tion with respect to the nature of what is probative thereof. The true light may come from what is extrinsic to the document.

CHARLES CHENEY HYDE.

LIMITATIONS ON COERCIVE PROTECTION

There are numerous doctrines of international law which serve to put off indefinitely the day when permanent peace may reign among the nations. Among these are the institution of conquest, the refusal to admit the doctrine that duress makes treaties voidable, the belief in the existence of the *rebus sic stantibus* clause in treaties, the supposed doctrine that private property may be charged with a lien or taken for the payment of governmental debts—a revival of confiscation—and the doctrine that citizens abroad may be protected by force of arms for alleged violations of international law practised against them. I shall address myself only to the latter institution, and shall venture to suggest what seems to me a necessary limitation and a practical reform. The protection of citizens in immediate danger of life in areas given over to anarchy will not be discussed.

Protection by the nation of a citizen abroad reflects one of the most primitive institutions of man—the theory that an injury to a member is an injury to his entire clan. It seems questionable whether in the highly integrated organization of the world today this practice is either necessary or desirable to secure for the citizen abroad the assurance of international due process of law.

A cursory examination of the existing practice will demonstrate the inefficiency, if not, indeed, the unfairness of the system. When the citizen abroad is injured he is expected first to exhaust his local remedies, except in cases where, the injury resting upon legislation, the law is not reviewable or reversible by the local courts, as in the case of prize courts operating under municipal statutes which violate international law. Assuming that the local remedy is ineffective, the citizen may invoke the diplomatic protection of his own government. That government may act as it sees fit in the matter, either extend good offices, make diplomatic claim, or institute coercive measures of protection in the event that diplomacy fails. Coercive measures invite the danger of war, involving all the people of the claimant's state.

Under this system all three parties to the issue, the individual, the defendant nation, and the claimant nation, are in a precarious and unhappy condition. Politics rather than law governs the outcome of the case. If the individual is a member of a strong clan (state), he may be able to obtain the aid of his nation; if not, he is in this respect helpless. Thus his relief, which should be governed by legal rule, depends on the accident of his nationality. It will also depend on the momentary political relations between the plaintiff and the defendant states, the political strength of the defendant state, and on other non-legal factors. The defendant state is in the position of

having coercion exercised against it on the unilateral determination of a foreign government that its citizens' rights have been violated. The weaker the state, the more exposed is it to arbitrary interposition or intervention, until in very weak states a responsibility amounting almost to a guaranty of the security of foreigners and their property is imposed. Such a state may, indeed, to avoid the threat of intervention or compulsory measures, pay a claim essentially unjust. A strong defendant state, on the other hand, may, without fear of interposition, violate with impunity the rights of an alien and may decline to arbitrate. The unfortunate factor in most intervention is that the complaining state is likely to constitute itself plaintiff, judge, and sheriff at one and the same time. This can hardly be deemed "the rule of law" or "reign of law," as Maitland put it. Nor is the plaintiff state exactly in a happy position. It must make *ex parte* determinations on inadequate evidence, and may be influenced by domestic political considerations to espouse a claim it does not fully endorse. It may, on the other hand be unable by virtue of its political relations with the defendant state to press a claim which makes a strong appeal legally and equitably.

Thus all three parties to the issue—which involves a question whether the citizen abroad has sustained a denial of justice (international due process of law), a purely legal question—are exposed to the disturbing interference of politics as a determining factor. This does not make for the growth of law or for peace.

As an alternative, it has been suggested in numerous circles, both of the "exploiting" and "exploited" countries, that the citizen abroad should be left to bear the risk of his location, and that he should take the law as he finds it. The effort of defendant governments to force aliens to abide by a so-called "Calvo" clause and to forego the privilege of invoking the diplomatic protection of their own governments, whether in constitution, law or contract, has not been generally successful, and diplomatically states have refused to be bound by such an alleged waiver on the part of their citizen abroad. The suggestion of leaving the citizen to the local law for his redress may result in depriving him of the protection of international due process. To that he is entitled, and the question is how far international law should go in securing it for him.

Under the existing system the issue is determined by the *ex parte* views of the strong state, whether plaintiff or defendant. Force is the *ultima ratio*, and that is likely to weaken the reign of law. The resort to arbitration instead of being regarded as a part of due process in the prosecution of claims is, as a rule, deemed a matter of expediency only. The suggestion recently made that intervention becomes proper and arbitration may be declined if the defendant state seems (to the complaining state) too poor to pay any judgment or award found against it, is not warranted by anything to be found in international law. It is an indication of the easy rationalization of force. A poor country, under the view thus advanced, is to be invaded

whenever a strong state charges it with violation of international law. It may not exercise normal legislative powers except with the consent of foreign states, and worst of all, it may not even invoke arbitration, for it may be deemed financially unable to pay an eventual award.

It has been suggested heretofore that the nations should voluntarily agree automatically to submit all pecuniary claims to arbitration if diplomacy failed, and that arbitration should be deemed an inherent part of due process in such matters. At the Pan-American Conferences of 1902 and 1910 the nations on this continent committed themselves to such a course. The larger European nations have been unwilling up to this time to consent to treaties providing for the mandatory submission to judicial determination even of indisputably legal questions. Were this done, all three parties to the issue would be assured of the protection of law rather than the domination of politics. The individual alien would not depend for his rights on the accident of nationality, the defendant state would rely on law for the determination of its rights and for protection against unjust intervention, and the plaintiff state would be relieved from the pressure of politics inducing intervention, from the danger of war and from the charge of imperialism and naked might.

It is submitted that international law may well go a step further. Whether or not the nations agree to submit such legal issues to arbitration, the individual himself should have the opportunity of trying the issue in the international forum before his state becomes politically involved in the case. Thus, before intervention becomes proper, he should be required not only to exhaust his remedies in the local courts, but he should also have the opportunity of instituting a suit against the defendant state before an international court, if he believes that international due process of law has been violated to his prejudice. This is not a radical step, for it was employed in the Central American Court of Justice of 1907, in the abortive International Prize Court, and has been approved on occasion by claims commissions. It would require treaties by which states would agree to permit themselves to be sued, but there would be a strong incentive on the part of both defendant and plaintiff states to institute this intermediary forum. What is desired is to assure the alien the protection of due process of law without the necessity of coercion and all that armed force implies, physically, psychologically, politically and legally. By enabling the injured citizen to sue the defendant state in the international forum, possibly with the financial aid of his government if the claim is deemed meritorious, all three parties to the issue and the cause of peace would be benefited, for they would rely upon legal processes for the assurance of international due process of law to the alien. That is all any of the parties has the right to ask. Such treaties would be easier for the European and Latin-American states to conclude than they may be for those of the Anglo-American world, where the tradition that the government may be sued in courts at the instance

of individuals is not yet fully established. An analogy from administrative law lends support to the theory and practice suggested. In the eighteenth century the natural law school of jurists advocated the right of resistance to unlawful acts of state prejudicing the individual. As that spelled disorder, the state met the popular demand for defense against illegal acts by instituting administrative and sometimes judicial courts in which the validity of its acts could be tested and determined. That is what is needed in international law, and it does not seem an unusual demand to make upon the nations. To promote the reign of law by permitting the government to be sued for injuries it inflicts by its agents should not invite opposition. To extend the practice from the local to the international forum is but a slight advance. The institution of the practice would remove from the political to the legal field an important department of international relations.

EDWIN M. BORCHARD.

PROJECTS FOR THE CODIFICATION OF AMERICAN INTERNATIONAL LAW

The International Commission of Jurists for the Codification of International Law, composed of two delegates from each of the Latin American republics and the United States, will meet at Rio de Janeiro on April 16, 1927, in accordance with the resolution [1] adopted by the Fifth International Conference of American States at its session held at Santiago, Chile, on April 26, 1923. The basis of the Commission's discussions will be the thirty projects for the codification of international law prepared by the American Institute of International Law pursuant to the resolution adopted by the Governing Board of the Pan American Union on January 2, 1924, by which the Governing Board submitted to the Executive Committee of the American Institute of International Law "the desirability of holding a session of the Institute in 1924 in order that the results of the deliberations of the Institute may be submitted to the International Commission of Jurists at its meeting at Rio de Janeiro."[2] These projects, in the form of proposed conventions, are as follows: (1) Preamble; (2) General Declarations; (3) Declaration of Pan American Unity and Coöperation; (4) Fundamental Bases of International Law; (5) Nations; (6) Recognition of New Nations and Governments; (7) Declaration of Rights and Duties of Nations; (8) Fundamental Rights of American Republics; (9) Pan American Union; (10) National Domain; (11) Rights and Duties of Nations in Territories in Dispute on the Question of Boundaries; (12) Jurisdiction; (13) International Rights and Duties of Natural and Juridical Persons; (14) Immigration; (15) Responsibility of Governments; (16) Diplomatic Protection; (17) Extradition; (18) Freedom of Transit; (19) Navigation of International Rivers; (20) Aerial Navigation; (21) Treaties; (22) Diplomatic Agents; (23) Consuls; (24) Exchange of Publications; (25)

[1] Special Supplement to this JOURNAL, Vol. XX, 1926, p. 295.

[2] This JOURNAL, Vol. XVIII, 1924, pp. 269–270.