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# SOME REMARKS ON THE TRADITION OF THE „VIENNESE SCHOOL OF INTERNATIONAL LAW” IN THE CONTEXT OF ITS HISTORICAL EVOLUTION\*

At stake, there are subjective and objective legal views on today's jurisprudence. Especially, the theory of international law oscillates between the opposites of one state-individualistic and human-universal point of view subjectivism of the primacy of the state legal order and objectivity of the primacy of international law (...). But still it is in a safe way for one objective view of the law.<sup>1</sup>

Hans Kelsen

**Abstract:** The article is based on some remarks on the tradition of the so-called *Viennese School of International Law* analysed by its main historical evolution stages from the beginning until today. The *Viennese School* is presently the one of the world's oldest professional schools in international law. It was and it is represented by highly reputable scholars having outstanding achievements. Their determination of teaching, research, including an excellent publication record and international reputation has a special focus on multidisciplinary. All of this builds a main parameters of this *School*. The sources of research are fields related to legal sciences, especially of history of teaching and research of international law in Vienna, international relations, sociology and, above all, philosophy. Thus, the above mentioned *School* has been valued in the world by many scholars of different schools. The community combining contemporary and modern lawyers, followers and supporters of the *Viennese School of International Law*, has never have the same interests or common beliefs. However, they share a common method

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\* This article is a tribute of the author to the so-called Vienna School of International Law who received a lot of professional knowledge and experience from public international law from this School.

<sup>1</sup> Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 319.

of theoretical thinking and methodological approaches of the *Viennese School* in the field of international law. Therefore, today the main task of dealing with the objective of *the Viennese School of International Law* is primarily striving to understand international law as a separate kind of normative order in an multidisciplinary context.

**Keywords:** normative comparative research, methodological approach, multidisciplinary context, common belief policy,

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## 1. Introduction

The tradition of the so-called *Viennese School of Law* and in particular the *Viennese School of International Law* or *the School of Philosophy of Law* (these terms don't formally exist, they appear mainly among scholars) analysed by its main historical evolution stages from the beginning until today, is an exciting source of normative comparative study, not only for internationalists. The analysed issue creates indeed a huge intellectual challenge for multidisciplinary area. For this reason, this article can only be based on some remarks dealing with the tradition of the so-called *Viennese School of International Law* seen by its historical evolution. The *Viennese School* is presently the one of the world's oldest professional schools in international law. It was and it is represented by highly reputable scholars having outstanding achievements. Their determination of teaching, research, including an excellent publication record and international reputation has a special focus on multidisciplinary. All of this builds main parameters of this *School*. The sources of research are fields related to legal sciences, especially history of teaching and research of international law in Vienna, international relations, sociology and, above all, philosophy. Thus, the above mentioned *School* has been valued in the world by many scholars of different schools. The community combining contemporary and modern lawyers, followers and supporters of the *Viennese School of International Law*, has never have the same interests or common beliefs. However, they share a common method of theoretical thinking and methodological approaches of the *Viennese School* in the field of international law. Therefore, today the main task of dealing with the objective of *the Viennese School of International Law* is primarily striving to understand international law as a separate kind of normative order in an multidisciplinary context.

The abovementioned issue moves a researcher of the *Viennese School of Law* to the Middle Ages (650 years ago) until 1365, when (thanks

to the efforts of Duke Rudolf IV) the University of Vienna was founded and also Faculty of Law, modern for these times, creating canons of teaching in many fields of legal sciences. Nowadays, the University of Vienna has fifteen departments, five world-class research centres, employing approximately 6 800 researchers.<sup>2</sup> The evolution of *the Viennese School of Law* can be seen therefore, in its great achievements in the legal sciences. The beginning of the twentieth century, which was the most significant moment of the evolution of the *Viennese School*, was of paramount importance for science of international law. It was during this period that the *Viennese School of Jurisprudence*, was also known as the *Viennese School of Pure Law Science* (in German *Reine Rechtslehre*), which was established by Hans Kelsen and his students.<sup>3</sup> However, in fact, *the Viennese School of International Law* was created by Alfred Verdross (actually Alfred Verdross von Drossberg), widely recognized as the largest and most prominent Austrian internationalist of the twentieth century. For this reason, the conceptual doctrine of international law precursors of this *School*, professors Kelsen and Verdross deserves a wider presentation in this work. Their most worthy successors continue their research and teaching of international law the same way as their masters did, accordingly to the newest achievements of international law. In this way, they still represent the glorious *Viennese School*, facing complex challenges for the law of nations in the modern era. However, in this broad context, this analysis goes definitely beyond the scope of this study.

In the present time, the interpretation of this issue is very correct by the view of Josef L. Kunz from 1934, analysing the historical evolution of the *Viennese School of International Law* in the general context of the history of international law in the world. This view is essential for a full understanding of contemporary international law.<sup>4</sup> It is this part of history, as J.L. Kunz emphasizes, which we call modern law, within which we jointly

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2 <http://www.univie.ac.at/access> date 23/12/2020.

3 Jabloner, „Kelsen and his Circle: The Viennese Years”, 368-385.

4 Kunz, „The “Vienna School” and International Law”, 370-372. It should be emphasized that the view of J.L. Kunz at that time is also very relevant today. This is because the history of international law itself is an area of law that has traditionally been little paid attention to. Currently, there is a kind of renaissance in this area because the history of international law has become not only the subject of legal history, but also of many disciplines taught at the University of Vienna. The subject of lectures, symposia, scientific conferences and research at the aforementioned university, are relations between states, analysed between the early modern period, the nineteenth century and the outbreak of World War II.

work out historical methods.<sup>5</sup> Therefore, we fully recognize that it is justified to examine sociological situations, conditioning the advent of the existence of international law. We recognize, like J.L. Kunz wrote, that

there may exist a science of international ethics, differentiated from the science of international law. Therefore, we fully recognize the legitimacy of the policy of international law, which may be even more important than a science of international law. The boundaries between science and politics of international law should be respected, and the differences between international law and its policy, should be what they are. Therefore, all over again, proposals concerning the future of international development depend on the subjective belief of political and ethical speakers.<sup>6</sup>

The aforementioned point of view is the most up-to-date and visible in many works of the present representatives of the *Viennese School of International Law*.<sup>7</sup> It is also visible in many works of other representatives of the science of international law.<sup>8</sup> This is due to the fact that the influence of the *Viennese School of International Law* in any case has never been limited to Austria. The *Viennese School* has been adopted and sometimes further elaborated by scholars in Poland,<sup>9</sup> Germany, the former Czechoslovakia, the former Yugoslavia, Hungary, Italy, France, Japan and many other countries.<sup>10</sup>

At present, the representatives of the *Viennese science of international law* are extremely well-known and respected all over the world, not only through their mature work in the field of international law, but also through intense teaching and international activity. This group includes professors: Karl Zemanek, Ignaz Seidl-Hohenveldern, Gerhard Hafner, Hanspeter Neuhold or August Reinisch. Scientists – lawyers teach not only at the University of Vienna, at the Diplomatic Academy of the Ministry of Foreign

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5 Kunz, *ibidem*.

6 Kunz, *ibidem*, 373.

7 Hummer (ed.), *Paradigmenwechsel im Völkerrecht zur Jahrtausendwende. Ansichten österreichischer Völkerrechtler zu aktuellen Problemfragen*, 1-267.

8 Lador – Lederer, „Some Observations on the “Vienna School” in International Law”, 126-150.

9 Lech, “An Academic Perspective of International Law and International Relations as a New Interdisciplinary Scholarship – Selected Issues”.

10 Murphy, „Democratic Legitimacy and the Recognition of States and Governments”, 545-550.

Affairs in Vienna, but also at many of the world's leading universities. First of all, they sit in leading international bodies, such as the Institute of International Law (professors Verdross, Zemanek and Hafner ), the UN International Law Commission (professors: Verdross, Verosta, Hafner and now Reinisch).

The *Viennese School of International Law* assured a great respect in many scholars in the world, belonging after all to different schools. This is due to the fact that the science of international law is, after all, a special branch of legal sciences, therefore it can only be perceived as a normative science with its own research methods.

## **2. The Impact of the Centuries-old Tradition of Teaching Law at the University of Vienna on the Formation of the Viennese School of International Law**

For over 600 years of history, intellectuals of many disciplines have been undertaking an analysis of one of the longest traditions of teaching of law at the University of Vienna. The studies in the field of civil and canon law *Iura Canonica et Civilia* were already mentioned in the letter to Rudolf IV of March 12, 1365. However, they remained in practice limited to law for almost a hundred years. It was only in 1494 that Hieronymus Balbi of Venice obtained a degree in civil law.<sup>11</sup> As it was practiced at the time in European universities, an important role played *Corpus Iuris Civilis*, a collection of texts from classical Roman law from around 533, created at the behest of the Emperor Justinian I the Great. The national law, which was administered by the courts, was often not registered and was not part of the academic curriculum in Vienna until the seventeenth century. It was taken into account only later, as the individual institutions of national law gradually became involved in dogmatic treatment of law.<sup>12</sup>

The complete reorganization of the Faculty of Law was carried out in 1753 by Empress Maria Theresa, who expanded the Faculty with an important subject canon. In particular, the natural law was introduced to the Faculty, in the person of Karl Anton von Martini. The greatest lawyer and philosopher of his time, he became the most important representative of the *law of reason*

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11 Mühlberger, *Die Universität Wien. Kurze Blicke auf eine lange Geschichte*, 34-66.  
12 Ermacora, *Universitäts-Organisationsgesetz (UOG)*.

in Austria. He is the author of the *Books of Galician Acts* from 1797, on which the later *Allgemeines bürgerliches Gesetzbuch* (ABGB) is based.<sup>13</sup> Martini's successor, Franz von Zeiller, designed a new curriculum from 1810 that placed great emphasis on natural law as an introduction to legal studies. At that time, the work started under the guidance of Empress Maria Theresa on the codification of Austrian criminal and civil law, which was completed, thanks to which the lectures could then be conducted directly on the basis of the Penal Code and the General Civil Code.

The subject canon of teaching and research of the Faculty of Law, which was initially limited to canon and Roman law, was gradually expanded from the 18th century, not only on the basis of legal disciplines, but also to non-legal disciplines such as economics and statistics. In 1848 the former Faculty of Law was named the Faculty of Law and Political Sciences. At that time, the main focus was on the description of the state of the Austrian monarchy, thus combining various teaching contents, from many fields that would be more likely today in geography, ethnology or contemporary history. First of all, the Faculty taught the main features of the political order, in direct reference to modern constitutional theory by Moritz von Stubenrauch in 1850. While the nature of the law school had a new and particularly serious reorientation on the university by the reform of minister Leo Graf Thun – Hohenstein. The 1855 curriculum largely suppressed natural law, which was at least indirectly blamed for the outbreak of the (failed) revolution of 1848. In its place, subjects of legal history – Roman law, German legal history, and German private law – dominated the first stage of study. The hopes of the aforementioned minister to re-establish contact with German law, and above all to educate law students to become patriotic and conservative citizens were not fulfilled. The importance of the subjects of legal history was significantly reduced in all subsequent reforms.<sup>14</sup>

Together with the study regulations of 1893, two subjects of public law: constitutional and administrative law became compulsory subjects of legal studies and since then they have constituted one of the main fields of teaching legal sciences at the university. However, for some time there have been objections to their too strong formal foundation in the curriculum. In addition to studying law and political science, the foundations has been laid

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13 Olechowski, „Die Entwicklung und Ausdifferenzierung der rechts – und staatswissenschaftlichen Disziplinen”, 183-200; Mühlberger, *ibidem*, 56-64.

14 Feichtinger, „Die verletzte Autonomie. Wissenschaft und ihre Struktur in Wien 1848 bis 1938”, 261-292.

for introducing a special professional degree in political science in the future. This was done as early as in 1919. At the same time, women were admitted to law school. The new professional degree was less adapted to the needs of the Austrian judiciary, but emphasized the essence of broadly understood public law and the role of economic entities. This period lasted until 1966, when economic and sociological studies were established at the Faculty of Law and Political Sciences.<sup>15</sup>

The main representative of the Vienna's legal science of the interwar period was the aforementioned H. Kelsen. At the Vienna Faculty of Law and Political Sciences, he founded the aforementioned *Viennese School of Legal Theory*. It is mainly characterized by the issue of separating scientific statements about law from statements about actual (sociological) relations, as well as political legal claims. This is indicated by the main directions of research initiated by H. Kelsen on the theory and philosophy of law, constitutional law and international law. At the beginning of the 20th century, H. Kelsen became the greatest expert on Austrian constitutional law and creator of the Austrian constitution of 1920. The works and achievements of this professor of state and administrative law at the University of Vienna in the years 1919-1930, also concerning international law, in the opinion of many scientists, constitute the largest theoretical system of law that was created in the 20th century.<sup>16</sup> Kelsen 's greatest achievement, however, is a *doctrine of pure legal science*, so well presented that it has attracted many followers.

After leaving Vienna by H. Kelsen, and by one of the most outstanding specialists in private law and conflict law, Professor Albert Ehrenzweig (from the reasons of anti-Semitic hostility), *Viennese School* began gradually to disintegrate. However, its honourable followers, until the 1960s, were professors Merkl (in the field of constitutional law), Verdross and Kunz (in the field of international law).<sup>17</sup>

Then, legal studies, passed a major reform in 1935. Because of this reform, the ideology of a state was recognized, for example in the framework of lectures on Christian philosophy of law. Specific regulations concerning the course of studies were introduced in all Austrian Law Faculties in 1939. They completely revolutionized the traditional canon of subjects and remained practically with some changes until 1981, which was deeply

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15 Walter, *Hans Kelsen als Verfassungsrichter*; Métall, *Hans Kelsen. Leben und Werk*.

16 Olechowski, *Hans Kelsen. Biographie eines Rechtswissenschaftlers*.

17 Widłak, *Teoria i filozofia prawa międzynarodowego Hansa Kelsena*; Brunkhorst (ed.), *Rechts-Staat. Staat, international Gemeinschaft und Völkerrecht bei Hans Kelsen*.

important for the further development of the *Viennese School of International Law*.

Unfortunately, in the interwar period, and especially in the 1930s, the Faculty of Law and Political Sciences was very much involved in political struggles. The Nazi era caused far greater staff reductions as more than half of the professors and Faculty members retired or lost their teaching license. Many of them emigrated, many were arrested or killed in concentration camps (eg. Josef Hupka, professor of commercial law and Stephan Brassloff, professor of Roman law).

After World War II, in 1975, Faculty of Law and Political Science was divided into the Faculty of Law and the Economic and Social Department. The latter was divided into smaller and smaller units in 2000-2004. Studied law has been basically reformed in 1978. They were divided into graduate studies and doctorate in modernist building *Juridicum*.

The comprehensive reform of the Faculty of Law was also of great importance for the development of the Institute of International, European and Comparative Law at the Faculty of Law, and thus the *Viennese School of International Law* today.

### **3. Priority of International Law – the Theory of Hans Kelsen and its Influence on the Formation of the Viennese School of International Law**

#### 3.1. Main Assumptions of Hans Kelsen's Pure Theory of Law in Relation to International Law

H. Kelsen is considered to be one of the greatest lawyers and philosophers of the twentieth century, whose views constitute a point of reference for the modern science of the state and law. The person and views of this outstanding intellectual have been for decades one of the main topics of scientific works, not only in the literature of international law,<sup>18</sup> but in

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<sup>18</sup> Jöckel, *Hans Kelsens rechtstheoretische Methode. Darstellung und Kritik Ihrer Grundlagen und hauptsächlichsten Ergebnisse*; Ehs (ed.), *Hans Kelsen. Eine politikwissenschaftliche Einführung*; Heidemann, *Die Norm als Tatsache. Zur Normentheorie Hans Kelsens*; Koja (ed.), *Hans Kelsen oder die Reinheit der Rechtslehre*.



the broad context of legal science.<sup>19</sup> The result of this respect, above all for Austrian science, is the Hans- Kelsen – Institut in Vienna, established in 1971, which is a centre for researching the thoughts of the great scientist.

The *Pure Theory of Law* of H. Kelsen – a theorist and philosopher of law, politics, sociologist, dealt also with the issues of broadly perceived international affairs, which has had always a significant impact on the theory and philosophy of state and law, not only at the beginning of the twentieth century. It plays also a significant role today, as emphasized in works, for example by R. von Ooyen, S.L. Paulson or M. Stoleis.<sup>20</sup>

The *Viennese School of Law*, created precisely by Kelsen, took a very radical position in relation to the traditional science of law. As a contemporary of Kelsen time scholar, rightly claimed, being one of the leading Polish lawyers of the interwar period, prof. A. Peretiatkowicz, the separation of law from the realm of being, the identification of the state and law, the primacy of international law over state law, negation of subjective rights in the traditional sense, negation of the traditional distinction between private law and public law, negation of purposefulness in jurisprudence – these are quite revolutionary theories which must have caused a stir in the legal scientific world.<sup>21</sup>

H. Kelsen in his long scientific career has conducted research mainly on the radical separation of law and morality as well as law and fact. The boundaries of the latter distinction are marked by the dualism of being (in German *Sein*) and duty (in German *Sollen*), where law is subject to the sphere of duty.<sup>22</sup> For confusing these spheres, Kelsen criticized highly legal positivism. Obligations are spoken of by means of norms, which are a specific linguistic construct expressing an obligation. Thus, a norm is an elementary structure of law. A standard cannot be definitively defined without the concept of a legal system. A legal norm cannot be outside the normative system, therefore, in order to state that a norm is valid, it must be shown that it belongs to the legal system.<sup>23</sup>

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19 Von Ooyen (ed.), *Der Staat der Moderne. Hans Kelsens Pluralismustheorie*, 23-57; Paulson and Stoleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, 56-89.

20 Ibidem.

21 Peretiatkowicz, „Teoria prawa i państwa Hansa Kelsena”, 445.

22 Kelsen, *Die Staatslehre des Dante Alighieri*, 5-45; Kelsen, *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze*, 12-78; Klug, *Prinzipien der Reinen Rechtslehre -Hans Kelsen zum Gedächtnis. Mit einer Ansprache von Klemens Pleyer Scherpe*.

23 Walter, Ogris, Olechowski (eds.), *Hans Kelsen. Leben, Werk, Wirksamkeit*, 45-123.

H. Kelsen developed three concepts of the legal system: static, dynamic and mixed. They are all connected by perceiving the system as a hierarchical, autonomous and orderly whole, closed by one highest norm. In a static system, the links between standards are of an inferential-content character: the content of the lower standard can be derived from the content of the directly higher standard. The highest standard is the one we take for granted and to which we assign the highest value. In a dynamic system, the relations between standards are formal and competent: the directly higher standard is the formal basis for the application of the lower standard, it contains the authority to issue it. The highest standard is the basic standard (in German *Grundnorm*, which Kelsen describes as ‘purely conceived or fake’;<sup>24</sup> it is the transcendental – logical closure of the system. A legal norm only covers a certain state of affairs with the legal order. Therefore what is under consideration is the formal nature of a legal act. If one perceives it this way, *Pure Science of Law* can only deal with the legal form of the phenomenon. It is the responsibility of the sociologist studying law to analyze the issue in terms of content and historical or political aspects.<sup>25</sup>

In the background of the above Kelsen’s concept one can find a universal structure of legal order with priority for international law. As J. Kammerhofer rightly emphasizes, Hans Kelsen’s theory of international law is an integral part of *Pure Theory of Law*, to which the doctrine of international law and the doctrine necessary for *Pure Theory of Law* are consistently applied.<sup>26</sup> H. Kelsen relativizes the traditional understanding of the term state and its sovereignty, making a decisive contribution to the essence of the international controversy concerning major international issues. Unfortunately, comparing to the developed state law, Kelsen qualifies international law as primitive legal system.<sup>27</sup> He accuses it of lack of central legislation and specific, effective law enforcement agencies, as well as lack

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24 Kelsen, *Was ist Gerechtigkeit?*, 89-126; Jestaedt (ed.), Hans Kelsen. Werke. Band 1: Veröffentlichte Schriften 1905 – 1910 und Selbstzeugnisse, 67-90.

25 Kelsen, *General Theory of Law and State*, 56-111; Kelsen, *Vom Wesen und Wert der Demokratie*, 44-98.

26 Kammerhofer, „Kelsen, which Kelsen? A Reapplication of the Pure Theory to International Law”, 225-249.

27 Kelsen, *Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik (RR)*, 146-216; Kelsen, *The Law of the United Nations: a critical analysis of its fundamental problems*, 28-111.

of international jurisdiction. He compares international law with the archaic forms of society with their laws.<sup>28</sup>

The above controversy relates to two fundamental questions. Firstly, what is the validity of international law as a law overriding it? Secondly, what is the relation between international law and state law? In the discussed context, the concept of H. Kelsen develops as monistic teaching with the primacy of international law. In his theory, Kelsen aims to build a universal, uniform, and coherent universal legal system in which international law conveys both the scope of national legal systems and acts as a higher-order law.<sup>29</sup> It is for this reason that Kelsen is considered one of the most staunch supporters of the radical monist in the context of building relations between international and state law.<sup>30</sup>

Moreover, the mere reflection of the teachings of Kelsen and the study of international law is a remarkably stimulating activity as it involves an enormous, double challenge. Firstly, because Kelsen's thought, in the course of his long and productive scientific career, was changing from constitutional law, often described as state law, to international law. Second, Kelsen recommends that all legal systems operate under so-called 'Grand Unified Theory.'<sup>31</sup>

### 3.2. Methodological basis of building a monistic legal system with the primacy of international law in Pure Legal Theory

Kelsen's monistic theory of law, in line with international and national law, in fact paved the way that dominating modern doctrine: law can encompass any aspect of life that justifies the international legal application of human rights.<sup>32</sup> It should be underlined, as F. Rigaux rightly emphasized, that Kelsen's monistic and logical approach to *Pure Legal Theory* is well known. One of basic elements of this theory is identification of the state and law. The second element is the view that the legal order is a union of norms in

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28 Kelsen, *The Law of the United Nations: a critical analysis of its fundamental problems*, 123-245.

29 Kelsen, *Principles of International Law*, 56-79; Kelsen, *Österreichisches Staatsrecht: Ein Grundriss entwicklungsgeschichtlich dargestellt*, 34-77; Rigaux, „Hans Kelsen on International Law”, 325-343.

30 Kelsen, *Allgemeine Staatslehre*, 34-67.

31 Ibidem.

32 Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, 33-89.

relation to the *Grundnorm* basic norm. The third element is the exclusion of the general actual set in effective designing compliance with rules. The fourth element is related to the rejection of reference to other illogical premises, such as morality or natural law.<sup>33</sup>

In his theory, Kelsen, due to epistemological, legal, theoretical and methodological postulates, constitutes a fundamental principle of *the Pure Theory of Law*. This is the central foundation of the structure of a universal legal system with the primacy of international law.<sup>34</sup> This peculiar criterion aims to systematize and analyse the structure of international law and its place in the overall legal order. Therefore, the above postulates have been defined as theoretical arguments and included within the concept of the theory of international law.<sup>35</sup> Based on his purely legal teaching, Kelsen builds a legal system with the supremacy of international law. In his theory, however, he critically analyses the theory of the state and international law.

Analysing a nature of international law, Kelsen sees law as a legal system in terms of *the Pure Doctrine of Law*, which can be assessed through a qualification state. The result of this deduction is the design of a complex system of international law and national legal order.

### 3.2.1. Basic Norm and Structure of Levels of International Law

The doctrine of horizontal structure of law structure and doctrine of basic norm, concern, according to Kelsen 's general theory of law, direct application of international law. In the above interpretative context of the issue, Kelsen presents the sources of international law. According to this view, there is a specific system of levels of sources of international law.

The first is mind, as a hypothetical assumption of the basic *a priori* norm. With the help of this basic norm, it can influence the validity of the next level, customary international law. On the other hand, a norm *pacta sunt servanda*, defines the validity of international contract law and is a positive norm of customary international law. Accordingly, a special legal agreements, which bind only ratifying States, can be taken from customary international law. International treaty law justifies judgements of international courts.

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33 Rigaux, „Hans Kelsen on International Law”, 325-343.

34 von Ooyen, *Hans Kelsen und die offene Gesellschaft*, 100-134.

35 Kelsen, *Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik (RR)*, 56-78.

The second level refers to the basic standards of international law. According to Kelsen, a consistent knowledge of the basic norms of international law, suggests examination of their material content. This materialization of fundamental international law develops in Kelsen's general concept. These views of Kelsen, are presented in the monograph *The Problem of Sovereignty and Theory of International Law* (German: *Das Problem der Souveränität und die Theorie des Völkerrechts*) from 1920.<sup>36</sup> These views were initially based on a hypothetical intention, which includes the sentence concerning *pacta sunt servanda*:

In particular, the international sentence *pacta sunt servanda* acts together with other fundamental provisions of international law entirely in the name of a statute, ie a statute in the sense of a necessary requirements of legal norms, the hypothesis whereby: international law is primarily possible as the establishment of community co-ordinated society.<sup>37</sup>

However, according to Kelsen, the following problem takes place: the basic standard of international law may in fact not contain the norms of customary international law, because otherwise the law would identify the same application of customary law.<sup>38</sup>

### 3.2.2. *The Concept of a Unified Legal System*

In order to qualify the state and international law as a legal system, Kelsen describes the issue extensively in his many works.<sup>39</sup> They constitute a kind of normative study preparing international law and state law as a unified legal system, in terms of creating future norms of universal world law.

Kelsen analyses three possible solutions regarding the relation of international law to state law. Firstly, it is characterized by a dualistic construction that states that state law and international law represent two fundamentally different systems of norms. Secondly, it analyzes the primacy

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36 Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 127-131.

37 Ibidem, 135.

38 Ibidem, 130-134; Kelsen, *Wer soll der Hüter der Verfassung sein?*, 23-68.

39 Kelsen, *Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik (RR)*, 78-99; Kelsen, *Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus*, 66-72.

of the state legal order, considering international law as external state law. Thirdly, it presents the primacy of international order law which particular state legal orders conceive as a kind of delegation of international law.<sup>40</sup> In this context, it draws attention to the existing discrepancies between sublegal systems of international law and the law of the state in the universal legal system.<sup>41</sup> When international law and state law are brought together in a logically coherent whole, it is necessary to grasp the relation between these sub-legal systems to be considered in relation to each other. Kelsen proposes the so-called choice hypothesis (in German: *Wahlhypothese*). According to Kelsen, the solution to this hypothesis is based on the doctrine of the primacy of international law as well as the primacy of state law. This Kelsen's hypothesis choice was created basing on his basic dilemma, as well as the modern theory of law. It concerns the antagonism of seemingly incompatible approaches to truth, the universal, objective world view on the one hand, and the subjective state view on the other.

Kelsen qualifies the above hypothesis as a choice between the above-mentioned approaches of the purely ideological nature: belonging to a political decision of the lawyer and his worldview. This selection deals with two main issues: the primacy of international law and the primacy of state law.<sup>42</sup> Kelsen advocates strongly for the primacy of international law. It justifies its decision both logically and in line with the policy of international law. It is the central function of international law in coordinating and delimiting the various legal systems which, in turn, are international law. This profile of tasks of international law directs the principle of effectiveness under international law, and is therefore a logical system of international law. The principle of effectiveness, on the other hand, complies with customary international law. In this case, international law protects the territorial scope of the state legal system. According to Kelsen, this determines the norm of international law as well as the spatial and temporal scope of state legal systems. It influences also a range of national systems in limitation of international law.

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40 Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, 127-131.

41 Ibidem.

42 Ibidem.

Under international law, through its various instruments, it can regulate all human behavior. It concerns also issues that were previously regulated solely by the state legal system.<sup>43</sup>

By choosing the primacy of international law, Kelsen creates a new quality in the evolution of this law.<sup>44</sup> According to Kelsen's *Pure Legal Doctrine*, sovereignty, is set in a desired value of legal order, and its immediate importance. The legal norm of such a law must derive from hypothetical basic norm. Therefore, only international law is sovereign, because it derives its validity directly from the basic norm. Therefore, sovereignty is no longer the property of the state but the property of the legal system. Sovereignty is therefore a logical principle as 'an expression of the unity of order'<sup>45</sup> and 'purity of the legal order.'<sup>46</sup>

It might be concluded that the theory of the primacy of international law is understanding of different national legal systems, as delegated international law. In the above context, every state is only an organ of the community of international law, thus canceling the principle of state sovereignty, especially the contemporary perception of sovereignty in international law.<sup>47</sup> This means that Kelsen's construction on the primacy of international law is difficult to maintain because it is in contradiction with positive law, as well as in dissonance with the basic tenets of Kelsen's legal theory.

### 3.2.3. *International Law as the Right to Duty in the Context of Bellum Iustum and in a Decentralized Enforcement Mechanism Rights*

In H. Kelsen's theory, there is an effective and limited quality of international law and a theoretical requirement to qualify international law as a compulsory order in the sense of the *Pure Legal Theory*. In this context, Kelsen mentions the repression and particular injustice of international law during the war,<sup>48</sup>

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43 Ibidem.

44 Ibidem; Rigaux, „Hans Kelsen on International Law”, 325-343.

45 Ibidem, 67; Rigaux, „Hans Kelsen on International Law”, 325-343; Lech, „Contemporary perception of sovereignty in international law”, 129-140; Peretiatkowicz, *ibidem*, 499.

46 Kelsen, *Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik (RR)*, 57-63. The author observes: 'the offended state is entitled in its law to respond to the offender by means of universal international law and acts of coercion: repression or war. It is a self-help technique from which the development of the state legal order also emerged'.

47 Zolo, „Hans Kelsen: International Peace through International Law”, 306-324.

48 Ibidem.

and also legalizes the notion of war in the sense of the doctrine of just war (*bellum iustum*) and the perception of peace.<sup>49</sup> In order to legalize the war, Kelsen advocated a simplified and secularized version of the doctrine of *bellum iustum*.

Kelsen's concept deals with the positive aspects of a just war, which inevitably blurs the distinction between international law and international morality. The experiences of World War II led Kelsen to develop the doctrine of just war as an appropriate sanction for violating international norms, a theory difficult to reconcile with any form of natural law. He claims that 'if there were a total prohibition of the use of force without international law, it would justify the possibility of coercive action with sanctions, which also loses its legal etiquette.'<sup>50</sup>

The interpretation of war as a crime or a sanction under positive international law meets the coercion paradigm. Kelsen's acceptance of obligation as the basis of all law is the main argument in favor of Kelsen's theory in the context of the unity of all law.<sup>51</sup> Kelsen saw war as regulated by international law, and no action beyond or 'outside' of this law, as was the case from the perspective of the nineteenth century until the *Briand – Kellogg Pact* from 1928.<sup>52</sup> According to a contemporary interpretation of that time and positive international law, in accordance with Article 11 of the League of Nations and the *Briand – Kellogg Pact*, without prohibition of war in general and by the doctrine of *bellum iustum*, Kelsen assumed that international law is enforced in the same way as in the sense of *The Pure Doctrine of Law*. He proves the abovementioned view by stating that

international law is a true law if coercive acts of states, compulsory state interference, which are in the sphere of the interests of another state, are generally permitted only as a reaction to a crime and appropriate use of force for any other prohibited purpose, in other words, if an act of compulsion is taken in response to a crime, it can be interpreted as a reaction from the international legal community.<sup>53</sup>

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49 Von Bernstorff, *Der Glaube an das Universal Recht: Zur Völkerrechtstheorie Hans Kelsens und seiner Schuler*, 77; Lech, „Modern jus post bellum – Finding a New Branch of International Justice and Law”, 9-38.

50 Kelsen, *Principles of International Law*, 56-79.

51 Kelsen, *ibidem*, 23-55.

52 Kelsen, *ibidem*.

53 Kelsen, *ibidem*, 64-65.



What, by Kelsen institutions of an international organization, could be called sanctions? In his opinion, they are, based on general international law: repression and war. Repression is a form of self-help with a decentralized law enforcement mechanism. Thus, an action that is normally prohibited is warranted as a sanction, that is, as law enforcement.<sup>54</sup> This view is confirmed by the position of the International Law Commission (ILC) in the *Articles on State Responsibility* of 2001. This refers to their competence to apply severely limited reprisals and the so-called ‘countermeasures’ understood in the broad interpretation context of the issue.<sup>55</sup> The Commission’s report states clearly: ‘Countermeasures are a feature of a decentralized system by which aggrieved states can seek to assert their rights and restore legal relations with the responsible state that has been severed by an international illegal act.’<sup>56</sup>

In the context of the Charter of the United Nations, especially Chapter VII, Kelsen emphasizes that the possibility of arguing that the implementing measures set out in Art. 39, 41 and 42 do not constitute sanctions as they were not established in response to a breach of the obligations set out in the Charter (...). The enforcement actions taken in accordance with Art. 39 are purely political means, that is to say, means which the Security Council may use at its discretion in order to maintain or restore world peace.<sup>57</sup> Thus, Kelsen believes that the measures under Art. 41 (seen as repression) can only be interpreted as sanctions because ‘repression is only permissible in the event of a breach of international law.’<sup>58</sup>

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54 Von Bernstorff, *ibidem*, 81-83.

55 Frankowska, „Artykuły Komisji Prawa międzynarodowego dotyczące odpowiedzialności państw – nowa forma kodyfikacji prawa międzynarodowego”, 168-174; Crawford, „The ILC’s Articles on State Responsibility Wrongful Acts: A Retrospect”, 878-879; Karska, „Responsibility of the state for violations of humanitarian law in the context of the draft Articles on the responsibility of states for internationally unlawful acts”, 76; Bederman, „Countermining Countermeasures”, 818-819; Caron, „The ILC Articles on State Responsibility: The paradoxical relationship between form and authority”, 857-876; Szewo, „Retaliation measures in the World Trade Organization”, 586; Simma, Pulkowski, „Of Planets and the Universe: Self-Contained Regimes in International Law”, 488-489; Lech, „Self-contained regime and the meaning of *lex specialis* rule on the example of Draft Articles on Responsibility of States of UN International Law Commission and the Dispute Settlement Body (DSB) within the law of World Trade Organization (WTO) – selected issues”, 357-362; Draft Articles on Responsibility for Internationally Wrongful Acts In Report of the International Law Commission on the Work of Its Fifty -Third Session (UN GAOR 56th Session, Supplement No. 10, UN Doc. A / 56/10 (2001); Lech, „International liability for injurious consequences arising out of acts not prohibited by international law,” 20-34.

56 <http://www.ilc.org/> access date 11.01.2021.

57 Kelsen, *Principles of International Law*, 64-65.

58 <http://www.ilc.org/> access date 11.01.2021.

In addition, Kelsen expresses another view on the above subject, arguing that if the enforcement actions are sanctions, any conduct against which the Security Council is empowered by the Charter to respond to enforcement actions that are in the nature of a violation of the Charter. Accordingly, members of the organization have (...) the obligation also to refrain from any action that the Security Council pursuant to Art. 39 and heconsiders it a threat or a breach of peace.<sup>59</sup>

The views of Kelsen presented above with respect to the objective of *bellum justum* in the context of Chapter VII of the Charter not only show a cohesion in views of Kelsen, but also are essential for all internationalist in the XXI century.

#### **4. The Viennese School of International Law of Alfred Verdross and Continuation of Kelsen's Theory**

##### 4.1. Foundations of the Viennese School of International Law

Prof. A. Verdross is universally recognized as the founder of the so-called of course *Viennese School of International Law* and *the School of Philosophy of Law*. Verdross was an international legal teacher, writer, and philosopher of law. As a diplomat he was a professor at the consular academy from 1922, a professor at the University of Vienna in 1924–1960 and a judge at the European Court of Human Rights in 1958–1977. He was also a long-term member of the International Law Commission and the Institute of International Law. As a student of H. Kelsen with A.J. Merkl, he studied the unity of the *Pure Legal Doctrine*, which he did in the same way with regard to the relationship between international law and state law. Thanks to his vast knowledge of positive law, he shaped his views into a closed legal system, based on his approach to the philosophy of law, and based on state practice. It was Verdross who first adapted Kelsen's *Pure Theory of Law* to the study of international law, in the context of a purely theoretical aspect, making the greatest contribution to this theory.

Verdross claims that natural law can only be understood through the analysis of positive law. At the same time, understanding the positive

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59 Kelsen, *Principles of International Law*, 71-73.

international law assumed an insight into the natural law.<sup>60</sup> This leads Verdross to the Hegelian dialectic: the real object of knowledge is the dialectical sublimation duality of positive international law and Christian rights of humanity. B. Simma describes professor Verdross as ‘a master of synthesis’, both law and philosophy, as well as natural law, emphasizing its realism and a spirit of conciliation.<sup>61</sup> The above context is part of the development of the international community after World War II, which shows in many respects natural values, especially in the idea of a fair distribution of the goods of this world. This found also his ineffable expression in the development of the teaching of Verdross of basic rights and duties of States.

#### 4.2. A. Verdross as the creator of the foundations of international constitutionalism

Prof. A. Verdross was one of the first scientists to make a significant contribution to the concept of the constitution of international law. To sum up, it includes four main elements: evolving concepts of constitution, the autonomy of international law, multilevel constitutionalism and moderate monism and autonomy of constitutionalism. The research subjects and the achievements of the scientist prove the role of international constitutionalism, manifested in striving to establish the existing autonomy between international law and state sovereignty and state consent. Verdross uses modern international constitutionalism as the normative basis for an adequate understanding of international law. In this context, Verdross has worked on the fundamental elements of international constitutionalism in today’s world. This does not mean, however, that it has created a comprehensive constitutional discourse in international law. On the contrary, according to the scholar, international constitutionalism is a constant struggle for emancipation, which requires, beyond it, a new theoretical basis for the concept of international law as an order of values. As he admits, these are intellectual efforts to idealize international law, and thus excessively use the potential of the international legal system. In this respect, it is Prof. Verdross who tried carefully to combine his vision of positive law and its practical application.<sup>62</sup>

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60 Simma, „The Contribution of Alfred Verdross to the Theory of International Law”, 33-54.

61 Ibidem.

62 Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism”, 385-416; Luf, „Naturrechtsdenken im Banne Kelsens: Erwägungen zum Verhältnis von Kelsen und Verdross”, 239.

Creating a theory of moderate monism, Verdross refers to the issues raised by today's multi-level constitutionalism, that is, the relation existing in the international and national law. Contrary to some modern approaches, Verdross only uses the term *constitution* in international law in a metaphorical way. The theory of Verdross serves more ambitiously also to international constitutionalism, as a kind of metatheory of international law in the current debate.<sup>63</sup> Verdross by transferring the concept of constitution to international law, made present international constitutionalists direct their efforts to strengthen of international law.

Verdross's monism is closely related to his structural or systematic conception of international constitution as the apogee of a unified legal system. International constitutional law is fulfilled here as a part of the external constitutional function in the field of national legal orders according to the definition of domains of jurisdiction, i.e. the external borders of states' jurisdiction.<sup>64</sup> In contrast to this structural approach in relations between national and international law, constitutional thesis focuses today on constitutional functions that international law plays in the context of national law. This can be seen in contemporary international law, where the functions of national constitutions are transferred and strengthened by international public law. Thus, the norms of international law seem a supplement to the national constitutions. In the context of the analyzed interpretation issues, they apply only to the international courts of public international law. They can invalidate the national provisions which are contrary to international law.

Contemporary scholars advocate the constitutional approach to international law, often quoting A. Verdross as a precursor of the idea of constitutionalism as a visionary in international law – an approach based on the specific characteristics of the international system of law. Contemporary international law is after all quite different, both in terms of structure and content, analyzing it from the perspective of international law in times of Verdross and from the Austro-Hungarian Empire, through the interwar period, and the decade of *the Cold War* ending. Although the concepts

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63 Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism”, 385-416.

64 Ibidem.

of Verdross and the basic concepts of international law have changed, the basic concerns remain the same.<sup>65</sup>

The conception of A. Verdross is still relevant in the international arena, since it is aimed at the establishment of the autonomy of international law against the sovereignty of states and the consent of the state. Thus contemporary constitutionalists conceptualize international law as an imperative of values and refer to the founding instruments of international organizations, in particular the Charter of United Nations, a specific *constitution of international law*.

Some of the observations made by today's constitutionalists in relation to international organizations and founding instruments can be considered a new dimension of autonomy in international law. Importantly, international lawmaking that takes place in international organizations is no longer a purely inter-state affair but concerns non-state actors. As a consequence, states are involved in common interests and lose their autonomous power to shape their own rules. The ability of individual states to veto secondary law, such as the evolution of treaty regimes in general, the role of consent as a guarantee of state sovereignty, is limited.

In the early writings of Verdross, the constitution is a key to understanding international law as a unified legal system. Later, the Viennese professor develops his conception of the constitution in more meaningful terms. This change has also an impact on the understanding of the Verdross hierarchies in international law. This view can be easily seen in the work of A. Verdross entitled *Die Verfassung der Völkerrechtsgemeinschaft* from 1926, often cited with reference to contemporary constitutionalism. The abovementioned is not a treatise on the concept of the constitution of international legal community. It concerns the concept of international law based on its universalism.<sup>66</sup>

However, *Die Verfassung der Völkerrechtsgemeinschaft* is not his only work on this subject. In his various articles and books, Verdross refines and also modifies his concept of constitution. At the beginning, the international constitution (in German: *Völkerrechtsverfassung*) was a tool for understanding international law as a legal system. Verdross introduced a kind of innovation

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65 Verdross, „Zur Konstruktion des Völkerrechts“, 329; Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism“, 416.

66 Ibidem.

by transferring the meaningful concept of the constitution from the national context to the context of international law.<sup>67</sup>

As rightly pointed out by Th. Kleinlein analyzing views of Verdross on international constitutionalism, A. Verdross, as a student of Kelsen, perceives constitution as an international basic standard (in German *Grundnorm*) and the international legal system, as a condition for all other standards.<sup>68</sup> In the above context, the constitution in a legal and logical or systematic sense is at the top of a pyramid made up of a unified national and international legal system. This system consists of the norms which designate a substantive, territorial and time range of legal systems. Due to this structural function, this system is not only a constitution of public international law, but indirectly also a constitution of the legal orders of States and of a uniform legal system as a whole. Moreover, the international constitution contains norms concerning the law-making procedure and the source of international public law.<sup>69</sup> According to Verdross, the documents of Westphalian peace were the first formal documents showing the constitutional basis for the so called *jus publicum Europeum*.

Verdross therefore considers international law as a legal order that is both uniform and fundamental. The constitution is its specific key to understanding the concept of constructing international law as a uniform legal system. Therefore, the contribution of A. Verdross to the concept of an international constitution, *ius cogens* and general principles of international law creates a building blocks of today's constitutionalism.<sup>70</sup>

### 4.3. International Law as an Order of Values

In the doctrine of international law, Verdross considers order value by *ius cogens* and rules of general international law. Also contemporary debate refers to the global values to explain the unique status of nature and

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67 Biaggini, „Die Idee der Verfassung – eine Neuausrichtung im Zeitalter der Globalisierung?“, 445-473.

68 Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism“, 385-416; Walter, „Die Europäische Menschenrechtskonvention als Konstitutionalisierungsprozess“, 961.

69 Walter, „Die Rechtslehren von Kelsen und Verdross unter besonderer Berücksichtigung des Völkerrechts“, 37; Pauwelyn, *Conflict of norms in public international law, how WTO law relates to other rules of international law*, 34-57.

70 Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism“, 416.

universally applicable basic standards of *jus cogens* and obligations *erga omnes*.

Verdross considers *ius cogens* to be a necessary part of constitutional law (in German *notwendiges Verfassungsrecht*) and general principles as legal norms emerging from natural law. He distinguishes three categories of general principles.

The first category consists of principles directly deriving from the idea of law (e.g. the principle that every legal norm must have meaning, content or be based on the principle of good faith).

The second category are the rules which, although not clearly be recognized in positive law, are implicated in some legal institutions, such as a contract, and finally the general principles rights recognized by civilized nations. In this case, international constitutionalism, the general principles remain a challenge. The third category remain constitutional rules on the authority of society in international law.<sup>71</sup>

In the context of the above principles, in Verdross's opinion, the most important is the perspective of contemporary constitutionalists focused on descriptive values, which corresponds to the emergence of community interests in positive international law. Recalling the values, it has also a normative dimension and at least potentially applicable rules force these values. What's more, the global values and the consequent pressure on their enforcement can be misused still in the legal system. Then, recalling to the universal values or to the abstract constitution by ensuring the highest interests of the community, can support the policy of those who are able to decide how important these values are in specific cases.<sup>72</sup>

## **5. Contemporary Evolution of the Viennese School of International law**

### **5.1. Karl Zemanek and Ignaz Seidl – Hohenveldern in the Period of Cold War**

The position of prof. K. Zemanek, a respected successor and postdoctoral researcher of A. Verdross (1956 Habilitation concerned the law of international

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<sup>71</sup> Kadelbach, Kleinlein, „Überstaatliches Verfassungsrecht: Zur Konstitutionalisierung im Völkerrecht“, 235 and 243-248.

<sup>72</sup> Verdross, „Entstehungsweisen und Geltungsgrund des universellen völkerrechtlichen Gewohnheitsrechts“, 635-653.

contracts), is very high among the greatest internationalists of the twentieth century. Professor Zemanek ensured a comprehensive continuation of the teaching of the doctrine and practice of international law by A. Verdross. He conveyed it also to his successors, to professors G. Hafner and H. Neuhold (in that time employees of the Institute of International Law and International Relations at the University of Vienna).

The period of the greatest scientific activity of this Viennese scholar took place during the *Cold War*, starting in 1954 and it has not ended until today. After completing his studies in Vienna, Paris, Oxford and Saarbrücken, he became permanently associated with the University of Vienna, teaching mainly international law and the law of international organizations. In addition to academic work, since 1967 K. Zemanek was a legal expert of the Austrian Foreign Ministry.

One of the main research areas of K. Zemanek, together with prof. S. Verosta – a direct successor of prof. A. Verdross at the Institute – initiated already in the interwar period by prof. A. Verdross, was the validity of basic principles of international law. This can be seen in the study of the law of treaties,<sup>73</sup> as well as paradigmatic changes in legal structures in contemporary international relations.<sup>74</sup> In this context, especially, the problem of the metamorphosis of *jus cogens*, put a great attention to the Viennese scholar, analysed from an institution of treaty law to the bedrock of the international legal order.<sup>75</sup> Over the decades, thanks to this research, K. Zemanek became an international authority in these areas, especially in the field of neutrality of states in international law. These studies are extremely important nowadays, because new international systems are emerging, regulating various political, social and, above all, economic interests.

Economic relations are increasingly legalized today, which is associated with the emergence of new rules, such as the fundamental rights of states or the international community. In this context, since the seventies of the last century, K. Zemanek, together with his students, has developed and justified new trends in human rights, international peace and legal

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73 Zemanek, *Das Vertragsrecht der internationalen Organization*.

74 Zemanek, *Die Schifffahrtswfreiheit auf der Donau und das künftige Regime der Rhein-Main-Donau-Grossschifffahrtsstrasse: Eine völkerrechtliche Untersuchung*; Zemanek, *Haftungsformen im Völkerrecht*.

75 Zemanek, „The Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?“, 381-410; Zemanek, „The Basic Principles of UN Charter Law“, 401-430.



aspects of international security. What is still analysed is the issue of research of the contemporary *Viennese School* and concerns the role of international organizations shaping international relations.<sup>76</sup>

The second valuable person of the *Viennese School of International Law*, during *Cold War*, was prof. Ignaz Seidl – Hohenveldern. This Austrian legal scholar worked particularly in the field of international law as a professor at the University of Vienna. One of his best-known works in the world is a short textbook that has been published since 1965 under the title *International Law* (in German *Völkerrecht*).<sup>77</sup> I. Seidl-Hohenveldern worked also as a consultant in the Austrian Federal Chancellery, initially in the liaison service to the Allied Council. In 1951 he was also habilitated, like K. Zemanek at the University of Vienna under A. Verdross. Apart from the academic activity at the University of Vienna, prof. Seidl-Hohenveldern worked also as a visiting professor at the College of Europe in Bruges and at the Hague Academy of International Law. It should be also noted that Ignaz Seidl-Hohenveldern was accepted into the Austrian Academy of Sciences and from 1969 he was a member of the Institute of International Law. The University of Paris V awarded him an honorary doctorate in 1978 and in 1989 he received the *Silver Medal of Honor* from the University of Vienna.

The academic works of the scholar had a essential contribution to the legal work covering a wide range of topics from the theory and practice of international law,<sup>78</sup> including international organizations,<sup>79</sup> international business law,<sup>80</sup> to international environmental law and European law. The most important aspect of his work was the preoccupation with the influence of state interventions on private property rights. Moreover, prof. Seidl-Hohenveldern developed the meaning of recognition and enforcement of arbitral agreements in specific countries and regimes.<sup>81</sup>

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76 Fischer and Köck, *Das Recht der Internationalen Organisationen*; Lech, „Współczesny dyskurs na temat kompleksowego charakteru podmiotowości prawnomiędzynarodowej organizacji międzynarodowych”, 183-202; Lech, „Die internationale Verrechtlichung der Menschenrechte im Rahmen der Vereinten Nationen”, 59-88.

77 Seidl-Hohenveldern, *Völkerrecht*.

78 Seidl-Hohenveldern, *Völkerrecht und rechtliches Weltbild. Festschrift für Alfred Verdross*.

79 Seidl-Hohenveldern, *Das Recht der internationalen Organisationen einschliesslich der supranationalen Gemeinschaften*.

80 Seidl-Hohenveldern, *International Economic Law*.

81 Seidl-Hohenveldern, *Internationales Konfiskations- und Enteignungsrecht. Reihe: Beiträge zum ausländischen und internationalen Privatrecht*.

## 5.2. Universalism of international law in the Viennese School of International Law – contemporary parameters from Gerhard Hafner to August Reinisch and other youngest scholars

Prof. G. Hafner, as a successor of professors Verdross and Zemanek, occupies a special place in the life of the author of this work. With great deference I recall lectures and seminars of prof. Hafner, a leading thinker and professor of international law, and also an outstanding polyglot.<sup>82</sup> One of his many right views was e.g. on importance of the changing factors of contemporary international security, which play an important role in creating new paradigms of global international security through the prism of fragmentation and the universalism of international law in many of its aspects.<sup>83</sup> This point of view has a significant impact on the nature of the broadly understood perception of this area of law.<sup>84</sup>

The issue becomes more comprehensive not only in terms of analytical needs and challenges, but above all in the context of profound changes in international politics at the end of the *Cold War*.<sup>85</sup> The changes led mainly to the emergence of new orders in the field of the emerging global international security. The fall of the *Iron Curtain* has changed the understanding of international security on a global scale. The weakness of the countries present in the global and regional area significantly affects the international security system for specific countries as well as major international organizations related to the creation of international security.

In addition to many issues that are the domain of prof. Hafner, including e.g. codification of public international law, European law, International Criminal Law, neutrality, state succession, or peaceful dispute settlement and those surveyed comprehensively, this subject includes, for example, the complex issue of the jurisdictional immunities of states and their property.

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82 Firstly, as a professor of international law at the Diplomatic Academy of Vienna and later as a supervisor of Ph.D. dissertation from the European Union Law at the University of Vienna.

83 The author notes.

84 Hafner, „Legal Personality of International Organizations: The Political Context of International Law”, 81-100; Hafner, *Die seerechtliche Verteilung von Nutzungsrechten: Rechte der Binnenstaaten in der ausschließlichen Wirtschaftszone*; Hafner (ed.), *Schutz und Durchsetzung der Rechte nationaler Minderheiten*; Lech, „Perspektywa globalnej architektury bezpieczeństwa międzynarodowego – analiza prawna i instytucjonalna”, 269-283; Weiss, „Invoking State Responsibility in the Twenty-first century”, 798.

85 Hafner, „Legal Personality of International Organizations: The Political Context of International Law”, 81-100.

As chairman of an *ad hoc* Committee Agreement on Jurisdictional Immunities of States and their Property, (called *Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*), prof. G. Hafner, in the Sixth Committee on 25 October 2004, pointed out that ‘general understanding’ that has always prevailed’, including situations in which military action were not covered so far by the Convention of the UN.<sup>86</sup> Based on this discovery, and also on the fact that no country has ever been heard, the International Court of Justice (ICJ) upheld in its document *Jurisdictional Immunities in the case of Member (Jurisdictional Immunities of the State Case)*. The issue concerned a situation where a territorial tort constitutes an exception to the principle of state immunity, which does not apply to activities in the territory of operations during an armed conflict.<sup>87</sup>

Prof. Hafner, interpreting the subject of jurisdictional immunities of states, always strongly emphasized the fact that ‘no state can exercise jurisdiction over another state, which, despite this only seemingly obvious situation, will always be one of the most difficult and controversial issues in the doctrine and practice of international law.’<sup>88</sup> The professor always clearly emphasized that the state itself and its executives (analysing this issue in a broader international legal context) cannot be sued in the courts of another state, and state property cannot be subject to search, seizure or enforcement. This is due to the fact that the jurisdictional immunity of a state is an attribute of its sovereignty and independence, therefore its application is not limited in time and cannot be unilaterally waived by another state. State immunity serves to protect the independence of sovereign states, and more precisely to protect the state’s competences and interests in international relations. Prof. Hafner has always emphasized the specific function of immunity, which also serves to preserve friendly relations between states, thanks to the peaceful settlement of disputes arising between them. Therefore, a possible waiver or limitation of its immunity by a foreign state in relation to a specific case or matters depends on its consent.<sup>89</sup>

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86 The author notes; Summary Record of the 13th Meeting of the Sixth Committee, UN Doc. A / C.6 / 59 / SR.13, 22 March 2005, couple. 36. The accuracy of Professor Hafner’s judgment resulted in an interesting authorship article on the subject (Dickinson, „Status of Forces Under the UN Convention on State Immunity”, 428-431).

87 Hafner, Köhler, „The United Nations Convention on Jurisdictional Immunities of States and their Property”, 13-17.

88 The author notes.

89 Ibidem.

These issues, very important for prof. G. Hafner, have also become pararell the subject of research by prof. H. Neuhold. Continuing the views of prof. K. Zemanek, H. Neuhold in his works emphasises the legal aspects of contemporary international security, international relations and law. The long scientific career of H. Neuhold proves filling the gap between international relations and public international law. In this regard, the research of Vienna's professor mainly focused on international relations, public international law, the human rights, international law and economic integration.<sup>90</sup> Moreover, the main reasearch topics have focused until today on theoretical issues of international law, concerning the use of force and law in international relations. In this way, international security plays a great importance, with its political and legal aspects. It is of great importance in legal and political aspects of many conflicts, looking from the perspective of transatlantic relations. The above problems are widely discussed in the doctrine as a part of the process of universalism and fragmentation of international law.<sup>91</sup> This is reflected deeply in *Round Tables*, organized mainly by current professors and other workers of the Institute of International, European and Comparative Law, where the most prominent internationalists from around the world are invited. The general topic of *Round Tables* focuses generally on contemporary problems in development of international law.

Prof. Christoph Schreuer, together with professors Hafner and Neuhold, constitute an essential academic pillar of the Institute. This great scholar is a graduate of the Univeristies of Vienna, Cambridge and Yale. In his academic carreer, for more than forty years, he has published numerous articles and several books in the field of international law. He has covered such diverse areas as human rights, adjudication by national and international courts and tribunals, sovereign immunity, the law of international organizations, the sources of international law and the future of sovereignty. Prof. Ch. Schreuer for years has concentrated on international investment

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90 Reinisch, Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*; Neuhold, *The United Nations as a security organization: the "Balkan Laboratory"*; Neuhold, „The international community and “rogue states””, 215-235; Neuhold, „The European Union at the crossroads: Three major challenges”, 253-271.

91 Buffard, Crawford, Pellet ,Wittich (eds.), *International Law between Universalism and Fragmentation. Festschrift in Honor of Gerhard Hafner*; Hafner, „Risks Ensuing from the Fragmentation of International Law” Official Records of the General Assembly, Fifty-Second Session, Supplement No. 10 (A / 55/10); Hafner, „Pros and Cons ensuing from fragmentation of international law”, 849; Cała-Wacinkiewicz, *Fragmentacja prawa międzynarodowego*.

law, continued by prof. A. Reinisch<sup>92</sup> and has written many articles on the subject.<sup>93</sup> The main product of this activity is a 1500 page commentary on the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* under the title *The ICID Convention: A Commentary*.<sup>94</sup> Moreover prof. Ch. Schreuer has written expert opinions in many investment cases and has served as arbitrator in ICSID and UNCITRAL cases.<sup>95</sup>

Nowadays, the main research subjects, as well as parameters of the *Vienna School of International Law* are represented mainly by the youngest generation of professors of international law: A. Reinisch,<sup>96</sup> U. Kriebaum,<sup>97</sup> S. Wittich, I. Marboe,<sup>98</sup> M. Waibel<sup>99</sup> and others. They focus on analysis of international subjects of European law, international law, private international law, comparative law and international relations. Moreover, the main focus of the research is commercial and private law in Europe, state liability law, international investment law and international family law. Among many scientific and teaching activities, for example in 2021, Prof. Reinisch was responsible for Working Meeting of the International law Association Committee on ‘The Rule of Law and Investment Protection.’<sup>100</sup> He is also a Director of the LL.M. Programme on International Legal Studies supported by Prof. G. Hafner and M. Waibel. In this light by many other fields, Prof. M. Waibel continues scientific work of late Prof. I. Seidl-Hohenveldern in general international law, international economic law,<sup>101</sup> sovereign debts and international dispute settlement. The activity of the above-mentioned professors is widely supported by their masters, presently by Professors Zemanek, Hafner and Neuhold.

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92 Schreuer, Reinisch, *International Protection of Investments: The Substantive Standards*.

93 For example: Dolzer and Schreuer, *Principles of International Law*; Schreuer, *The ICID Convention: A Commentary*.

94 Schreuer, Malintoppi, Reinisch, Sinclair (eds.), *The ICID Convention: A Commentary*.

95 Prof. Christoph S. Schreuer has been an arbitrator in at least 15 international cases.

96 Reinisch, Convention on the Privileges and Immunities of the United Nations, New York 1946 and Convention on the Privileges and Immunities of the Specialized Agencies, New York, 21 November 1947, Commentary, Audiovisual Library of International Law, <http://untreaty.un.org/cod/avl/ha/cpiun-cpisa/cpiun-cpisa.html>; access date 22.12.2022.

97 Reinisch, Kriebaum (eds.), *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*.

98 Marboe (ed.), *Legal Aspects of Planetary Defence*.

99 Waibel, Viñuales eds., *ICSID Reports, Remedies*.

100 <http://www.univie.ac.at/> access date: 18/09/2022.

101 Waibel, Burgstaller (eds.), „Investment Codes”.

Members of the Institute, regardless of their title or academic degree, are represented in many national and international expert groups and work as editors, authors of leading Austrian and international legal journals, commentaries and textbooks. In addition to teaching and examining the obligatory diploma and doctoral studies curriculum, the employees of the institute offer detailed training courses in the above-mentioned disciplines. In addition, members of the Institute coordinate the ERASMUS programs with 88 partner universities and supervise 180 students arriving and departing within frames of the Institute. Thanks to this cooperation, the Institute is highly respected in the world for its scientific and financial support for the young generation of lawyers.

## **6. The Importance of the Viennese School of International Law from the Perspective of its Historical Evolution**

The position of contemporary *Vienna School of International Law*, represented mainly by the Institute of International, European and Comparative Law of the University of Vienna is very high, as well as the Vienna Conventions are important for the common practice of international law. The analysed tradition of this *School* between former and contemporary professors, continuators of the *Viennese School of International Law*, indicates parameters of a common policy of belief, creating the structure of modern doctrine and the canon of teaching contemporary international law. The other parameters contemporary are a common way of theoretical thinking, a common methodological approach, normative and interdisciplinary learning, as well as the role of contemporary international law. All of them makes the capital of Austria one of the most important academic centres in the world. Moreover, in the city are held international congresses, related to the discipline and to the broadly understood international security. The OSCE and the United Nations have their headquarters in Vienna, and their legislative activity (especially UNODC and UNCITRAL) play a significant role in the development of international law practice, shaping modern standards of this law.

From the beginning of the 20th century to the present day, the main contribution of the *Viennese School of International Law* concerning the evolution of the law of nations, has been primarily the desire to understand international law as a separate kind of normative order in

an interdisciplinary context.<sup>102</sup> It is a merit of the *Viennese School* of H. Kelsen, and then A. Verdross, whose achievements have become an integral part of the doctrine of international law. H. Kelsen was the first in his famous *Pure Theory of Law* to put on the agenda fundamental methodological issues concerning the state and law and the primacy of international law. After all, in a sophisticated way he made the logical distinction between the normative method and the empirical method within *Pure Legal Theory*. Elaborating the views of H. Kelsen, A. Verdross, created a real *Viennese School of International Law*, of an interdisciplinary character. He was the first to create the foundations of international constitutionalism and the concept of international law as an order of values. Like international constitutionalists today, he aimed at establishing the autonomy of international law vis-a-vis State sovereignty and State consent. More ambitiously, international constitutionalism also serves a kind of meta-theory for international law in the present debate. In contrast to some modern approaches, Verdross's use of the term constitution in international law was only metaphorical.<sup>103</sup>

In contemporary *Viennese School*, in continuation of thoughts of Kelsen and Verdross, so much attention is paid, among others, to analyse the historical structural features of the law of nations: the main objectives and values, in fact, in contemporary international law. Through the prism of this analysis, the modern representatives of the *Viennese School* analyse complex issues related to the entity that is used and the quality of their legal instruments in the framework of global standards and orders, so that they become universal and legalized. These are the research domains of contemporary professors G. Hafner, H. Neuhold, A. Reinisch, I. Marboe, M. Waibel, U. Kriebaum and S. Wittich. All of them pay a special attention to the issues of existing sources of international law and those postulated by contemporary international law. Therefore, constantly are asked questions about the universality of rights and the fragmentation of international law. Today these views are becoming more and more of global importance. On the fragmentation side, the universalism of international law applies to events such as decolonization or regional political alliances now and in the future. These issues are also relevant – which is constantly present in the latest research staff of the Institute – to the extremely necessary contemporary global constitutional law (returning and developing proposals

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102 Lech, *An Academic Perspective of International Law and International Relations as a New Interdisciplinary Scholarship – Selected Issues*, 12-66.

103 Kleinlein, „Alfred Verdross as a Founding Father of International Constitutionalism”, 416.

of A. Verdross). International law should concentrate on the real law. It will never be limited to hierarchical centralised institutions or courts. It will be used to solve global legal issues in the complex international legal order, based on *ius cogens* and *erga omnes*, what contemporary representatives of the *Vienna School of International Law* underline in their broad teaching and publications.

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