

PROTECTION OF NATIONAL SOVEREIGN RIGHTS UNDER INTERNATIONAL LAW

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COMPATIBILITY BETWEEN SOVEREIGNTY and international law entails that sovereignty comprises certain legal rights, which are conferred upon a state by international law. These sovereigns assume significant rights in two ways. First, sovereign rights deal with matters that constitute the *raison d'être* of the state and enable the latter to pursue activity in the international context. Second, these rights provide a legal edifice for this activity, thereby enabling the states to conduct their affairs in a legitimate manner. Construed in this sense, sovereignty can be equated with legal independence, in the sense that it entails the legal powers, which are *sine qua non*, for a state to conduct its affairs in the international comity of nations.

Until the closing part of the nineteenth century, Vattel and other jurists adhering to the natural-law school had held that membership in the comity of nations conferred upon the member states what were called the sovereign rights of states. It was further opined that these sovereign rights were essential, absolute, and self-evident, since the international community comprised sovereign states and these rights were inherent in the very nature of such states. These rights were indispensable and to be preserved even by war, as without them, no sovereign state could survive.¹ Other rights enjoyed by the states were regarded as secondary.

During the early phase of the twentieth century, there prevailed conflicting opinions amongst the jurists regarding the meaning and classification of the sovereign rights of a state. However, there was general agreement on some distinct rights which *inter alia* included the right to existence, to independence, to equality, to respect, and to territory. Some jurists regarded these rights as absolute and inalienable, while other jurists, who took a realistic view, opined that during the past these rights had come to be regarded as essential conditions of the membership of the international community, hence there was no need to assign to them an absolute and inalienable character. Oppenheim even argued that the notion of sovereign or fundamental rights should be excluded from Law of Nations.²

However, the practice in vogue, as applied by the states, has been to accord recognition to the rights of states, which came into existence by virtue of custom or as a sequel to treaties between states. In other words, the rights and duties of states must be those agreed and consented to by other states or stipulated by international law. The Montevideo Convention of Rights and Duties of States adopted in 1933

was the first authoritative declaration by American states on the subject of fundamental rights and duties of states. The convention *inter alia* declared: (a) that the political independence of states was independent of recognition and that the recognition merely signified the acceptance of international personality; (b) that the states were judicially equal; (c) that the fundamental rights of states were not susceptible to being affected in any manner, and states possessed them by virtue of their existence as states; (d) that no state has the right of intervention in the internal or external affairs of other states.³

Before this declaration could become universally acceptable and applicable, the Second World War broke out (1939–45). It was only after the adoption of the Charter of the United Nations in October 1945 that the controversy about what the fundamental rights of states were came to an end. The UN Charter accorded recognition to the following principles as sovereign rights of a state: (a) sovereignty, (b) equality of state, (c) noninterference in the domestic affairs of other states, and (d) the self-determination of peoples. Incidentally, the UN Charter has also specified matching duties of the states which include noninterference in domestic affairs of other state, settlement of disputes by peaceful means, and refraining from threat or use of force by states.⁴

According to Starke,⁵ the rights and duties of states are correlated; he implies that the right of one state entails a corresponding duty on the part of the other state. Thus the relation of one state to other states or to the international community has assumed significance under the UN Charter, because it has laid down rules governing such relationships. In other words, the principles enshrined in the UN Charter and other norms, which have developed in the post-Second World War period in the international law, have their bearing on the conduct of relations between states or members of the international community. It is in this backdrop that the sovereign rights of a state are briefly analyzed here.

Right of Equality

In the wake of the proclamation in the UN Charter of the "sovereign equality" of states, the principle of equality of states has become an integral part of international law. The assumption that all the states are equal entails that all the subjects of international law enjoy equality, one with another. Equality here means equality before law or equality of legal status. However, it should not be construed in the sense of a physical capacity for rights. In international law, states having variable sizes, strengths, and resources are prone to pos-

sess different physical capacity, but all can enjoy equal legal status in the international community.

The Treaty of Westphalia echoed the principles of sovereignty and independence of states. The jurists belonging to the naturalist school had introduced the doctrine of equality of state into international law. Another group of jurists, who were disinclined to this naturalist principle, opposed it on the grounds of its being contradictory to facts. However, some other writers tried to support it by making a distinction between the legal and political equality of states. This doctrine of equality of states implies that states are equal in law, despite other obvious inequalities. In other words, all the states have the same rights and obligations. Oppenheim has underlined the following four conditions essential for the doctrine of equality of states in international law: (a) Every state has a right to vote and to one vote only; (b) the vote of a weaker state has as much weight as the vote of the most powerful state; (c) no state can claim jurisdiction over another; and (d) the courts of one state do not, as a rule, question the validity of official acts of another state in so far as those acts purport to take effect within the latter's jurisdiction.⁶

This shows that the rights of one state need legal protection as much as the rights of any other state, irrespective of physical capacity or geographical size. Broadly speaking, all states do not enjoy equal rights in the realm of international politics; big powers have experienced primacy among states for a long time. This political primacy got legalized both in the Covenant of League of Nations and in the UN Charter. In the UN General Assembly, the principle of equality of states is applicable, because each member country is required to send an equal number of representatives and each member country casts equal votes. However, this is not the case with the UN Security Council, where only five great powers are given permanent representation and the principle of equality of voting is substantially impartial. The political predominance of great powers is not keeping in consonance with the principles of equality.

According to Alan James,⁷ the common possession of sovereignty enables the territorially based members of international society to speak of their sovereign equality. It is possible to draw "a contrast between them that all states are supposed to be sovereign and the fact that the rights which are at the disposal of some states are inferior to those at the disposal of others."⁸ It equally misrepresents the position of the states to say "though lip service continues to be paid to the concept of 'sovereign equality,' it now bears less relation than ever to the treaties of the world."⁹ As Vattel aptly stated, a dwarf is as much a man as a giant;¹⁰ so a small republic is no less a sovereign state than the most powerful kingdom. Yet the state practice continues to favor the big powers. The cause of small countries was echoed by the Prime Minister of Nigeria at the first Pan-African summit in

1963: "There must be acceptance of equality by all states. No matter whether they are big or small, they are all sovereign and sovereignty is sovereignty."¹¹

In the post-Cold War period, the political dominance of great powers continues to rule the roost, which in turn has affected the doctrine of sovereign equality of small and weaker states. Some of these states, being raven with ethno-religious dissensions or having geographic contiguity with great or powerful states, have been victims of inequality. Central Asia, the Middle East, Africa, and Latin America provide instances of such factual position where the doctrine of sovereign equality of states has been reduced to a mockery.

Right of Existence

It is the fundamental, primary, and basic right of every state to have its national existence. The renowned jurist Fenwick has opined that the right of a nation to exist is also known in international law as the right of national security or self-defense or self-preservation.¹² When perceived in theoretical terms it looks very attractive, but in real terms, the existence or survival of a state is dependent upon its capabilities to protect itself from states having conflicting interests or aggressive designs.¹³ The existence of smaller and weaker states has always been at stake. History is replete with many instances which demonstrate that powerful and ambitious states have violated the rights of smaller states. Poland fell prey to its powerful neighbors in 1772–1795, Korea to Japan in 1910, and Abyssinia to Italy in 1936, etc.

The right of existence is closely akin to the right to self-defense. Article 51 of the UN Charter contemplates the right of resistance to attack or invasion. Despite the prohibition on the unilateral use of force in Article 2(4) of the UN Charter, a victim of an armed attack may use force to defend itself, and others can join in force to defend the victim, pending action by the Security Council.

Undoubtedly, the right of individual or collective self-defense continues to apply if the Security Council does not act at all. It is also generally accepted that self-defense against armed attack includes the right to take war to the aggressor in order to effectively terminate the attack or even to preserve or deter its recurrence. The states are permitted to organize themselves in advance, as in the case of the North Atlantic Treaty Organization (NATO), in bonafide self-defense arrangements for possible action if an armed attack occurs.

In the wake of the Suez Crisis, it was argued by some that the inherent right of self-defense incorporated the traditional charter right of self-defense, which was not limited to, and did not have to await "armed attack", that the right of self-defense "if an armed attack occurs" does not mean "only if an armed attack occurs."¹⁴ Some have also argued that the only limitation on self-defense was that implied in the famous Caroline dictum that the self-defense was limited to cases in which "the necessity of self-defense is instant, over-

whelming and leaving no choice of means and no moment of deliberations.”¹⁵ It further applied that the use of force had to be reasonable and proportional.

However, Louis Henkin¹⁶ finds these arguments untenable and fallacious. According to him, Article 51 of the UN Charter permits unilateral use of force in very narrow and clear circumstances: in self-defense if an armed attack occurs. Difference of opinion among jurists continues to prevail in this regard.

Justification for an invasion of territory of other states under international law is contingent upon two conditions. In the first place the necessity of self-defense by such invasion ought to be of the gravest nature, and secondly, the state that was invaded should be reluctant or unable to prevent the impending attack, if it is by a third power. Grotius expressed opposition to an attack on the neighbor, since it entailed the possibility of being attacked because the neighbor was amassing arms to defend himself. In Grotius' view, such an eventuality did not give a right to attack, unless there were other just grounds of war.¹⁷ Vattel has also endorsed this view. However, in practice, leaders and statesmen have generally ignored such views of the jurists and have continued piling up sophisticated arms, including nuclear weapons. In the post-Second World War period, the advent of the Cold War kept the threat of war imminent because of intense rivalry between the United States and the Soviet Union. Massive build up of sophisticated arms and nuclear arsenals kept the threat of war alive, and surrogate states having affiliation with either side were involved in some of the conflicts that afflicted the Third World during that period. Even in the post-Cold War period, the possibility of attack from a powerful neighbor continues to loom large for the weaker states, especially in the Middle East and Central Asia.

The notion of collective defense is also advocated by some to ensure protection of the states. The idea of collective responsibility for security was incorporated in the Covenant of the League of Nations. It had also provided for the peaceful settlement of disputes. The pact of Paris, also known as the Kellogg Brand Pact, concluded in 1928, sought to condemn recourse to war as a means to settle international disputes; it laid emphasis on peaceful settlement and on renouncing war as a tool of national policy in relation with other states. However, in no manner did it impair the right of self-defense, which is inherent in every sovereign state.

The UN Charter provides for the maintenance of peace and security in the international community. The UN Security Council is entrusted with the responsibility of taking appropriate measures to maintain peace and security in the world. The Security Council even decides upon military measures, for which the member countries are called upon to contribute their forces and join in other measures. In this way, the UN Charter envisaged the principle of collective security

for the maintenance of peace and security in the world. During the Cold War period this principle was interpreted by great powers to forge military alliances like NATO, WTO, ANZUS, CENTO, SEATO, etc., thereby seeking refuge under Article 51 of the UN Charter. Measures taken under such military alliances for collective defense have to be communicated to the Security Council. These measures are to be ceased when the Security Council takes appropriate measures to restore and maintain international peace and security. This shows that the right of self-defense under the charter is a restricted right, exercisable only until the Security Council has taken the necessary measures to maintain international peace and security.

Undoubtedly, the system of collective security as contemplated in the UN Charter is stronger than what was envisaged in the Covenant of the League of Nations. However, the League failed to instill mutual confidence among its members about the self-defense measures, while UN actions in Israel, Indonesia, Congo, and Suez crises, and many other conflict prone areas, demonstrated that the UN collective defense system was stronger and effective. Unfortunately, the collective defense measures taken against Iraq during the 1990–1991 Gulf war and NATO's military actions against Yugoslavia in 1998–1999 have raised doubts about the legitimacy of collective defense, because such arbitrary use is prone to endanger the territorial integrity of the state against which that action is directed.

Intervention and Self-defense

A state, finding developments in a neighboring state portending threat to its national security, can declare a war; after the latter's defeat, the former may impose conditions on it in the form of terms of peace to prevent recurrence of such conditions. However, this is an extreme step that is seldom made. The aggrieved state can adopt simpler measures in order to get redressal by overturning the offending government in the neighboring state by intervening in its internal or external affairs. Thus, on the grounds of self-preservation, the aggrieved state can have the right to intervene in the affairs of another state. Such situational intervention in international law is a measure of self-defense, provided it is not in contravention of Article 2(4) of the UN Charter. This has introduced a new approach to self-defense.

Oppenheim has opined that intervention is a dictatorial interference by a state in the affairs of another state for the purpose of maintaining or changing the actual conditions prevalent therein. However, some jurists have justified it as a measure of self-defense. The essential ingredient of intervention is the use of force or a threat to use force.

Intervention has two kinds, internal and external. Internal intervention is the interference by one state in the disputes between or among the different groups in another state, to support or protect either the government or its opponents or

rebels. This is the interference in the internal affairs of another state. External intervention implies interference in the foreign affairs of another state with a view to creating enemies and hostile relations with other states. The intervention is legitimized under international law if it is for self-preservation, for the enforcement of treaty rights, on the grounds of humanity, or for the protection of property, persons, and national honor of a state. The UN Charter also permits collective intervention, provided it does not affect the domestic jurisdiction of a state.

According to Oppenheim, although the law of nations does not permit intervention, there are circumstances when intervention can occur or is exercised as a right. There are also instances where intervention does not occur as a right, but still is permitted by the law of nations and excused in spite of the violations of the sovereignty of nations.

Legality of intervention, according to Brierly, is justifiable under three circumstances: for self-preservation, for reprisals, and for the exercise of treaty rights.¹⁸ Undoubtedly, intervention is justifiable for self-preservation or breach of treaty rights, but such circumstances should not be created as a ploy or pretext for intervention. Humanitarian grounds or grounds of protection of persons and property or of national honor can also justify intervention.

Intervention for self-preservation has created many historical precedents. When at war with France in 1907, Britain apprehended the seizure of a Danish fleet by France; consequently, when Britain demanded its custody, Denmark refused it and Britain seized it in self-defense.

Principles of self-preservation have been explicitly laid down by the famous case of *Caroline*. According to it, a necessity of self-defense should be instant, overwhelming, and leaving no choice of means and no time for deliberations. Besides, nothing should be done unreasonable or in excess of the requirement of self-defense.¹⁹

Right of Independence

Every sovereign state has a right of independence. This right of independence is a corollary of the right of existence. It demonstrates freedom of a state from outside control in domestic and external affairs. Independence of a state entails two aspects: internal and external. Internal independence implies sovereign control of a state over persons and property within its territory. In other words, it is known as domestic jurisdiction of a state. Exercise of the right empowers a state to frame its national constitution, grant citizenship rights, and regulate the economic, social, and political life of the state. In other words, a state has full control of its internal affairs without any outside control. Article 2(7) of the UN Charter prohibits the United Nations from interfering with the domestic jurisdiction of any state, except when the Security Council is required to take action because of threats to peace under Chapter VII of the Charter.

External independence implies the freedom of a state to carry on or determine its relations with other states without the interference of any other state. A state can establish diplomatic relations or enter into treaties with other states. A state is free to have pacts, alliances, commercial, and cultural relations with other states. Both internal and external independence are essential for a state.

However, the right of independence of a state is subject to the prevalent limitations or restrictions in international law, which are binding on all the states. The rules and customs of international law, and bilateral and multilateral treaties between and among the states, serve as restrictions on the independence of a state. Each state, as a responsible member of the comity of nations, has to abide by rules, standards, norms, and human rights framed and adopted by the United Nations and its specialized agencies. These sovereign rights of states have been reiterated within the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations and the Charter of Rights and Duties of States.²⁰

Conclusion

In modern times of interdependence—economically and technologically—no state can either live in isolation or exclusively exercise its national sovereign rights. Besides, problems like terrorism, drug trafficking, proliferation of small arms, degradation of environment, etc., require international cooperation and interstate interaction for their resolution. Thus a state, while exercising its sovereign rights, has to see that similar interests of other states are preserved. The process of globalization and the clamor for attracting a foreign direct investment demand fluctuations, and not rigidly, in the capabilities of a state to exercise its sovereign rights. Non-state actors like international terrorist groups and multinational corporations have emerged on the scene as effective pressure groups, which have immense potential to influence domestic as well as external policies of a state. These and related developments have necessitated the urgency of safeguarding the national sovereign rights. This also calls for recasting of measures designed to protect these rights.

The political predominance of great powers—which are represented in the group of eight, or G-8, in the Security Council, and as permanent members of the Council for Security and Cooperation in Europe (CSCE), and NATO, etc.—poses a sort of threat to the sovereign national rights of smaller and weaker states. The possibility of this threat has assumed added dimensions in the post-Cold War period in the aftermath of the unraveling of the former Soviet Union. NATO is expanding eastward, and its role in Bosnia Herzegovina and then in Kosovo has raised apprehensions. The American role in Iraq also raised skepticism. The mandate of the UN Security Council was exercised by individual countries.

Thus the protection of national sovereign rights of a state calls for expansion of the permanent members of the UN Security Council, where veto power should be abolished and all decisions are taken by consensus or at least by two-thirds majority. Only a strong United Nations is the surest guarantee for protection of national sovereign rights of the states.²¹

NOTES

1. See, Vattel. *The Law of the Nations or The Principles of Natural Law*, English translation, Book I, London, 1916.

2. *Oppenheim International Law*, edited by H. Lauterpacht vol. I, London, Long man and Green, 1966, p. 261.

3. Cited in P.W Back and M.B. Travis (ed.) *Control of Foreign Relations in Modern Nations*, Network, WW Norton Company, 1957.

4. Adapted from the UN Charter, see United Nations (UN) Yearbook of the United Nations 1996, Vol. 50. (The Hague: Maitinus Njijhoff Publishers, 1996), pp. 1449–63.

5. Starke, J.G. *Introduction to International Law* Seventh edition, London, Buttersworth, 1972, p. 107.

6. Oppenheim, n. 2, pp.263–67.

7. James, Alan. *Sovereign Statehood: The Basis of international Society*, London, Allen and Unwin, 1986, p. 270.

8. Hoffman, Stanley. *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics*, Syracuse, N.Y. Syracuse University Press, 1981, p. 144.

9. Luard, Evan. *Types of International Society*, New York, Free Press, 1976, p. 234.

10. Vattel, quoted in P. Butler, "Legitimacy in a States-System: Vattel's Law of Nations" in M. Dolelan (ed.) *The Reason of States*, Landon, Allen and Unwin, 1978. p. 52.

11. Nigerian Prime Minister Sir Abubkar Balewa, quoted in John J. Stella, *The International Politics of the Nigerian Civil War, 1967–1971*, Princeton, Princeton University Press, 1977, p. 16.

12. For details G.E Fenwick, *International Law*, Landon, Appleton, 1971.

13. See Articles 1, 5, and 7 of the NATO Charter in UN Treaty Series 1949.

14. See McDougal in *Proceeding of the American Society of International Law*, 1963, p. 163.

15. Moore, J.B. *Digest of International Law*, Vol.2, 1906, p. 412.

16. Henkin, Louis, *How Nations Behave*, second edition, New York, Columbia University Press, 1979, p. 141.

17. Max Sorensen, (ed). *Manual of Public International Law* (New York: Macmillan, 1968), pp. 767–68.

18. For details see J.L. Brierly, *The Law of Nations: An Introduction to the Law of Peace* edited by, Sir Humphrey Woldock. London, Oxford University Press, 1963.

19. Cited in Oppenheim n. 2, pp. 300–301.

20. UN General Assembly Resolution 2625 (XXV) 24 October 1970.

21. UN General Assembly Resolution adopted on 23 December 1974.