

ST. LOUIS LAW REVIEW

Vol. III

Published by the Undergraduates of the
Washington University Law School

No. 3

THE STATE'S RIGHT OF SELF-PRESERVATION.

I.

"DECLARATION OF RIGHTS AND DUTIES OF NATIONS."

What was done by the American Institute of International Law at its first session, held in Washington, January, 1916, is worthy of careful consideration and study. It laid down the basis for a reconstruction of international law in a "Declaration of the Rights and Duties of Nations." The substance of that Declaration is as follows:

1. Every nation has the right to exist, and to protect and conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States.

2. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.

3. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitles them."

4. Every nation has the right to territory within defined boundaries, and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

5. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one it is the duty of all to observe.

6. International law is at one and the same time both national and international; national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable, as such, to all questions between and among the members of the society of nations involving its principles.

This Declaration, both on account of the name it bears and the principles it proclaims, has been misunderstood. Some people have thought that it was a reversion to the declarations of rights in vogue when America was winning her independence and when France was in the throes of revolution, and that, although there might have been a reason for such declarations in those days, no such reason exists now. The Declaration of the Institute simply repeats what has already been said in these earlier declarations and in the works of publicists on this subject, as well as what is recognized in the practice of states. Others say that to lay down the basis, even if it is a new one, for this reconstruction is useless as long as the edifice itself remains unbuilt. Still others contend that to declare the rights of nations while there are no courts to apply them, nor adequate sanctions to protect them from violation, produces very imperfect results, and it was for this very reason that the practice of declaring rights fell into disuse.

If we set aside this last observation, which is a correct one and which I on another occasion have already discussed in speaking of the means whereby the rules of international law may be made effectual, the remaining objections have no ground to stand on. My present purpose is to show the sound wisdom that lies beneath the surface of the Declaration and the hopes that it inspires for the future of international law.

In another place I have sketched the development and characteristics of the rights of independence and of liberty in the states of our continent, and the different conception of these same rights in Europe. Where these rights are concerned, therefore, we cannot speak of a universal international law.

We shall now consider the other rights proclaimed in the Declaration of the Institute—the rights of existence, of free development, of sovereignty, and of legal equality, and the limitations of which they are susceptible.

We shall first examine these rights together, because it is scarcely possible to draw a line of demarcation between them. All refer to

preservation of the state, and the divisions or classifications that some writers make are simply different manifestations of the right of self-preservation. Then these rights give rise to other rights, which play a very important part in international relations, and it is also very difficult to say with which one of the fundamental rights they are connected.

The fundamental rights of which we shall now speak are very old. They arose with international law itself. Grotius proclaimed them in his immortal work *De jure belli et pacis*, published in 1625, and the Treaty of Westphalia of 1648 formally recognized legal equality. These rights are not, however, so distinctively American in character as those of independence and of liberty. They belong to universal law, but this fact does not prevent their having certain well-defined features peculiar to our continent.

All these fundamental rights were easy to determine under the individualistic regime, when there were very few bonds between states. But today, as the result of the progress of civilization, better means of communication and the development of commerce, creating economic and social rivalry as well as interdependence, these rights are disregarded, or else the exercise of some one of them is always a limitation of some other fundamental right. It is therefore impossible to say when a state keeps within the just limits of its rights and when it abuses or disregards the rights of others. The same is true of solidarity and the general interest, which are further recognized limitations of the said fundamental rights and which the Declaration of the Institute formally sanctions. International law lays down no rules on the subject; that is to say, it does not determine what privileges flow from the fundamental rights and what are their limitations. This is perhaps its gravest defect. One thing that is well worth noting is that with the development of social life some of these rights acquire more or less superiority over others, and the latter must therefore yield to the former. For instance, the right of exclusive jurisdiction could in days gone by act as a check on the right to protect nationals in foreign countries, which springs from the right of self-preservation. Today the opposite is true. This same right of exclusive jurisdiction formerly allowed a state to refuse to recognize that a foreign law applied in its territory; today it is just the reverse.

We shall now consider what is the present status of these various fundamental rights, according to European and American practice, and then discuss how they should be regulated in the future.

II.

RIGHT OF EQUALITY.

In practice, the imperialism of the great powers, the European Concert, and the hegemony of the United States disregard the right of equality. All these political manifestations tend to disregard two fundamental rights in particular: equality and liberty.

By this policy the great powers have in effect arrogated to themselves rights which they refuse to recognize as belonging to other states, such as colonization in Africa, or they assume a guardianship over other states, considerably curtailing their sovereignty in both domestic and foreign affairs. It must, however, be admitted that, though their immediate object is their individual interest, in many cases the general interest is also subserved.

This policy of the great powers is not the result of their arbitrary will, as is generally believed. It is the result either of a development superior to that of other states, which impels them to expand beyond their borders, or of the fact that they believe themselves, by virtue of their superiority, to be called to govern international society and to play a leading part therein.

Every society must, by its very nature, be directed by some one who will ensure peace among the members constituting it. In civil society this is accomplished by the legislative, executive, and judicial powers of the state.

In international life this is not the case. The states are in a state of nature and community; that is to say, they have no organization similar to that which exists in civil society. For this reason this community has passed through two distinct periods, which may be characterized as that previous to and that subsequent to the establishment of international law.

In the first period States did not recognize any rights as belonging to other states. Their preoccupation was to dominate other states by force of arms and to defend themselves in the same way.

In the second period, which includes the present time, since civilization has established peaceful relations between states, they recognize certain rights as belonging to each other, but these rights are frequently disregarded, especially by the great powers.

In a third period, that of the reconstruction of international law, the society of nations must be organized in such a way as to insure respect for the rights of states and supervision of the general interests

of society by all the states, not, as in the case today, by the great powers alone.

This does not mean that the normal development of the great powers must be curbed, as some persons, a little hasty in their wishes, would like, nor that these states should cease to exert in international matters the natural influence that prestige exerts in everything. What we must strive to do is to prevent these powerful states from developing through material or moral coercion, or oppression of the weak, without indemnifying them. If the injustice of the strong against the weak is an evil, the attempt to destroy the influence of the strong is an injustice on the part of the weak against the strong, which is perhaps a greater evil than the other.

We cannot, therefore, recognize the absolute equality of states, subjecting the more powerful to various kinds of restraint. The equality that must be established, that which is proclaimed and asserted by the Institute, is legal equality, by virtue of which no state may, merely because of its superiority, have any claim or pretention to rights which are not recognized as belonging to weaker states. All states must be equal before the law.

Mr. Root, while Secretary of State, delivered an address at the Third Pan-American Conference, in which he described in masterly style the characteristics that international equality should possess, particularly the attitude of the great Powers towards the weaker States. His declaration has been unanimously approved throughout America and is often quoted and held up as the rule that should be adopted in our international relations. Given the unanimous approval of this declaration in America, the authority of its author and his right at the time, by virtue of his official position, to speak in the name of the Government of the United States, we may say that Mr. Root's statement embodied the American conception of legal equality between States. His words are as follows:

"We wish for no victories but those of peace; for no territory except our own; for no sovereignty except the sovereignty over ourselves. We deem the independence and equal rights of the smallest and weakest member of the family of nations entitled to as much respect as those of the greatest empire, and we deem the observance of that respect the chief guaranty of the weak against the oppression of the strong. We neither claim nor desire any rights, or privileges, or powers that we do not freely concede to every American Republic. We wish to increase our prosperity; to expand our trade; to grow in wealth, in wisdom, and in spirit; but our conception of the true

way to accomplish this is not to pull down others and profit by their ruin, but to help all friends to a common prosperity and a common growth, that we may all become greater and stronger together."

In what way, it may be asked, can international life be organized so as to obtain the result which we have indicated.

We have considered this point elsewhere.¹ Let us content ourselves here with pointing out that one of the best organizations would be a political union among the States of each continent, such as the Pan-American Union in our hemisphere. Problems relating to all these matters would there be discussed and solved. It would, moreover, be easier to establish such an organization than is generally believed.

III.

AGGRESSIVE RIGHT OF SELF-PRESERVATION.

Besides this aggressive policy of imperialism or hegemony of the great Powers, there is another kind of political acts, which, though in the guise of peace, are provocative of strife. These are certain rights that States pretend to exercise in the name of self-preservation. All publicists are unanimous in recognizing that States have the right, indeed the duty, to take such steps as are deemed necessary for self-preservation and defense. This right gives rise to important questions, which have been elucidated by publicists, namely: May a State oppose the increase of military power of another State? If so, what restrictions are placed upon this right? May a State ask another State for an explanation of an increase in its army or navy, which the first State may consider excessive? May a State contract alliances to protect itself against possible attack by other States? May a State oppose the expansion of another State, even though this manifestation of progress be of a peaceful nature?

All these and many related questions cannot be satisfactorily answered from the standpoint of law. In practice these questions are answered in the affirmative and have thereby become a prolific source of misunderstanding. The result is a strange phenomenon: the right of self-preservation, which would seem to be the most innocent, the most peaceful of rights, may become one of the most aggressive. That is what has happened in the present war; all the countries of Europe allege that they are fighting for their existence which is menaced by their enemies.

These questions cannot be settled satisfactorily in future except through a sound political organization of international society.

¹ *Le Droit international de l'avenir*, pp. 72, et seq.

IV.

RIGHT OF NECESSITY.

Another serious problem resulting from the right of self-preservation concerns the acts which a State may commit in case of extreme necessity.

Publicists are divided on the question whether in such a case a State may infringe international law and even violate the territory or the rights of other States. In practice States have alleged necessity in a number of famous cases: England when she seized the Danish fleet in 1807 in order to prevent its falling into the hands of Napoleon; Canada during the insurrection of 1837-1838 in the case of the *Caroline*; Spain in the case of the *Virginius*, during the Cuban insurrection of 1868-1878; Japan when she invaded Korea and Manchuria in 1904 during the Russo-Japanese war. The most serious case is beyond doubt the invasion of Belgium by Germany at the beginning of the present war. The statements made on this subject by the Chancellor, von Bethmann-Hollweg, at the session of the Reichstag on August 4th, 1914, have become famous: "We are in a position of legitimate self-defense, and necessity knows no law," and these statements have since been corroborated by all the German intellectuals, who have taken the same stand as the Chancellor. The jurist Kohler, professor in the University of Berlin, has so amplified this thesis as to frighten and to irritate a great many people, and indeed to call forth vigorous protests on the part of certain German professors. He declares specifically that "the relations between States are governed most frequently by the law of necessity. The State which has to fight for its existence acts rightly when it infringes the rights of other States, even the rights of neutrals, for its existence is in jeopardy."

What is to be the fate of this right or alleged right in the future? The Declaration of the Institute rejects it categorically, and cites in support of its action divers decisions of the Supreme Court of the United States, as may be seen in the official commentary on this Declaration.

It would seem that in so delicate a matter no absolute rule should be given, but that certain distinctions must be drawn. In the first place, legal rules, and indeed the established political order, may be violated when the general interest of mankind or of an entire continent really demands it. Though this may seem strange at first sight, it is not, if we consider that most of the progress in international life has been effected by violating the rules of the law of nations, since this law furnishes no adequate method of changing the existing legal order,

when it does not meet the requirements of new situations. The independence of the New World and the constitution of many European States could not have been accomplished except by violating the rules then in force, and what was then a violation has generally been justified afterwards and sanctioned by public opinion as a principle of international law.

But we must also lay down the principle that, if the political or legal order is established by convention and forms a part of what may be called the public law of a continent, it cannot be altered by the will of a single State, but that the consent of all is necessary. As a matter of fact, this principle was laid down in the protocol signed at the London Conference on January 17, 1871.

So far as concerns treaties of other kinds, which do not form part of public law, we can follow the rule recognized at the present day in theory and practice, that a State may refuse to abide by them when they would jeopardize its vital interests,—“if the very existence of the State should endanger, if the fulfillment of the international duty would be self-destructive,” as was recognized in the award of the Hague Court of November 11, 1913.²

Finally, if there could be organized on every continent a permanent union of States, the principle could be accepted that a State alleging the necessity of encroaching upon the rights of another State could submit its demand to the conference for decision as to the grounds for its encroachment and as to the indemnity it should pay the State so injured. For greater details on this point, we would refer to what we have elsewhere said on this subject.³

V.

RIGHT OF INTERVENTION.

The so-called right of intervention, which is derived from the right of self-preservation and free development, is one of the greatest restrictions that can be placed on the fundamental rights of States, particularly on the right of liberty and territorial sovereignty.

At the time of the French Revolution, the principle of non-intervention was incorporated in the Constitution of 1793,⁴ but even at that time it was disregarded, and has since been ignored

² See *Revue generale de droit international public*, Vol. XX (1913), Doc., p. 29; cf. Scott, *The Hague Court Report*, New York, 1916, p. 317.

³ See *Le Droit international de l'avenir*, pp. 83-85.

⁴ “The French people declares itself the friend and naturally ally of free peoples; it does not interfere in the governments of other nations; it does not allow other nations to interfere in its own.” Arts. 118, 119 of Constitution.

repeatedly. The opposite principle, namely, intervention, prevailed in Europe during the nineteenth century. In Europe, intervention has been either individual or collective, and political, religious, financial, etc., in nature. The peculiarity of intervention is that international law has no rule governing it. It is left to the practice of the States, varying according to the period and the country. The Papacy has condemned as a heresy, the result of modern liberalism, the principle of non-intervention.

In the United States the principle of intervention was condemned almost at the very beginning of its independence, and particularly in the Monroe Doctrine, which, as we have said, has been approved by all of the States of the continent, and the Latin States have during the past century reprobated the hegemony of the United States.

Therefore, in our hemisphere, contrary to the practice of Europe, intervention has never been recognized as a right, although it has taken place in fact. This idea is brought out strongly in Article 5 of the draft prepared by the Third Committee of the Conference of American Jurists, charged with the codification of international law: "A State may interfere in the affairs of another State only in a friendly and conciliatory way, and its intervention must in no case take on the appearance of constraint, since the independence and sovereignty of each of the American nations is a fact and an acquired inviolable right."

However, there has come into existence a new doctrine, which the United States itself has accepted and according to which there may be collective intervention in exceptional cases, to be passed upon in advance; but up to the present time it has not been considered advisable to apply it, although there have been serious cases in which it might have been resorted to.

Besides these characteristic differences between Europe and America in the matter of intervention, there is a special kind of intervention, on which there is uniformity of opinion on both continents and for which there are legal rules: intervention for financial reasons to obtain payment of public debts. A question of this kind arose in 1902 regarding the coercive action by certain European Powers against Venezuela. The eminent Argentine statesman, Dr. Drago, then his country's Minister of Foreign Affairs, addressed his famous note to the Minister of the Argentine Republic to the United States, asking him to obtain this country's support of the principle that payment of public debts may not be procured by force. This is called the Drago Doctrine.

At the Third Pan-American Conference, the States of Latin

America deemed it advisable not to consider this as a purely American question, but rather to urge the adoption of a world-wide resolution at the Second Hague Conference, which took place the same year. A convention respecting the limitation of the employment of force for the recovery of contract debts was indeed signed at this Conference, the first article of which states: "The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer for arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award."

In short, what this convention established is that compulsory recovery of public debts is not admissible against a State acting in good faith, but that it is admissible when the State acts in bad faith.

VI.

THE AMERICAN DOCTRINE OF INTERVENTION.

If we would now attempt to establish for the future an American doctrine in the matter of intervention in accord with the political life of our hemisphere, we would say that non-intervention by a State in the domestic or foreign affairs of another State should be the rule and that individual intervention should be permitted only in four cases. (1) When a State by convention or otherwise accepts from or grants to another State the right to intervene. (2) When the debtor acts in bad faith, where public debts are involved. In this case the State that wishes to intervene would do well to make known its decision in advance to the continental political union, which should be established. Such a union already exists in America in the Pan-American Union. (3) When it is a question of guaranteeing the lives and property of nationals; but in this case intervention must be preceded by a diplomatic admonition, the peril must be imminent, and the State where the incident takes place must be either unwilling or unable to protect its interest. The intervention must be confined to what is absolutely necessary, and the other States must be informed, as in the preceding cases. (4) When it is a question of self-preservation, but the peril must be direct and immanent, not merely contingent. This last case is the most difficult to regulate and the most serious, because it may lead to abuse on the part of powerful States.

Collective intervention for the sake of humanity or the interests of the world at large or those of the continent should also be permitted. Such intervention should be discussed in advance by all the States in conference, who would decide whether the intervention should take place and in what way.

VII.

PROTECTION OF NATIONALS IN FOREIGN COUNTRIES.

The protection of nationals in foreign countries is a right which States exercise by virtue of their right of self-preservation and of sovereignty. It consists of demands made by one State on another for injury to or molestation of its nationals residing in that State.

This matter of the protection of nationals in foreign countries is one of the most complex, because, although it is recognized in principle, it is not properly regarded by international law, which only lays down the rule that the demand must be made on the authorities of the country, in which the incriminating acts occur, and that the demands through diplomatic channels may be made only in exceptional cases. The result of this is that the matter is left to the policy of the States and consequently varies with their interests.

Perhaps the greatest number of such cases have arisen in the United States, and therefore this country has the greatest number of precedents for establishing legal rules on the subject.

This omission in international law has been largely responsible for the extreme, not to say abusive, lengths to which the States of Europe have gone in diplomatic claims against the weaker States of Latin America. They have addressed the States themselves in nearly all cases, without recognizing the local authorities of the countries upon which they have made demands.

The States of Latin America have continually called the attention of the States of Europe to the fact that the local authorities are competent to act, especially in view of the fact that these Latin-American countries make no distinction between nationals and aliens in the matter of acquiring and enjoying civil rights. They maintain that foreigners who have a claim against a State for damages suffered in its territory should appeal to the judicial authorities of the said State, and that the State in which they belong may not protect them through diplomatic channels except in cases of denial of justice, of abnormal delay, or of open violations of the principles of international law. At the Second Pan-American Conference the States of America, with the exception of the United States, signed a convention, laying

down the foregoing principles, to which they have constantly appealed ever since.

The project of the third committee of the conference of American jurists, of which we have already spoken, contains two articles relating to this matter of diplomatic claims and the protection of nationals in foreign countries. Article 1 states: "The citizens of American States residing in foreign countries are subject to the laws and authorities of those countries and enjoy the same civil rights as nationals. In no case may they claim the privilege of securing additional rights or of exercising such rights otherwise than as provided for nationals by the Constitution and the laws." And Article II says: "States have the right to protect their nationals residing in foreign countries, when an offense has been committed against their person, or their property has been injured, if it shall have been proved that they have been unable to obtain from the local authorities the reparation to which they are entitled. This protection may not be carried into effect when the individual for whom the claim is made is, according to the law of the State against which the claim is made, considered a national thereof."

VIII.

LIMITATION OF THE FUNDAMENTAL RIGHTS OF STATES.

We have seen the privilege which States have assumed by virtue of their fundamental rights, privileges which, as we have said, are limitations on the fundamental rights of other States.

Let us now examine the limitations which practice imposes on these rights in the name of the general interest of the society of nations, and which relate both to internal and external sovereignty.

In the first place, a State may not, on the ground that it is absolutely independent, isolate itself entirely from the other States or refuse to enter into relations with them. The great Powers have compelled certain of the Asiatic States to open their doors to European commerce, and this action has been approved by the whole civilized world.

Furthermore, a State may not, on the ground that it is sovereign in its domestic affairs, refuse to recognize within its territory the force of foreign laws or the validity of legal acts consummated outside its territory; in other words, matters of private international law. Formerly the force of foreign laws and the validity of legal acts consummated in foreign countries were recognized merely as a matter

of courtesy, *comitas gentium*, in the language of the publicists. Today it is held that it is not simply a question of courtesy, which a State may or may not extend, but a real obligation which cannot be refused without violating the law of nations. Private international law would not thus be based; not upon mere courtesy, but upon a legal obligation.

We must also include among the limitations on the absolute rights of States, in consideration of the general interest, the duties which are regarded as moral duties, but which are tending to become legal, to give each other mutual aid in certain branches of governmental administration and in humanitarian and sanitary matters. It is by fulfilling these duties that States have performed worthy acts of civilization, such as the abolition of slavery, etc. If the idea of moral duties continues to be accentuated in the relations between States, the conception of the fundamental rights will take on an entirely different aspect and give international law a new direction.

IX.

INTERNATIONAL LAW A PART OF THE NATIONAL LEGISLATION OF EVERY STATE.

A point, which is of the utmost importance for the future of international law is that of establishing the relation of this law to the domestic legislation of every State.

The sixth declaration of the Institute lays down the principle that international law is part of the legislation of every State, thus putting an end to one of the great divergences between the Anglo-Saxon and the Latin-American people on this subject. For, while the former have frankly admitted the said principle, the States belonging to the latter school have admitted it only in exceptional cases.

International law will in the future be considered throughout America as genuinely positive law, on the same footing as national law. It forms part of the national legislation and consequently it must be applied by the authorities of every country.

But a question arises with regard to this new aspect of international law. What shall be the attitude of the authorities of a country when there is a conflict between the national and the international law?

Many publicists hold that in this case it is the national law which the local authorities must apply. The Constitution of Venezuela follows this doctrine, laying down in its 25th article that "the law of nations forms a part of the national legislation; but its provisions

may not be invoked when they conflict with the Constitution and the laws of the Republic.”

This solution in absolute terms is inadmissible; it is, on the contrary, international law which must prevail over national law, because it binds the States in their mutual relation. What happens in practice is that the local authorities apply the national law, but the State to which they belong is responsible to the country which has suffered as a result of the application of the national law, and these infractions of international law, as we have said, are one of the cases warranting diplomatic demands. In practice, many entanglements have arisen which have been settled by indemnities.

ALEJANDRO ALVAREZ.