I

INTERNATIONAL LAW AS LAW

CHAPTER I

THE NATURE OF INTERNATIONAL LAW AND GENERAL JURISPRUDENCE

Editor's note This chapter is reprinted from *Economica*, 12 (1932), 301–20. Most of the article was incorporated in *The Function of Law in the International Community* (first published in 1933 by the Oxford University Press and reprinted photographically in 1966 by Archon Books, Conn., U.S.A.), at pp. 420–3 and 432–8. Nonetheless, as explained in the Preface to volume 1 of these Papers, it has been thought appropriate to include this item in the systematic presentation of Lauterpacht's works.

1. THE DENIAL OF INTERNATIONAL LAW

A large and not the least important part of present-day international law is based on the assumption that what appears to the ordinary lawyer as incompatible with the conception and the purpose of law is not necessarily inconsistent with the body of rules called international law. This is so, it is said, because international law, far from being like any other law, is a 'specific' law. The purpose of this article is to examine the relevance of this view both to the question of the nature of international law and to the major question of the conception of law in general jurisprudence. In the first place we must inquire how far theories based on the independence of international law of the conception of law as developed in municipal jurisprudence can be regarded as consistent with the legal nature of international law. It will be submitted in this article that such theories, in so far as they have a definite meaning, amount to a negation of international law.

The number of writers who deny, without any qualifications, the existence of international law is comparatively small. In their view the relations of States are in effect governed by rules neither legal nor moral but by laws regulating the mutual relations of physical forces. Thus Hobbes found in the relations of States the historical demonstration of what, even in his own view, would otherwise have been a mere hypothesis, namely, of the existence among men of a pure state of nature[1] co-extensive with an entire absence of

[1] *Leviathan*, part 1, ch. xiii: 'But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings and

legal regulation. Spinoza followed him closely.[1] In the middle of the nineteenth century Lasson, a prominent German writer, gave clear expression to the same negative attitude towards international law.[2] He found followers both before and after the World War.[3] For some of these writers the negative attitude towards international law has been merely a link in the chain of an argument calculated to support their political theory of the State. This was notably the case with Hobbes and Spinoza. With others it is an expression and a justification of an attitude of nationalism and of a deliberate negation of the existence or of the practicability or of the need for an organized international community under the reign of law. With others still it is a denunciation of the predominant attitude of complacent disregard of realities and of the actual reign of force in an admit-

persons of sovereign authority, because of their independency, are in continual jealousies, and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is their forts, garrisons, and guns upon the frontiers of their kingdomes; and continual spyes upon their neighbours; which is a posture of War.' This is the true meaning of Hobbes's identification of the law of nature with the Law of Nations: 'Concerning the offices of one sovereign to another, which are comprehended in that law, which is commonly called the *Law of Nations*, I need not say anything in this place; because the Law of Nations and the law of nature, is the same thing. . . . And the same law, that dictateth to men that have no civil government, what they ought to do, and what to avoid in regard to one another, dictateth the same to commonwealths, that is, to the consciences of sovereign princes, and sovereign assemblies' (*ibid.* part II, ch. xxx (*in fine*)). And see part II, ch. x (*in fine*) of his *De Corpore Politico* (1640) for a clear statement to the effect that 'that which is the law of nature between man and man before the constitution of commonwealth, it is the Law of Nations between sovereign and sovereign, after.' And see also the well-known Dedication to *Elementa philosophica de Cive* (1642) for the juxtaposition of the principles *homo homino deus* and *homo homini lupus*, the first obtaining within the State, the second in the relations of States.

[1] See Lauterpacht in *B.Y.* 8 (1927), 89 *et seq.* [printed below p. 366], and the literature there quoted; and Verdross in *Z.ö.R.* 7 (1927), 100 *et seq.*

[2] *Prinzip und Zukunft des Völkerrechts* (1871); *System der Rechtsphilosophie* (1882). He says, in the former work: 'Two States confront each other like two physical forces. It is true that they are persons endowed with intelligence enabling them to recognize what is advantageous to them and to act accordingly. But there is no other link between them than their common interests, and no form of moral will limits their attitude of selfishness' (at p. 56). And he says, in the latter work: 'International law lacks the quality of true law . . . not only provisionally and for the duration of a lower stage of civilization, but permanently' (at p. 402). Seydel, a distinguished German constitutional lawyer, gave expression to the same views in almost identical terms: *Grundzüge einer allgemeinen Staatslehre* (1873), pp. 31–2.

[3] See, for instance, Binder, *Philosophie des Rechts* (1925), pp. 550–93; Hold-Ferneck, *Lehrbuch des Völkerrechts* (1930). Hold-Ferneck doubts whether there is in the modern world any measure of cultural or legal unity to serve as a basis for international law (pp. 23–4). He is of the opinion that a true community of law between States is inconceivable (p. 86); that the relation between sovereign States is necessarily one of enmity, international law being merely the expression of a *modus vivendi* in the permanent state of latent warfare (pp. 86–8); that obligatory arbitration is inconsistent with the right of self-preservation and any large measure of acceptance of the commitments of obligatory arbitration constitutes a departure 'from the wide and clear paths dictated by the very nature of the State' (p. 151).

tedly transient stage in the development of the international society.[1]

Another group of writers, while not denying the obligatory force of the rules governing the relations between States, have denied to them the character of legal rules. Thus Austin regarded rules of international law – conceived as an independent system of law[2] – as 'positive moral rules which are laws improperly so-called', i.e., 'laws set or imposed by general opinion',[3] and pointed to 'the greatest logical error of all . . . committed by many continental jurists, who include in public law, not only the law of political conditions, of crimes, and of civil and criminal procedure, but also international law; which is not positive law at all, but a branch of positive morality.'[4] But he agreed that these rules were binding and that they were enforced by moral sanctions like fear of provoking general hostility and reprobation for the violation of maxims generally received and respected.[5] Recently, Felix Somló, an able representative of the Austinian method on the continent of Europe, without denying the binding force of the rules commonly referred to as international law, denied that they partake of the character of law.[6]

Both the denial of the existence of international law and the denial of its legal nature are, as mentioned, comparatively rare. The more usual approach is to maintain that it is either a 'necessarily weak law' or 'specific law'. It is maintained that international law is a law

[1] See Lundstedt, *Superstition or Rationality in Action for Peace? Arguments against Founding a World Peace on the Common Sense of Justice. A Criticism of Jurisprudence* (1925). See also Nelson, *Rechtswissenschaft ohne Recht* (1917). And see Fricker in *Zeitschrift für die gesamte Staatswissenschaft*, 28 (1872), 90 *et seq.* and 347 *et seq.*; *ibid.* 34 (1878), 368 *et seq.*

[2] *Lectures on Jurisprudence or the Philosophy of Positive Law* (5th ed., 1885), I, 182.

[3] *Ibid.* II, 754.

[4] The denial of the legal nature of international law conceived as an independent system of law is not incompatible, and must not be confused, with the affirmation of the legal character of some of its rules, namely, of those which are administered as legal rules expressly adopted by the State and its courts. Austin distinguished clearly between these two aspects of the question. He was pointing out repeatedly that 'although positive international morality (so-called international law) . . . has no force within one nation yet . . . a nation may adopt it and enforce it as positive law within itself': *Jurisprudence* (4th ed. by Campbell, 1873), II, 635. This point of view is clearly expressed in *Mortensen* v. *Peters* in the High Court of Justiciary of Scotland (8 Session Cases 93): 'It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the law of Scotland.' It is generally accepted by writers on English law in so far as they touch on international law. For a recent affirmation of international law as external constitutional law see Wenzel, *Juristische Grundprobleme* (1920). See also Akzin, *Les problèmes fondamentaux du droit international public* (1929).

[5] *Jurisprudence*, I, 226.

[6] *Juristische Grundlehre* (2nd ed., 1927), pp. 153–73.

analogous to that obtaining among primitive communities; that these undoubted shortcomings do not seriously imperil the legal nature of international law; that they are the necessary consequence of the existence of a community of sovereign States; and that to remedy them would in effect mean the termination of international law and its transformation into internal or federal law. This is a school of thought which is generally not regarded as unprogressive. It combines an idealistic defence of the legal nature of international law – conceived as weak law – with repeated assertions that its shortcomings are of a permanent nature as there 'is not and never will be a central authority above the several States'.[1] This view is held by writers as wide apart as Holland,[2] Zitelmann[3] and De Louter.[4] Some writers even go to the length of maintaining that although most of these permanent deficiencies constitute legal shortcomings, they contribute towards making international law a superior type of law from the moral and social point of view.[5]

[1] Oppenheim, *International Law* (4th ed., by McNair, 1928), I, 288. And see *ibid.* pp. 13–15, for an exposition of the legal character of international law notwithstanding its being a weak law. The view that there cannot and 'never will be' an organized *civitas maxima* exercising authority over States is a persistent feature of Oppenheim's treatise.

[2] *The Elements of Jurisprudence* (6th ed. 1893), p. 339. International law, he says, 'is the vanishing point of Jurisprudence: since it lacks any arbiter of disputed questions, save public opinion, beyond and above the disputant parties themselves, and since, in proportion as it tends to become assimilated to true law by the aggregation of States into a larger society, it ceases to be itself, and is transmitted into the public law of a federal government'.

[3] *Die Unvollkommenheit des Völkerrechts* (1919). After enumerating a series of shortcomings of international law, he expresses the opinion that these shortcomings are the necessary consequence of an international law as a law between sovereign States. The present shortcomings of international law, he says, could be removed by the League of Nations becoming the *civitas maxima* and exercising judicial and executive functions over the States. 'But then,' he says, 'this would no longer be international law seeing that the latter presupposes logically the existence of sovereign States' (at p. 53).

[4] De Louter, I, 59: 'Le droit international n'a pas de législateur, et, qui plus est, n'en aura jamais. Un pouvoir législatif ne saurait exister que *dans* un État. Dès que le droit international cesse d'être un droit *entre* des États souverains, pour devenir le droit d'un pouvoir qui leur est supérieur et auquel tous sont soumis, les États perdent leur souveraineté et le droit international se métamorphose en droit public d'un État mondial.'

[5] 'The Law of Nations is of a distinctly different character from municipal law. It may truly be affirmed that the *lex gentium* is of a more elevated nature. Applying as it does *inter gentes*, it does not appeal to the policeman; it appeals to reason itself, to the sense of equity, to a higher moral consciousness' (Philip Marshall Brown, *International Realities* (1917), at p. 104). See also Sauer, *Lehrbuch der Rechts- und Sozialphilosophie* (1929), at p. 290, to the effect that although international law is deficient *qua* law, it is a superior cultural phenomenon: 'From the cultural point of view international law transcends municipal law as based on compulsion. It aspires, from the limited domain of strict law, to an affirmation, as a matter of moral conviction, of the cultural community of mankind.' The historian of legal thought will note with interest that at a certain stage of the development of international law its notional attractiveness was regarded by some as a sufficient compensation for its substantial shortcomings.

The latter doctrine, although viewing the weaknesses of international law as necessarily and permanently connected with the existence of the international society of States, admits that they are shortcomings from the more general legal point of view. But according to another view, the so-called shortcomings of international law are merely the manifestation of its specific character. They are shortcomings, it is said, only so long as they are viewed from the narrow perspective of municipal law, whereas in fact they are a reminder of the existence of a wider conception of law of which municipal law is only a historical category. Thus we find Westlake suggesting that the controversy whether rules of international law are rules of law or of morality can be solved if we decline 'to treat the law of the land as the only proper kind of jural law, for then while keeping law distinct from morality, we shall not encourage an undue attribution to international law of the characters only appropriate to the law of the land'.[1] It is said that 'the orthodox concept of law is not sacrosanct'; that 'it is necessary to inquire whether it ought not to be adapted to the requirements of actual life' (actual life meaning for this purpose the existence of rules called international law);[2] and that the proper way to approach philosophy of law is international law 'through which one is in the position to follow the delicate problem of the creation and the development of law'.[3]

We thus arrive at the central problem in the question of the determination of the legal nature of international law. The answer to this question obviously depends upon the conception of law which we adopt as the basis of the investigation. To what conception of law must international law conform in order that it can accurately be described as law? Is it a conception of law deduced from the positive legal order within the State, i.e., a conception of law of general jurisprudence in modern society? Or is it a conception of law made so elastic as to embrace the body of rules regulating at present the mutual relations of modern States? Shall international law be guided, while admitting its own shortcomings, by the generally

[1] *Papers*, p. 14. However, Westlake himself saw the dangers of this method of approach, and admitted that 'if we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense' (*ibid.* p. 22). The whole trend of his work justifies the observation of Oppenheim that 'he belonged to the legal school of international jurists who, in contradistinction to the members of the diplomatic school, desire International Law to develop more or less on the lines of Municipal Law' (*ibid.* p. 10).

[2] Mayer in *Archiv des öffentlichen Rechts*, 38 (1918), 14.

[3] Sauer, *Grundlagen der Gesellschaft* (1924), p. 431.

accepted notion of law which few would venture to deny but for the necessity of defending the legal nature of international law? Or shall it broaden it and impart to it some of its elasticity? To put the question in a manner expressing the view of the present writer – Shall international law aim at improvement by trying to bring its rules within the compass of the generally accepted notion of law, or shall it disintegrate it and thus deprive itself of a concrete ideal of perfection? It will be noted that the question thus put transcends the limits of a problem of international law. It becomes a problem of general jurisprudence, a problem whether the general conception of law should be broadened by the inclusion of a generalized norm of conduct based on the relations of sovereign States as at present constituted. Before answering these questions it is necessary to consider the doctrine in which the theory of the specific character of international law has found its current expression. This is the so-called theory of international law as a law of co-ordinate entities or, shortly, as a 'law of co-ordination'.

2. INTERNATIONAL LAW AS A SO-CALLED LAW OF CO-ORDINATE ENTITIES

The notion of international law as a law of co-ordination has recently been increasingly adopted by writers, but there has been no attempt to elaborate it in detail.[1] In a recent text-book of

[1] See, for instance, Strupp, *Éléments*, I, 11 ('Les États étant égaux entre eux, le droit international public en tant droit entre les États est un droit de co-ordination et non un droit de subordination'); Liszt, p. 8 ('International law is based on a corporate not authoritarian principle'); Walz, *Das Wesen des Völkerrechts und die Kritik der Völkerrechtsleugner* (1930), pp. 252–61, also bases his construction of international law on the theory of co-ordination, but there is no attempt at a detailed exposition of what the law of co-ordination really means. Ultimately, the whole theory is reduced to a difference in the manner of the creation of rules of law. Walz does not deny that rules of international law, once established, bind States independently of their will. But he attaches decisive importance to the difference in the 'process of positivation' (i.e. of creation) of rules of law. There is no explanation why this should be a reason for regarding international law as 'a law of a specific character strongly differing from municipal law' (p. 295). See also Heller, *Die Souveränität* (1927), pp. 43–4, who regards international law as 'a non-authoritarian legal order based on contract' (*herrschaftsfreie Vertragsordnung*).

It seems that the insistence on the specific law of co-ordination on the part of German writers has recently assumed the form of a particularly German conception of international law grounded in the Teutonic as distinguished from the Romanistic tradition as embodied in some peculiarities of the political structure of German society in the Middle Ages and in the feudal period. See, for instance, Sternberg, *Einführung in die Rechtswissenschaft* (2nd ed. 1927), part I, p. 26. See also for an admirable survey with an extensive bibliography, Borchard in *Yale Law Journal*, 36 (1926–7), 1058–74. That the idea of the *societas inordinata* as the basis of political relations is necessarily bound up with the existence of a legal power above the *societas inordinata* is clearly pointed out by Binder, *Die Philosophie des Rechts* (1925), p. 572.

Hatschek[1] there is a restatement of the theory of co-ordination, but the attempt is not particularly illuminating. International law, he says, is a legal system based on co-ordination.[2] This, he explains, means that, unlike municipal law, which is based on subordination of persons to the legal rule, there is in international law no superior will which imposes the law. There is no super-State endowed with authority. He then proceeds to define the international law of co-ordination as a 'legal order based on the recognition of States as equal subjects of international law' – a somewhat inconclusive explanation seeing that municipal law, which is a law of 'subordination', is also based on the equality of individuals before the law. How are rules of international law created in such a system? They are created principally by parallel legislation or customary municipal rules in various countries, for instance, by that relating to the inviolability of envoys and foreign heads of States. These rules are binding upon States not as legal rules but as so-called social or conventional rules, i.e., rules which are not created by an authoritative source of law and whose sanction consists merely in social compulsion.[3] From these conventional rules there grows, as the result of their becoming part of the legal conviction of States, particular and, in the long run, general customary international law. We are not told what is the basis or the nature of the binding force of this customary international law. This somewhat slender basis serves as the foundation for Hatschek's exposition of international law. For a more satisfactory exposition of the law of co-ordination it is necessary to go back to earlier German writers, in particular to Jellinek and Triepel.

Jellinek was the first to construe international law as a specific law of co-ordination. He did it with the help of the theory of self-limitation,[4] a theory originally developed in order to demonstrate

[1] *Völkerrecht als System rechtlich bedeutsamer Staatsakte* (1923). An English translation by Manning of the abridged version of this book appeared in 1930.

[2] *Ibid.* p. 2.

[3] Hatschek instances the conventions and customs of the constitution in Great Britain as an example of conventional rules. On the whole the term 'conventional rules' as used by Hatschek and other German writers is identical with Austin's 'positive morality'.

[4] The theory was first formulated in Jellinek's *Die rechtliche Natur der Staatenverträge* (1880), and subsequently amplified and defended in his *Allgemeine Staatslehre* (1st ed. 1900). Of the latter a French translation by Fardis appeared in two editions under the title *L'État moderne et son droit* (2nd ed. in 1911 and 1913). The rudiments of the doctrine of self-limitation will be found in Ihering's *Der Zweck im Recht* (1880), I, 318, and possibly even in Rousseau's *Contrat Social* (Book I, chs. IV and VII). See Sukiennicki, *Essai sur la Souveraineté des États en Droit International Moderne* (1926), pp. 170–4. For examples of the adoption of the theory of self-limitation see Nippold, *Der völkerrechtliche Vertrag* (1894), pp. 19–22, and Zorn, *Grundzüge des Völkerrechts* (1903), p. 7. The doctrine has been accepted by some French writers, for instance, Mérignhac, I, 291 *et seq.*; Malberg, *Contribution à la théorie générale de l'État*, I (1920), 237 *et seq.*

the partial subjection of the State to law. In this act of self-limitation Jellinek recognizes also the source of such binding force as international law possesses. He sees no difference between international and municipal law except that, whereas the latter is a relation of subordination of the members of the community to law, the former is one of co-ordination of entities. International law is grounded in the will of the State, and ultimately it is this basis of international law which is decisive. Where international law and the existence of the State conflict, the former must yield, for international law exists for States and not States for international law. Legally, says Jellinek, the State is entitled to disengage itself at any time from an obligation deemed to be inconsistent with the interests of the State. This precarious nature of international obligations does not, in his view, deprive them of their legal nature, for in addition to the purely normative aspect there is a psychological foundation for law arising out of the fact that it is recognized as binding by the members of the society. Such obligations are not absolutely binding as a matter of strict law, but they possess a binding force grounded in the objective nature of international relations which from the point of view of their social necessity are comparable to those obtaining among individuals.[1] Thus, although as a matter of legal theory the will of the State is the origin and the basis of the obligation, that will is not an entirely irrational factor.

This juxtaposition of two conflicting methods of approach has led to some confusion as to the actual meaning of Jellinek's combination of the doctrine of self-limitation and the theory of a law of co-ordination. Whereas his treatment of international law is generally subjected to severe criticism and regarded as the very negation of law and a glorification of force, there are writers who draw attention to Jellinek's insistence on the objectively binding force of international law and express the opinion that there is no substantial difference between his approach and the more recent doctrines from Triepel to Kelsen and Verdross.[2] It may be doubted whether this is so. As a legal theory the doctrine of self-limitation cannot be interpreted otherwise than as a denial of the binding force of international law. As a sociological and psychological doctrine it amounts to a negation of the ultimate supremacy of the legally sovereign State and thus to an affirmation of the binding force of international law. This double method of approach Jellinek defended on the ground that the same

[1] *Die rechtliche Natur der Staatenverträge*, pp. 46–9.
[2] See, for instance, Spiropoulos, *Théorie générale du droit international* (1930), pp. 46–50.

object may form the subject-matter of various modes of cognition. Thus, he said, a symphony may be the subject-matter of physiology or aesthetics. In proceeding thus he laid himself open to the reproach that it is scientifically impossible to treat objects as the subject-matter of various modes of knowledge at the same time.[1] The fact that the juridical supremacy of the State is sociologically or morally limited by other considerations necessarily escapes juridical appreciation. In practice these considerations may or may not become operative; in practice political considerations may limit the State's freedom from the legal bond, but they need not when these very considerations dictate to the State the necessity of disregarding its obligations. The juridical theory of self-limitation leaves open that possibility. It makes the observance of rules of international law not a matter of legal obligation, but the result of a calculation—which may or may not take the long view – as to the compatibility of the observance of the obligation with the interests of the State. Jellinek himself admitted that as the result of a law of co-ordination thus conceived, 'the community of States is of a purely anarchical nature and international law, originating from an unorganized authority and possessing accordingly no overriding authority, may properly be described as an anarchical law'.[2] It is not surprising that he regarded war not only as a necessary factor but also as an element of progress in this anarchical society. This is in fact the attitude of most of the adherents to the doctrine of auto-limitation. Thus Bergbohm, one of the precursors of the doctrine, regarded the very idea of a permanent international court as incompatible with the modern conception of the State.[3] This was also the attitude of some of the followers of Jellinek.

Where, as the result of the adoption of a somewhat promiscuous method, a writer's opinion lends itself to two diametrically different interpretations, then that interpretation ought to be preferred – as being more accurate – which is most in accordance with the actual influence exercised by the doctrine.[4] It must be judged by its fruits.

[1] See for a vigorous criticism of this 'two-sides' theory Kelsen, *Der soziologische und der juristische Staatsbegriff* (1922), pp. 114–20. [2] *Allgemeine Staatslehre* (3rd ed. 1921), p. 379.

[3] *Staatsverträge und Gesetz als Quellen des Völkerrechts* (1877), p. 32. See also the same, *Jurisprudenz und Rechtsphilosophie* (1892).

[4] For a criticism of the doctrine of self-limitation see Triepel, *Völkerrecht und Landesrecht* (1899), pp. 77–81; Duguit in *H.L.R.* 31 (1917–18), 139–48; Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (1920), pp. 168–74; Sukiennicki, *op. cit.*, pp. 174–222; Verdross, pp. 12–20, and in *Hague Recueil*, 16 (1927) (i), 262–74; Chklaver, *Le droit international dans ses rapports avec la philosophie du droit* (1929), pp. 179–87; Brierly, 'Le fondement du caractère obligatoire du droit international', *Hague Recueil*, 23 (1928) (iii), 482–4.