believed in an international order superior to the States. The main
components of such an international legal order were for him threefold:

1. international organization: the growth of some form of international
federation within an international institution. Its aim was to legislate and
execute on common problems in a similar if not identical way to that with
the State;

2. obligatory arbitration or judicial settlement for legal disputes, obligatory
and binding conciliation for all the other disputes;

43 Alfred Verdross, Règles générales du droit international de la paix, RdC 30 (1929
271, 278.
44 This being its concrete constitutional function.
3. **codification of international law** in order to eliminate all the gaps and indeterminacy of which it was still suffering.

Let us illustrate briefly these points by apposite passages: on a World Federation, of which the League of Nations is an embryo:

[L.]a S.D.N. a reconnu qu’à côté du travail des représentants des États, il lui était nécessaire de faire appel à la collaboration immédiate des individus et des forces sociales sous forme d’autres organisations. Ce faisant, elle subit un développement parallèle à celui des autres États. Dans tout État, la démocratisation a commencé aussi par l’invitation faite aux citoyens de participer aux différentes tâches de l’administration, jusqu’au jour où cela ne leur suffit plus et où ils réclament leur part à la formation d’une volonté d’État décisive dans les grandes affaires politiques. De même la S.D.N. n’en restera pas toujours à l’utilisation accidentelle des forces sociales, qu’elle emploie ou laisse de côté aujourd’hui selon son bon plaisir. [...] Ainsi ce développement pousse à la création d’un parlement mondial.\(^{45}\)

On mandatory arbitration and codification:

L’idée fondamentale de la S.D.N. est [...] celle d’une organisation de la Société humaine en forme de société des peuples pour appliquer le droit. Pour réaliser complètement cette idée il faut deux conditions: 1) La protection du droit des États particuliers à l’intérieur de la S.D.N. doit être perfectionnée; 2) Le droit international matériel, aujourd’hui si plein de lacunes et si extraordinairement douteux à divers points de vue, doit être établi plus clairement et plus complètement dans une législation internationale. [...] Nous commençons par le premier problème: la protection du droit. Il s’agit ici de l’acheminement à l’obligation de soumettre tout différend à une juridiction et à une procédure juridique internationales.\(^{46}\)

We may notice the very similar results – at least on the level of personal choice, if one wants to include Hans Kelsen – reached among the authors of the Vienna School and the “Pacifists.” Their common core is the belief in the necessity of developing the international legal order to become one legal system for peaceful humanity as long as it is organized in different collectivities. Alternatively, international law may even become the legal order of a future World State. That is the core of “constitutionalization,” independent from it being more or less progressive. The opposition with the “sovereignist” authors is neat. This is the main gulf in German scholarship in the 1920s and 1930s.

\(^{45}\) Walther Schücking, Le développement du Pacte de la Société des nations, RdC 20 (1927), 349, 394; for a contemporary criticism of these views, see the nationalistic and Hegelian writing of Carl Schmitt, Die Kernfrage des Völkerbundes (1926).

\(^{46}\) Ibid., 406. On mandatory international conciliation, see 415.
II. German Legal Scholarship at the Hague Academy since 1947:
Prevalence of Community-Centered Versions

After the Second World War, the most characteristic feature of German scholarship at the Hague Academy is the prevalence of “international community”-based approaches. It is as if the German scholars attempted to compensate, by an unfailing commitment to the concerns of the international community and to the principles of the rule of law, the diffuse feeling of German guilt flowing from its power politics since the creation of Germany under Prussian leadership and up to the deviation of Nazism. The most salient feature of the doctrinal phase since 1945 is the slow emergence of such community-based doctrines. These teachings are not based any more on the construction complete or speculative systems of international law. They rather attempt to respond to concrete needs and dangers faced by humankind. Scholars seek to identify common interests and dangers going beyond the sole interests of challenges of a particular State. These are, for example, peace (dangers nuclear warfare), human rights, poverty, depletion of the environment, etc. Moreover, international society is enriched by a series of new subjects or actors in particular the individual. In that perspective too, international society moves partly towards a universal society of mankind. There is not only an attempt to define common interests and values of a universal nature (return of universalism) – such as human rights, peace, the environment – but also to organize the legal system in a way that devotes itself to these common values. To achieve this, the new international law embodying these values must give precedence over older layers of the law. This supposes a reorganization of the entire legal order in a vertical perspective (hierarchy of norms). The former hierarchy of the Vienna School is now enriched by a material hierarchy founded on the content of the norms at stake. Therefore, we witness the emergence of concepts such as *jus cogens*, obligations (and rights?) *erga omnes*, international crimes of the State, world order treaties constituting a form of vital legislat rather than a compact freely entered into, the Charter of the UN as a World Constitution, etc.

47 See Robert Kolb, Réflexions de philosophie du droit international (2003), 25 et seq.
This evolution of the perception of international law is mainly the result of concrete vital threats to humanity. Once more, it is a "negative" that operates as integrator: the "fear" of an enemy or a common danger is the most powerful motor of some union. One may mention: (1) the idea of inalienable human rights, preconditions for peace and human dignity, for which collective responsibility had to be assumed (reaction to totalitarian ruthlessness); (2) the idea of prevention of a new war, which through nuclear weapons threatened to destroy all life on the earth; (3) the idea of protection of the environment, threatened with depletion of resources, pollution, destruction; (4) the idea that economic and social interdependence of the modern world had led to a point where the lack of cooperation in these matters would create conditions of disparity conducive to instability, turmoil and war; etc. The great idea of the time was interdependence, solidarity and multilateral approaches to these problems. International law as a common law offered itself as a basis for tackling all these huge new problems causing "common concerns." In order to perform that task, it had to become a comprehensive blueprint of international social life. International law had to become the supreme law for detailed common regulation of all parts of social life. It had to extend to all subject-matters, since in the modern world anything impinges upon some international concern. Hence, the main function of this new international law is not just to delimit the spheres of jurisdiction of States. It moves to a comprehensive legal order, to a sort of international constitutional and administrative law. This, in turn, meant combating to some extent the old view that international law is purely bilateral and relativistic. To the interests founded on a utilitas singulorum, centered upon the triad "contract, property, civil responsibility," a new layer had to be superposed, based upon a utilitas publica triggering "legislation, cooperation, humanity." In this approach, the State is no longer considered to be acting only in its selfish interests. It is also, and perhaps mostly, the holder of a public function geared to the common weal of the national and of the global community.

These evolutions, characterized here as move towards "communautarization," have been qualified by most modern legal writers as "constitutionalization" of

international law.\textsuperscript{49} In a sensitive article devoted mainly to the general course at the Hague Academy, Armin von Bogdandy\textsuperscript{50} identifies the following aspects as typical concerns of this school of thought.

\textbf{International Law as the common legal order of mankind:} International law is rising to paramount importance in the context of globalization. Its principles (international peace, justice, human rights, rule of law) address and limit all forms of political power. International law is a comprehensive blueprint of social life.

\textbf{The State is an agent of the international community:} The international society has moved from a sovereignty-oriented model to a human rights-oriented value system. The State remains an autonomous actor in international relations but it also increasingly assumes a role in a play written by the international community. It then holds the role of an executor of common concerns. States thus increasingly serve as instruments for certain common functions geared to the weal of the community of mankind.

\textbf{International Law as the embryo of a federal international order:} International law is a building block in a system of global governance. It steers political, economic and social actors according to collective goals and values. There is a legislative, an executive and a judicial function within it, even if the persistence of sovereignty limits their reach. The system is based on a multi-level approach, the State being one layer within regional and global institutions.

\textbf{International Law gains legitimacy through the concept of a community values:} Some common institutions such as the Secretary General and the Security Council of the UN reflect a policy towards the realization of these common values. Thereby, they create international legitimacy. However, there are deficits in the democratic input to the system of global governance. An evolution towards more democracy and accountability supposes that most human beings acquire a perception of being parts of a common humanity (international spirit).


\textsuperscript{50} Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, Harvard Int’l L.J. 47 (2006), 223 \textit{et seq.}
Universalism as foundation of international law: the core of this view is that there exists a public order and a common good beyond the pale of States. International institutions are the main depositaries of such a common good. Only they can contribute to crystallize it and to shape some common action in its regard.

This approach is reflected most strikingly in the three major courses of Hermann Mosler (1974), Bruno Simma (1994) and Christian Tomuschat (1999). If the somewhat older course of Hermann Mosler is still more measured in terms and content, the last two propose a bold version of “communautarization.”

In his “The International Society As A Legal Community,” Hermann Mosler gives the following balance between traditional and progressive views on international law:

We have already seen that international law came into existence through the transformation of the hierarchy of mediaeval society into a group of modern States. The decisive factor in the newly emerging society was that legal obedience to a superior power was replaced by rules to be observed between entities equal in law. There was no legitimate authority to ensure the observance by States of duties created by this body of rules. A vertical legal relationship between a superior power with jurisdiction over lower entities and over persons continued to exist only in municipal law. Between States, as indivisible units in the international sphere, legal relations were of a horizontal nature. The only sanction for a breach of these rules was the reaction of the State injured by the act of another. Or, in other words, the need to coexist meant that sovereign States, in their relations with others, had to observe the same rules that they expected to be applied to themselves.

The members of international society formed, in the so-called classical period, a legal community without any vertical element of subordination. Classical international law was opposed to organisation. The fact that a legal community, recognised by all, existed without a constitution providing for enforcement by a competent organ, proves that coercive power is not an inherent element of law. It must, however, be admitted that such a legal order, in which the only sanction is self-help by the members, is always in danger of being turned upside down by the strongest member.

We are now about 50 years into the phase of organisation. Many factors indicate that this may, in some respects, be a period of transition. But it cannot be denied that the vertical element of subordination of States to an organisation of which they are members has become a fact.51

Then he goes further:

In any legal community there must be a minimum of uniformity which is indispensable in maintaining the community. This uniformity may relate to legal values which are

considered to be the goal of the community or it may be found in legal princ
which it is the duty of all members to realise. It may relate to legal rules whic
binding within the community. The whole of this minimum can be called a con
public order (ordre public international). The international community cannot dis
with this minimum of principles and rules as without them it would cease to ex

The term *ius cogens* refers to restrictions on freedom of contract which are imp
on all members of the international community in their mutual relations. The
that such mandatory restrictions exist was approved at the Vienna Conference o
law of treaties. Everyone who acknowledges that States cannot fully impleme
their agreements and that some dispositions have no legal effect at all impl
admits that there exists a group of higher rules which together form a public or
international community. If two or more States are not able to produce any
effect when they come into contact with one of certain principles, then there
exist a body of such principles which constitute the community as such.

It follows from what I have said that there is a close connection between *ius cogen*
and public order of the international community, but that the two are not identica
*ius cogens* is the counterpart of *ius dispositivum*. The terms apply only to agr
When the theory of positivism prevailed in classical international law the freed
sovereign States to agree on anything they wished regardless of the rights of
States or the body of States in general, was in theory unlimited. One finds this doc
view even in recent writings, although the disastrous consequences of followi
theory in practice has become evident. In my opinion it is not too early to say th
recognition of *ius cogens* is today so general that it has overcome all objection

The concept of a public order of the international community has a wider me
than that of *ius cogens*. The rules belonging to it apply not only to the memb
the international community acting as contracting parties but are also bindi
relevant legal situations other than treaty relations. It would be incomprehensi
rules binding on States did not apply to acts which concern international law b
not part of an agreement. For instance aggression is certainly prohibited by a f
mental principle not only when an alliance is directed against third States bu
when it consists of a unilateral act against the victim.\(^{53}\)

The course of Bruno Simma with the title “From Bilateralism to Comm
Interest in International Law” (1994) is fully devoted to the notion
community-interest based legal order. It is a thorough and eminently pow
course. All the issues raised are discussed from the standpoint of comm
requirements. For the author, now a judge at the ICJ, traditional internat
law was based on a “delict-property-contract” ethos. There was minimal

\(^{52}\) *Ibid.*, 33.

rules [the constitution of the international community] must contain certain subst
principles whose respect is so fundamental for a given society that it could not, w
them, constitute itself into a legal community” (translation by the author), Völke
als Rechtsordnung, ZaöRV 36 (1976), 32.
setting for bilateral relationships between sovereign States. This law was value-poor. It was based on consent and concentrated on sets of correlative rights and obligations regardless of their content. Modern trends, conversely, consider respect for certain fundamental values of all humankind as a matter of concern for all States. There is thus a growing awareness of the common interest of the international community. The system consequently moves from a private-law framework to a public-law framework. Bruno Simma names the types of community-interests crystallized by the modern law: (1) international peace and security; (2) solidarity between developed and developing countries; (3) protection of the environment; (4) the common heritage concept; (5) human rights.

Moving to particular topics, the author discusses first the question of the UN Charter as a Constitution of the international community. As to substance, the Charter embodies basic rules governing the life in the international community and as to form these rules have precedence over ordinary rules by virtue of its Article 103. He then moves to discuss to what extent the principal organs of the UN represent a form of world governance, e.g. to what extent the Security Council may be called a “world government,” especially in view of its increasingly sweeping interventions. After the institutional aspects comes the normative side of the coin: concepts such as jus cogens, obligations erga omnes and international crimes of States are discussed as testimony to a new layer of community-oriented law. It follows a long closing chapter on the way the community-oriented perception reshaped treaty law. Multilateral treaties have become a vehicle of community interest. In order to give a proper expression to these new trends, the consent-element in common-order treaties has to be softened. First, there may be some “World Order Treaties” where participation is mandatory and not dependent on consent, e.g. treaties on nuclear weapons. These treaties are vital for the survival of the international community. Moreover, in the rest of treaty law, the law of reservations, of interrelationship of successive treaties, of reaction to breaches to a treaty, or of State succession, has been modified to better accommodate the particular character of rules.

54 Bruno Simma, From Bilateralism to Community Interest in International Law, RdC 250 (1994), 217, 219 et seq.
55 Ibid., 236 et seq.
56 Ibid., 258 et seq.
57 Ibid., 264 et seq.
58 Ibid., 285 et seq.
59 Ibid., 322 et seq.
embodysing community concerns. Finally, the author discusses human right treaties as examples of “absolute” or “objective” compacts expressing a “commom public order” instead of a reciprocal network of rights and obligations. Thus, if consent is still the governing priciple in the law of treaties, a great reshaping is under way in the opposite direction.

The course of Christian Tomuschat, with the title “International Law: ensuring the Survival of Mankind on the Eve of A New Century” is the last and of the most uncompromising forms of such an approach to international law. This author starts his course by warning against a tendency – which he right perceives to be the greatest challenge and danger to the community-orient approach – namely, unilateralism and hegemonism:

One of the major assaults on the concept of a community of nations bound by common rules and values is the tendency of big powers to “go it alone,” in other words not to heed the rules of international law whenever such disregard fits their interests. As the only one remaining super power, the United States is particularly prone to fall prey to that danger. Many actions carried out over the last two deca reveal a negative attitude towards international law. Since many years, the United States has failed to correctly pay its assessed contributions to the budget of United Nations, trying to justify its obstruction by political claims for deep chan in the organization of its administrative services and its budgetary processes. Ar rings the de facto head of State of Panama, general Noriega, in his own territory through a massive military operation entailing hundreds, if not thousands of innoc victims (1990), was another one of actions whose inconsistency with the gro rules of the international legal order requires no lengthy explanatory comment. Yet, the American tribunals before which general Noriega was tried took no is with the way in which the arrest was effected. The Supreme Court, on its part, is free from the temptation to treat international commitments with a rather light hand. Attacking Baghdad on 26 June 1993 by two dozen of cruise missiles was qualifie an act of self-defence responding to alleged Iraqi plans to assassinate ex-Presic Bush during a visit to Kuwait many months earlier. In other instances, at least some effort was made to provide a justification whose lack of substance does not immediatly spring to the eyes. Thus, again, raids on Iraq motivated by Iraq’s refusal to accept full control of its weapons arsenal and installations were related to resolut 678 and 687 on the UN Security Council, although this contention is hardly conv ing. Finally, it must also be mentioned that the US authorities refused twoic comply with requests of the ICJ not to execute a person sentenced to death as lon proceedings on the merits had not yet been concluded. Although “orders” of the pursuant to Article 41 of its Statute through which it may “indicate... any provisi measures which ought to be taken to preserve the respective rights of either pa may not be binding, it would in any event have been a requirement of internati courtoisie to abide by the requests.

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60 See already Christian Tomuschat, Obligations Arising for States Without Against Their Will, RdC 241 (1993), 195.
It is quite clear that such acts of lack of respect for international law do not destroy international law as an authoritative body of law. However, they may entail fatal consequences. The conduct of the big powers is watched with particular attention by all other States. Negative precedents are quite easily imitated. Should the other States come to the conclusion that the big powers do not act according to legal standards, but rather in an arbitrary fashion in conformity with their national interests as identified by political analysts, the entire system might suffer heavy damage.\(^6^1\)

The international society is under way to a global community, albeit there remain weaknesses and drawbacks:

To sum up, the international community has many different faces. It is not a homogeneous organizational unit, but can be defined as an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values. In this sense, one might also speak, \textit{ratione materiae}, of a constitution of humankind made up precisely of the normative framework established with a view to upholding those collective interests. The study of comparative government has brought home the lesson that, as is the normal practice since the end of the eighteenth century, a constitution can be enacted as a single document, but that it can also grow by stages as exemplified by the history of the United Kingdom. Failing a \textit{pouvoir constituant} at the international level, the constitution of humankind can take shape only step by step, in accordance with the will of its main component actors, \textit{i.e.} States.

 [...] 

On the negative side, it appears at first glance already that the concept of international community has definite weaknesses. The main deficiencies concern the available mechanisms of implementation. On the one hand, the Security Council is mandated to respond to any threats to international peace and security. But its mandate does not cover all situations that put in jeopardy the international public order. As long as no genuine community institutions have come into being for the protection of the additional elements outside the formula of international peace and security, it can fall only to individual States and other competent international organizations to act as guardians of international legality. It is of course very difficult to determine what remedies they should be allowed to use. On the one hand, to invite everyone to take justice into his own hands for the defence of community interests may strengthen the law, on the other, such vigilantism contains the seeds of abuse and feud. It is obviously much to be preferred to see common interests of mankind handled by institutions duly established for that purpose.

 [...] 

The notion of an international community living under a common constitution has nothing to do, however, with a super-State which could claim supremacy over States, relegating them to pure "provinces" or other autonomous entities. The polemical attacks by Gaetano Arangio-Ruiz against the community concept remain attached to

an intellectual rigidity whose only point of orientation is the sovereign State. An organizational structure above sovereign States is measured against that yardstick and then discarded inasmuch as it does not display the same qualities of facto-power as a State. What the theory of international community wishes to convey instead, is that States, which by no means lose their capacity as the basic units of the international system, have established a considerable number of mechanisms and institutions for the discharge of certain tasks which they are no longer able to deal with acting in isolation. Just by observing realities, one cannot fail to notice through such slow processes of erosion sovereign might has lost much of its intellectual perfection. International society finds itself at a medium point between the traditional model of sovereign self-sufficient States and a world with a hierarchical structure, topped by a single command centre. 62

A most important passage, highlighting the core of Christian Tomuschka’s approach, is the one where he explains that in cases of gaps of international interest on grave questions of community-concern, a norm of positive law may directly derived from the international constitution in order to fill the gap. The supreme body of law is the depositary of certain fundamental values such as peace, human rights and cooperation and is able to generate particular norms conduct in cases of urgent need:

The enumeration given so far of the different categories of positive law, i.e. recognized as applicable in relationships placed under the régime of international law, is not exhaustive. In full consonance with the basic axiom underlying the concepts of jura cogens, obligations erga omnes and international crimes the ICJ hinted that it may be necessary, in certain instances, directly to rely on moral considerations without which a legal order is not conceivable. Thus, in its advisory opinion on Reservations to the Convention on Genocide, it held that ‘the principles underlying the Convention are principles which are recognized by civilized nations binding on States, even without any conventional obligation.’ This is not simply reference to customary law or to general principles of law, as is evident from the preceding sentence where the ICJ says about genocide that it ‘shocks the conscience of mankind … and … is contrary to moral law and to the spirit and aims of United Nations.’ Two years earlier already, in the Corfu Channel Case, the ICJ derived legal obligations incumbent upon Albania from “elementary considerations of humanity.” These statements, whose general tendency the Court has reconfirms in recent years, signify that binding legal precepts may derive for States not only from acts manifesting their sovereign will, but also from the constitution of the international community, which is not any more blind with regard to the substantive contents of legal norms, but has become firmly entrenched in a number of concrete values, in particular peace, human life and dignity. Whereas in earlier centuries all references to the protection of the individual were generally explained as a return to the teachings of the school of natural law, today the line of reasoning is in no need to resort to parameters beyond the scope of positive law inasmuch as the Charter of United Nations and the Universal Declaration of Human Rights have made cl

62 Ibid., 88–90.
once and for all that indeed international law is directly concerned with the individual human being.

One needs no prophetic gifts to conclude that the reasoning of the Court in the cases referred to above was inspired by the famous Martens clause, enunciated in the preamble of Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907 in the following terms:

'Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the law of humanity and the dictates of the public conscience.'

Indeed, more than any other human conduct armed conflict is in dire need of rules ensuring a minimum of decency even in situations where death and suffering are omnipresent. The Martens clause shows that there exists no watertight dam separating law and morals. In situations of extreme gravity, moral principles may convert themselves into positivist law if that law does not provide for the necessary instruments to deal with the situation at hand. It may well be that the drafters of the Clause were not aware of its potential impact and that its actual text was the result of a diplomatic settlement. But even the scarcity of its application in practice does not detract from the fact that it was approved in 1907 as a legal yardstick and that it was reconfirmed in 1977 in Article 1(2) of Additional Protocol I and in the preamble of Additional Protocol II.63

One will also notice his position on humanitarian intervention. Here it becomes necessary to decide a conflict between public order norms, i.e. peace and human rights:

Important conclusions may be drawn from this summary outline of the increased weight which human rights have acquired over the years within the framework of the United Nations. The most elementary proposition is that human rights are a matter of international relevance so that States cannot invoke Article 2(7) of the Charter or the prohibition of intervention as it applies in inter-State relations, based on Article 2(1) of the Charter. The Vienna World Conference on Human Rights explicitly proclaimed that "the promotion and protection of all human rights is a legitimate concern of the international community." Second, one may infer from the events portrayed that the international community considers active protection and promotion to be its responsibility. Third, human rights have been pushed up to the highest level of the hierarchy of internationally recognized public goods as far as the most elementary needs of the human person are concerned. Lastly, it may be said that generally a balancing process takes place according to the gravity of the violations in issue. The more serious the violations, the more drastic the means put into operation to seek redress. Or to put it

63 Ibid., 355–357. One may compare this reasoning with that of Hermann Mosler's writing – in the context of nuclear weapons – that "every time when a course of action is likely to negate the legal community as such, the legal order must perforce contain a norm prohibiting it" (translation by the author), (note 53), 44.
in more general terms: even outside specific treaty mechanisms, the natural tension between national sovereignty and international control over compliance with human rights is not resolved any more with a clear preference for the former, but has seen a continuous process of strengthening of the latter. Protection of human rights and national sovereignty are viewed as two principles of equal rank which have to be adjusted to one another.

This is a perfectly understandable philosophy since national sovereignty may be characterized as a legal title which States own primarily as an inherent right, which needs to be respected by other States only to the extent that basic requirements of minimum world order are being complied with.

There is no denying the fact that placing national sovereignty and territorial integrity under some kind of reservation is a dangerous argument which can easily be abused. Yet, to exclude rigorously any possibility of balancing national sovereignty against other values that are equally cherished by the international legal order risks making national sovereignty a hollow concept which might then be rejected altogether by advocates of Realpolitik. If there is an abuse, it should be denounced as such. Therefore, only to deny possible abuses and to denounce the recognition of humanitarian intervention as a "general licence to vigilantes and opportunists" means closing eyes vis-à-vis a problem which is far more complex. Lawyers are accustomed to distinguishing carefully between different sets of facts. Nobody would venture to suggest that intervention should be permissible in order to enforce freedom of press. Genocide, however, is a different matter. Still today, the world is asking whether or not the criminal practices of the Nazi régime when the killing machines began their fatal operations. Equally reprehensible was the lack of interest by the international community in the extermination policies of the Khmer Rouge in Cambodia. This, indeed, is the decisive test: must the international community stand idly by while millions of human beings are being massacred just because in the Security Council a permanent member holds its protective hand over the culprit? Must national sovereignty be understood as the paramount rule of international law that overrides any other value? Giving an affirmative response to these questions would totally deprive international law of its essential value content. All of its efforts seek to promote peace and justice. Therefore, if under the cloak of national sovereignty a State engages in genocidal practices or systematic "ethnic cleansing" rule which recognizes its independence of judgment and action loses its raison d'être. Mass killings of human beings deserve no legal protection.64

D. Conclusion

Only the main lines and some examples of an overly rich German scholar at the Hague Academy could be traced and discussed in this narrow compass. At the end of this journey, we may say that the German courses at The Hague reflect closely the main identity struggles of the German political society in

64 Ibid., 223–224.
twentieth century. In the inter-war period, one finds a harsh split: on the one hand “nationalist” (sovereignist) writers, skeptical towards the League of Nations, ranging from Erich Kaufmann, to Heinrich Triepel to Carl Bilfinger, each one with his particular shade; on the other hand “internationalist” writers, often idealistic and very pro-gressive towards the strengthening of international institutions able to govern a peaceful and cooperative international society, friendly to the League of Nations, ranging from Walther Schücking to Hans Wehberg. After the war, one finds the profound cathartic influence of the tragic events and the deep attraction of the peaceful and harmonious principles linked to the Bonner Grundrechtsdemokratie expanded to a universal level. Values such as the rule of law, human dignity and cooperation are now exported from constitutional (municipal) law to international law. Hence a progressive blend of both bodies of the law, called “constitutionalization” of international law. One of its most generous versions is the one presented at the very end of the century by Christian Tomuschat, as a final signpost, a last inventory and a testimonial cry.

What lies ahead? Germany is slowly finding its way back to the scene of inter-national great powers. The intellectual inhibitions of the post-war period are slowly fading away. Transatlantic commitment outweighs for some actors any multilateral community-oriented values. The German Constitutional Court is slowly displaying some dualistic approaches to the relationship of municipal (constitutional) and international law. The peoples in (Western) Europe are less patient with community-based adventures, such as European integration. “War against terrorism” and armed interventions in the world have torn apart all too lofty expectations about “new world orders.” There are thus new tensions, challenges and dangers ahead. Will there be a shift in German scholarship? Will that shift signify return, at least in part, to more traditional power-oriented constructions of international law? It seems that the next decades will be rich and important, if not crucial for humankind. We will see how legal scholarship will react to the challenges ahead. For one thing is certain: it will react.