

VIRGINIA LAW REVIEW

VOLUME 27

DECEMBER, 1940

NUMBER 2

THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

RECENT events on this continent make it seem appropriate once more to discuss the much-debated question of the relation between international law and municipal law.¹ For one school, the dualists, municipal law prevails in case of conflict; for the other school, the monists, international law prevails.

There are two special features about the debate which warrant mention: first, that while the disputants do not widely differ in the ultimate solution of practical problems, they do differ considerably in their major premises and in the resulting theories; and second, that the attempt of various countries on occasion to

1. The literature on this subject is well represented by the following publications:

Kunz, *On the Theoretical Basis of the Law of Nations* (1924) 10 TRANS. OF GROTIUS SOC. 115 *et seq.*

Kelsen, *Les Rapports de Système Entre le Droit Interne et le Droit International* (France, 1926) REC. ACAD. D. I. c. IV.

Triepel, *Les Rapports Entre le Droit Interne et le Droit International* (France, 1923) REC. ACAD. D. I.

PICCIOTTO, THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND AND OF THE UNITED STATES (1915).

Westlake, *Is International Law A Part of the Law of England?* (1906) 22 L. Q. REV. 14 *et seq.*

Bruns, *Völkerrecht als Rechtsordnung* (Deutschland, 1929) 1 ZEITSCHRIFT FÜR OFFENTLICHES RECHT U. VÖLKERRECHT 1.

Decenièvre-Ferrandière, *Considérations Sur Le Droit International Dans Ses Rapports Avec Le Droit de l'Etat* (France, 1933) 40 REV. GEN. D. I. P. 45.

WALZ, VÖLKERRECHT U. STAATLICHES RECHT. STUTTGART (1933).

BORCHARD, A HISTORY OF POLITICAL THEORIES, RECENT TIMES (1924) 120 *et seq.*

Scott, *The Legal Nature of International Law* (1907) 1 AM. J. INT. L. 831.

Willoughby, *The Legal Nature of International Law* (1908) 2 AM. J. INT. L. 357.

escape the restraints of international law persuades them to find a justifying theory in its supposed limited scope and in a compensating emphasis upon State sovereignty.

Those who have maintained the dualism of the two systems and the predominance of municipal law, have found some theoretical support in the supposed weakness of international law as a legal system. The alleged readiness with which the rules have been violated in time of war lends additional strength to this view. The undue demands made on international law as a supposed preserver of peace and the failure to allow for the interjection of politics further disturbs balanced judgment. The Austinians have done their share by asserting that international law was not law at all because it did not conform to their rigid tests of a rule laid down by a political superior to an inferior, that international law was not created by legislatures, and that hence in their judgment it constituted merely precepts of morality. Nor in times like these is the argument for its legal nature helped by the unfounded allegation that only public opinion sustains international law.

But even among those who admit that international law is positive law, although of a source, nature and scope different from that of municipal law, many still maintain that it does not control municipal law since it operates in a different sphere. It is argued that international law functions between States and municipal law between individuals, with sovereign control. The argument finds philosophical support in the view that international law is the product of national will, is consensual in character and cannot subordinate its creators. The theory of consent is used as a justification for the view that consent may be withdrawn.

If these were sound premises, the conclusion would be that international law is not law at all because any law that is binding only by consent is not binding at all. Foreign Offices and arbitral tribunals do not invoke it on any such basis, nor, strictly speaking, do nations claim exemption from its binding control by presenting *ad hoc* resignations or disavowing its validity. Nations in their diplomatic correspondence do not assert the prevalence in principle of their municipal law over international law. They may assert that international law does not control a particu-

lar situation, that the issue falls within the domain of domestic jurisdiction, that international law is to be construed or interpreted according to the views they advance, that, exceptionally, some motive like reprisal justifies their momentary departure from international law in a particular case. But they will not claim that either in general or in particular they are not bound by international law.

The dualists maintain that as international law cannot address itself to individuals, but only to States, States are free to regulate their internal affairs as they see fit, and that international law exercises little or no control over municipal law. Professor Oppenheim maintained, without support in theory or practice, that "international law and municipal law are in fact two totally and essentially different bodies of law which have nothing in common, except that they are both branches—but separate branches—of the tree of law."² The dualists are especially concerned to prove that international law cannot be invoked in municipal courts, quite a different matter. Courts constitute only one agency of the State. Although the dualists will admit that many of the rules of treaty and international law are devised for and accrue to the benefit of individuals, they nevertheless insist that only States may become spokesmen for these rules and advantages. Confronted by the fact that several treaties confer on individuals the right to bring personal actions against States, as in the Central American Court of Justice of 1907 and in the abortive international prize court, they maintain that this is an exception to the general rule.

Those, on the other hand, who assert the supremacy of international law have often been led to overemphasize the claim by the assertion, particularly of the so-called Vienna school of Kelsen, that municipal law finds its source in international law, that international law regulates individual conduct, that therefore there is only one single system of which all types of law are simply branches. From the admitted or obvious fact that international law exercises a considerable control over municipal law and to some extent dictates its content, as in the matter of diplomatic agents, immunity from the local jurisdiction, territorial

2. OPPENHEIM, INTRODUCTION TO PICCIOTTO, *THE RELATION OF INTERNATIONAL LAW TO THE LAW OF ENGLAND* (1915) 10.

waters, etc., they draw the unfortunate legal conclusion that all law finds its source in international law, a conclusion which gives unnecessary offense to the monists of the municipal law school and to the dualists as well.

The fact is that both these schools are partly right and partly wrong. When it is said that international law cannot "*per se* create or invalidate municipal law nor can municipal law *per se* create or invalidate international law,"³ the fallacy lies in the inference that municipal law can disregard international law and that a country incurs no responsibility under international law when its municipal law violates international law to the injury of a foreign nation or its nationals. As we shall see, international law exerts a definite check upon municipal law and holds the State responsible to the State whose nationals are injured by excesses in conflict with international law. When Article 2 of the Draft Convention of the Harvard Research in International Law provided that a State is internationally responsible for certain types of injuries to aliens, "anything in its national law, in the decisions of its national courts, or in its agreements with aliens to the contrary notwithstanding," it expressed a rule which indicated the control or supremacy of international law over State conduct discriminating against foreigners.⁴ Indeed, the effect of the dualistic theory applied to its logical extreme would be to deny legal character to international law, because it is hardly conceivable that two legal systems operating on the same groups of human beings should have no legal connection.

The dualists point out that the divergent source and subject matter of international law and municipal law are demonstrated

3. *Ibid.*

4. Article 2 of the tentative convention on Responsibility of States, drafted at The Hague Codification Conference, provided:

The expression "international obligations" in the present convention means obligations resulting from treaty, as well as those based upon custom or the general principles of law, which are designed to assure to foreigners in respect of their persons and property a treatment in conformity with the rules accepted by the community of nations.

Basis of Discussion No. 2 of the Conference read as follows:

A state is responsible for damage suffered by a foreigner as the result either of the enactment of legislation incompatible with its international obligations, resulting from treaty or otherwise, or a failure to enact the legislation necessary for carrying out those obligations.

The debate on this article will be found in, League of Nations Document, C. 351 (c). M. 145 (c). 1930. p. 26 *et seq.*

by the fact that the State itself stands between the two systems. If individuals are to be controlled, the State must act. The fact that the State so often acts contrary to international law and fails to bring its municipal law into conformity with international law, impresses the dualists with the independence of the municipal system and leads them to the conclusion that international law is a voluntary or moral obligation only, for they continually see evidences of the fact that the State insists on going its own way, regardless of the obligations allegedly imposed by treaty or international customary law.

What the dualists overlook is the fact that while departures from international law are occasionally successful in fact, this merely indicates that lawlessness, in the particular instance, has prevailed. It is not always practical to submit violations of international law to arbitration, and even less so to hail a recalcitrant nation into court or compel it to perform its international obligations. Considering the frequency, however, with which issues are arbitrated or settled by diplomacy according to rules of law, it would be improper to convert the exception into the rule or to endow the exception with legality and make the rule seem an accident. Observance of law is the custom and non-observance—which is noted by the entire world—the exception. We have innumerable precedents which have held States liable for their failure to perform international obligations, whether the delinquency arises out of statute or administrative act. Secretary of State Bayard in 1887 made a classic and frequently quoted statement of the rule of law:

“If a government could set up its own municipal law as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name, and would afford no protection either to states or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a Government can not appeal to its municipal regulations as an answer to demands for the fulfillment of international duties.”⁵

The Kelsen school add the further criticism that the dualistic

5. Secretary Bayard, to Mr. Connery, Nov. 1, 1887 (1887) *FOR. REL.* 751, 753. See also, Hyde, (1911) *PROC. AM. SOC. INT. L.* 36.

theory sins against the requirement of unity necessary to any science, including legal science. They argue that if international law and municipal law were absolutely different without interrelation it would be improper to call them both by the term "law." The dualist meets this charge by the assertion that international law is a feebler and special variety of law operating between entities called States, which are theoretically equal. The dualists thus really assert the primacy of municipal law and thus find themselves in conflict with the obvious fact that the State—except as a lawbreaker—cannot at will liberate itself from its international obligations. That practical fact fortifies the monists in their conviction of the primacy of international law. Indeed, the supposed primacy of municipal law leads to the contemplation of a kind of anarchy in which each State may decline to be bound by its treaties and by international law whenever its interests so dictate.⁶ While the appearance of things may occasionally give such an impression to the layman, the fact is that no country would venture to make any such profession and that the experience of treaty observance and arbitral decision leads to a conclusion quite different.

On the other hand, the monistic theory in spite of its architectural attraction is not quite tenable. Municipal law existed long before international law came upon the scene and survives its depressions. Even in a legal State international law controls but a very small part of external State activity and a smaller part of internal State activity, so that it is a little tenuous to argue that municipal law finds its source in international law. Technically, municipal law cannot authorize what international law prohibits, but in fact it often does, and individuals are bound by the aberrative municipal law. No individual can be punished for observing a municipal law which may be deemed to conflict with international law. On the contrary, his conduct, domestically, is privileged. The explanation of the inconsistency lies in the fact that while individuals are bound by their municipal law, regardless of its conformity with international law, the State may

6. See the doctrines of Hatschek, Jellinek and Kaufmann, set out in LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933) 409 *et seq.*

have to repair the wrong done to other States by its internationally unprivileged municipal law or decision.⁷

The monists again go too far in predicating a common principle *pacta sunt servanda* as the basis both of international law and of municipal law. Whatever the philosophical basis for explaining the observance of international law, this theory can hardly explain the binding character of municipal law. The monists err also in suggesting that the occasional divergence between municipal and international law is explained as a delegation of power by international law which authorizes the State to enact domestic rules contrary to international law. This is even less tenable in theory and practice, which not only do not sustain it but furnish a more correct explanation.

The error of each school appears to lie in the unwillingness to admit a principle of coordination between the two systems. They do have a relation and an easily established one. Although it is true that international law is addressed to States as entities, it exerts a command upon law-abiding States not to depart from its precepts, subject to international responsibility.⁸ The domestic instruments that the State employs to perform its international obligations are a matter of indifference to international law. It may employ statute or administrative official or judicial control. It may directly incorporate international law into the local system, or it may incorporate only treaties and not customary law. Its failure to enact the necessary implementing legislation or law may impose upon it international responsibility, as in the case of the *Alabama* claims. On the other hand, should its local legislation arrogate to itself privileges not permitted by international

7. Secretary Bayard in 1887 remarked:

"This Department has contested and denied the doctrine that a government may set up the judgment of one of its own courts as a bar to an international claim, when such judgment is shown to have been unjust or in violation of the principles of international law."

Mr. Bayard to the President, Feb. 26, 1887, VI MOORE'S DIGEST (1906) 667. See also, Mr. Bayard to Mr. Hall, Nov. 29, 1886 (1887) FOR. REL. 81; *Howland (U. S.) v. Mexico*, Apr. 11, 1839, Moore's Arb. 3227; *Mather and Glover (U. S.) v. Mexico*, July 4, 1868, Moore's Arb. 3231.

8. The law-breaker cannot always be dealt with as efficiently as in municipal law, whose law-breakers also frequently escape. But there are many pressures on states to observe international law, and the departure is usually profusely explained, if possible, even in time of war. No international law violations escape detection, as do municipal violations.

law, it will be bound either to make restitution or to pay damages through arbitration or diplomacy.⁹

In the United States the courts are by the Constitution bound to give effect to treaties which even an aggrieved individual may invoke. In England, the rule is different, for there treaties must be adopted or converted into legislation before they become invocable in the courts. But in both cases the treaty is binding on the nation and will be enforced, notwithstanding a conflicting municipal statute, by such instrumentalities as international law possesses. The American courts, like the English, are said to consider international law a part of the law of the land.¹⁰ And this is true, for international law will in principle be enforced directly in the municipal courts provided there is no statute *contra*.¹¹ Where a reconciliation between international law and municipal law is possible, the courts will make it.¹² Where there is a statute which conflicts with international law, instances of which will presently be noted, the courts must perforce give effect to the statute even as against the treaty, provided the treaty is earlier in time. But this merely indicates that the municipal economy or administration is so arranged that the enforcement of the international obligation is vested not in the courts but in a different department. This phenomenon has led to the inference that the municipal law enforceable in the courts prevails over a contrary rule of international law, which is enforceable by the Executive at the initiative of the aggrieved foreigner or

9. See statement of Secretary Bayard, *supra* note 7.

10. *Heathfield v. Chilton*, 4 Burr. 2015 (K. B. 1766); *Triquet v. Bath*, 3 Burr. 1478 (K. B. 1764); *Barbuit's case*, Talbot 280 (1737). 4 BL. COMM. (1765) c. 5, remarked that the law of nations was adopted fully by the common law, as part of the law of the land.

In *Queen v. Keyn*, 2 Ex. D. 63 (1876), the court did not believe that municipal jurisdiction over crime in territorial waters was a rule of international law. The Territorial Waters Jurisdiction Act, 1878, concluded that it was.

11. *The Paquete Habana*, 175 U. S. 677 (1900); *United States v. Arjona*, 120 U. S. 479 (U. S. 1887); *Thirty-Hogsheads of Sugar v. Boyle*, 9 Cranch 191 (U. S. 1815); *The Nereide*, 9 Cranch 388 (U. S. 1815); *Schooner Exchange v. McFaddon*, 7 Cranch 116 (U. S. 1812); *La Niña*, 75 Fed. 513 (C. C. A. 9th, 1896); *Emperor of Austria v. Day*, 2 Giff. 628 (Ch. 1861).

12. "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Marshall, C. J., in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (U. S. 1804).

his government. But this merely means that the courts have no local authority to give effect to international law *when it conflicts with municipal statute*, but that such function is vested in this country in the Secretary of State, who is the agent of the American people for the enforcement of international law. The rule that finally prevails on the American people is the rule of international law as evidenced in the taxes they may have to pay to make good the aberrations of the municipal statute.

So in *United States v. La Jeune Eugenie*,¹³ the United States felt obliged to pay damages to France for the illegal seizure of a private vessel, although sustained by the Supreme Court. After the Civil War the United States submitted to arbitration twelve prize decisions of the United States Supreme Court during the Civil War. In six of those cases, the arbitral tribunal found the Supreme Court to have been wrong and awarded damages to Great Britain, a phenomenon very common in prize cases, especially where the prize court is bound by municipal order in council or regulation and not necessarily by international law.¹⁴ In the nineties, the United States had extended its jurisdiction in the Behring Sea by law beyond the three-mile limit, in order to police the manner of taking seals. The Behring Sea Arbitration held this to have been a legal error and the seizures made under the statute illegal, so that heavy damages had to be paid.¹⁵ Whenever a country by municipal statute or decree au-

13. 26 Fed. Cas. 832, No. 15,551 (C. C. D. Mass. 1822). Compensation paid by Article III of the Treaty with France, July 4, 1831. See II MOORE'S DIGEST (1906) 920.

14. WHEATON, INTERNATIONAL LAW (8th ed. by Dana 1866) §§ 392-397; 3 WHARTON, DIGEST (2d ed. 1887) § 329a; 2 OPPENHEIM, INTERNATIONAL LAW (5th ed. 1930) § 557; *The Betsey, Furlong (U. S.) v. Great Britain*, Nov. 19, 1794, Moore's Arb. 3160-3209, especially Pinckney's opinion at 3180. The British-American Commission under treaty of May 8, 1871, passed upon numerous prize decisions of the United States Supreme Court, and overruled several of them by awarding indemnities to the claimants; *e. g.*, *The Hiawatha*, 2 Black 635 (U. S. 1862), Moore's Arb. 3902; *The Circassian*, 2 Wall. 135 (U. S. 1864), Moore's Arb. 3911; *The Springbok*, 5 Wall. 1 (U. S. 1866), Moore's Arb. 3928; *The Sir William Peel*, 5 Wall. 517 (U. S. 1866), Moore's Arb. 3935; *The Volant*, 5 Wall. 179 (U. S. 1866), Moore's Arb. 3950; *The Science*, 5 Wall. 178 (U. S. 1866), Moore's Arb. 3950. See also, *Felix (U. S.) v. Mexico*, Mar. 3, 1849, Moore's Arb. 2800-2815; *The Orient (U. S.) v. Mexico*, Apr. 11, 1839, Moore's Arb. 3229.

15. *La Ninfa*, 75 Fed. 513 (C. C. A. 9th, 1896).

thorizes unlawful seizures from or arbitrarily discriminates against foreigners, under the criterion of international law and not merely municipal law, it incurs international responsibility and must repair the wrong in the most practicable manner possible. And when the President disregards the statute or pays damages through congressional appropriation for the municipal delinquency, he is not exercising the pardoning power but acts according to a supervening rule of law. Should he dispute the rule of international law with a foreign government the issue is generally submitted to arbitration or diplomatic negotiation, but in no case would it be consciously asserted that the Foreign Office—except for commanding political reasons which entail responsibility—has knowingly declined to give effect to an admitted or established rule of international law. Even an assertion that the issue involves a domestic question is internationally justiciable, for international law does determine the matters that are within the *domaine réservé*.

But let us hear from the opposition. When Gilchrist says that "each State is independent and interprets for itself how far the principles of international law are to apply," because "there are as yet no international courts to enforce international law, though there are courts to interpret it, and what we find in practice is that States interpret international law for themselves, usually as they find it expedient," he presupposes a condition contrary to fact when States act in accordance with international law and true only when they violate international law. Following the analytical jurists like Austin and Jellinek, he believes that international law, as he views it, is nothing but "international principles of morality." Such duties as it has are self-imposed and hence could hardly be legal.

But when the President or Secretary of State on the demand of foreign nations, invoking a rule of international law, releases an alien from the military service¹⁶ or releases a rumrunner seized outside the three-mile limit and thereby in effect overrules a statute of Congress and a supporting decision of a municipal court,¹⁷ he is acting as a societal agent of the American people

16. *Ex parte Larrucea*, 249 Fed. 981 (S. D. Cal. 1917), (1918) 28 YALE L. J. 83.

17. Instructions issued Nov. 10, 1922, by Secretary of the Treasury Mellon to customs officers at New York. N. Y. Times, Nov. 11, 1922, p. 2, col. 8.

and State and is recognizing the binding character of international law as law in the United States and everywhere else. When foreign nations refused to permit Russia and Japan to make foodstuffs contraband or in other respects to violate the rights of neutrals;¹⁸ when foreign nations deny to the countries of Latin-America the privilege of unilaterally defining the term "denial of justice"¹⁹ or by contract with their citizens of exacting a waiver of the privilege of invoking diplomatic protection,²⁰ they are invoking international law as a rule of law superior to any contrary rule of municipal law.²¹ These nations, undertaking to interpret for themselves "how far the principles of international law are to apply" found themselves severely limited in their freedom of action by the foreign States affected by the misinterpretation of their international duties, invoking not their political strength but an established rule of international law from which no State can legally escape.²² The mere fact that violations of international law occur and occasionally go unredressed is no evidence that the rules violated are not law, any more than the no less frequent violation of municipal law is evidence of its non-legal character. While the sanctions of international law are somewhat different from those operating in municipal law, and while international law is not always certain, any more than is municipal law, the sanctions are none the less effective and the interpretative agencies none the less active. "International courts" do not "enforce international law"; no more do municipal courts "enforce" municipal law. But the declaratory and binding decisions of international courts are observed and carried out with a uniformity equal to that of

18. See Topic, Japan and Russia (1904-1905) *FOR. REL. passim*.

19. Mr. Bayard, Secretary of State, to Mr. Hall, Nov. 29, 1886 (1877) *FOR. REL.* 80-81. BORCHARD, *DIPLOMATIC PROTECTION* (1915) 847.

20. Mr. Bayard, Secretary of State, to Mr. Buck, Minister to Peru, Feb. 15, 1888, VI *MOORE'S DIGEST* (1906) 294; see BORCHARD, *op. cit. supra* note 19, at 797 and authorities there cited.

21. In an instruction by Secretary of State Bayard to Mr. King, Minister to Colombia, Oct. 13, 1886, it is said: "It is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a foreign sovereign for a wrong done to the latter's subjects." II *MOORE'S DIGEST* (1906) 4.

22. *Cf.* Pollard v. Bell, 8 T. R. 434 (K. B. 1800), in which Lord Kenyon remarked that no one member of the family of nations could, by unilateral ordinance, change international law.

municipal courts. The agencies for the enforcement of international law are not necessarily courts, but other State constitutional organs, usually the executive. The weakness of the system, which attracts a disproportionate amount of attention, consists in the inability to compel nations to submit their disputes to a court and the physical power of States, exercised on occasion without regard to law, to constitute themselves plaintiff, judge and sheriff in their own cause. The theory that international law is not necessarily binding on States, sustained by so many theorists and jurists, though founded on essential error, can only aggravate this weakness in the system and postpone the maturity of that international legal order for which most of them profess to be working.

Edwin Borchard.

NEW HAVEN, CONN.