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INTERNATIONAL RESPONSIBILITY FOR SUBVERSIVE ACTIVITIES AND HOSTILE PROPAGANDA BY PRIVATE PERSONS AGAINST FOREIGN STATES

MANUEL R. GARCIA-MORA†

It is a fairly well established legal proposition that subversive activities or revolutionary propaganda stemming from official sources is an international delinquency and, thus, redressable under international law.¹ However, an area of controversy is entered when dealing with revolutionary activities or hostile propaganda proceeding from private individuals. The preliminary problem thus arises of adequately imposing international responsibility on the state for hostile acts committed by private persons under the protection of its territorial sovereignty and directed against the peace and security of a foreign state.² While it is generally agreed that revolutionary acts of private persons are liable to be punished by the criminal law of the state against which they are directed under the so-called protective jurisdiction principle,³ international law becomes equally involved when the menaced state is unable to punish such activities thereby frustrating its possibilities of maintaining internal peace.⁴ It is the purpose of this article to explore the position of international law on this subject.

I. THE PRINCIPLES OF INTERNATIONAL LAW

Private revolutionary activities against foreign states present the initial and vital questions concerning the competence of international law to deal with them and the existence of a duty of prevention on the part of

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1. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 374 (1953).

2. There is in this connection a doctrinal confusion. Some publicists speak of original and vicarious responsibility, the former describing the responsibility of the state for acts of its government, while the latter includes responsibility for private acts. See, 1 OPPENHEIM, *INTERNATIONAL LAW* 337 (8th ed., Lauterpacht, 1955). Others speak of direct and indirect responsibility of the state. See, MIELE, *PRINCIPI DI DIRITTO INTERNAZIONALE* 236 (1953); DUMAS, *DE LA RESPONSABILITÉ INTERNATIONALE DES ÉTATS* 57-64 (1930). Still others speak of primary and secondary liability. See, 2 MCNAIR, *INTERNATIONAL LAW OPINIONS* 288 (1956).

3. For a full discussion of this principle, see Garcia-Mora, *Criminal Jurisdiction over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567 (1958).

4. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105 (1928).

the territorial state.⁵ Though the rules of international law on this matter have not been considered as sufficiently precise to insure international cooperation,⁶ it may be quite possible to suggest a control of private revolutionary activities both by international law and by the law of each individual state.

As matters stood prior to the legal transformation following World War II, the rules of customary international law not only failed to impose upon the territorial state the duty to prevent subversive activities on the part of the individual against foreign states, but also denied to the affected nation a corresponding right to redress.⁷ More precisely, the international law position of this period seemed to indicate that the international responsibility of the state was not engaged in so far as private revolutionary activities were concerned.⁸ The right of the aggrieved community could scarcely exceed one of vigorous protest.⁹ The net result of this legal position was a lack of a legal duty of the territorial state to enforce observance thereof upon citizens and aliens alike. International law, therefore, did not itself make the toleration of private revolutionary activities an international delinquency. What it did was to grant a liberty to the wronged state to deal with offending individuals who came into its jurisdiction. It thus became almost generally accepted that persons threatening a state's political institutions from foreign territory were amenable to the jurisdiction of the aggrieved state.¹⁰ In so doing, international law made available to the state the so-called protective ground upon which to exercise jurisdiction.¹¹

The failure of international law to bring private hostile activities against foreign states within its regulation can be broadly attributed to three factors. The first is that, while the authority of international law is generally conceded, in principle that authority has stopped short in matters stemming from the exercise of territorial sovereignty inasmuch as the latter is not only exclusive but is also a right protected by international law itself. It is, therefore, possible to argue, as the late Judge

5. "Territorial State" signifies in this connection the state within whose jurisdiction the hostile act was committed.

6. See in this connection the Resolution of the Council of the League of Nations of December 10, 1934, in respect to the alleged terrorist activities of Yugoslav nationals in Hungary. PUBLICATIONS OF THE LEAGUE OF NATIONS, C.L. 219, 1934.

7. Preuss, *International Responsibility for Hostile Propaganda against Foreign States*, 28 AM. J. INT'L L. 649 (1934).

8. 1 OPPENHEIM, *op. cit. supra* note 2, at 293.

9. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 243 (6th ed. 1915).

10. DE VABRES, *LES PRINCIPES MODERNES DU DROIT PÉNAL INTERNATIONAL* 87 (1928).

11. Research in International Law under the Auspices of the Harvard Law School. *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. SUPP. 543 (1935).

Anzilotti apparently did,¹² that in so far as territorial supremacy exists, "international law presupposes the State" and, thus, the state cannot be held accountable by international law unless the state should neglect its duties specifically emanating from a treaty.¹³ The central core of this doctrine really proceeds from a conception of sovereignty singularly exempted from any legal regulation.¹⁴ Second, hostile actions by private individuals against foreign governments are usually classed as political offenses for which the state has the competence to grant asylum under international law.¹⁵ On this view, the states are naturally reluctant to punish individuals for the commission of political offenses. This fact is particularly heightened in a conflict of ideology where the asylum state may not feel any special sympathy towards the political institutions of the state of which the refugees are nationals and, thus, the suppression of revolutionary propaganda coming from these sources may be viewed with particular antipathy.¹⁶ This argument on principle would still afford no legal warrant for a state's failure to suppress revolutionary propaganda by refugees, for, though there is no question about a nation's right to harbor political refugees, it would seem that consistently with the obligations of friendship between states, such persons may not be permitted to plot against the institutions of their native country.¹⁷ The third factor can best be explained in terms of the dilemma posed by a democratic society in preventing subversive propaganda against foreign governments while at the same time preserving its constitutional liberties.¹⁸ Even if in practice this problem may be real, the obligations of the state on the

12. 1 ANZILOTTI, *COURS DE DROIT INTERNATIONAL* 51 (French transl. by Gidel, 1920).

13. *Id.* at 466, 467.

14. Apparently, Judge De Visscher held similar views. See, DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 103-104 (Corbett's transl. 1957).

15. Cf. GARCIA-MORA, *INTERNATIONAL LAW AND ASYLUM AS A HUMAN RIGHT* ch. 4 (1956).

16. In this regard, a bill was defeated in the British Parliament designed to punish conspiracies formed in England and directed against foreign sovereigns. 2 MOORE, *A DIGEST OF INTERNATIONAL LAW* 431 (1906).

17. *Id.* at 430. In fact, this is one obligation that the state granting asylum has to fulfill.

18. Smith, *Subversive Propaganda, the Past and the Present*, 29 *Geo. L.J.* 809 (1940-1941). Upon complaint of the Mexican Government that publications appearing in the United States incited anarchism against Mexico, the State Department answered in part that "free speech and freedom of the press are two of the most sacred rights guaranteed by the Constitution of this country; . . . they are absolutely inviolable rights; and . . . although it may for a moment appear that such rights should be to a greater or less extent curtailed, a continuous national growth and development of more than a century and a quarter demonstrates beyond the possibility of a doubt that the public intelligence necessary to a firm and permanent stability and progress requires that such rights shall remain inviolate." Note of Secretary of State Knox to the Mexican Ambassador De Zamacona, June 7, 1911, 2 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 142 (1941).

international plane cannot be avoided by invoking difficulties of internal constitutional order.¹⁹

It can be readily seen, therefore, that traditional juristic interest was primarily concerned with preserving the rights involved in territorial sovereignty and not at all with the function of international law or with laying a foundation for international cooperation.²⁰ The difficulty with the problems arises from narrow and oversimplified interpretations which have obscured the issue by formulating it exclusively in terms of territorial sovereignty and, in so doing, international law faithfully reflected the absence of an international community of shared values and social solidarity. In addition, the constructive role which can be played by the development of international cooperation in this area has been in large measure blocked by the extent to which political considerations have been permitted to hold the center of the scene. Parallel with all this, writers on the subject were accustomed to classify states into the categories of "liberal" or "reactionary" depending upon whether or not their internal legislation provided for the punishment of revolutionary activities against foreign states.²¹ As late as 1928, Judge Lauterpacht regarded the Russian Penal Code of 1903 as "the most reactionary of all" because it punished all attempts, conspiracies and preparations within Russian territory designed to overthrow a foreign government.²² Such a statement may have been largely motivated by the belief that no democratic government could safely extend protection to political systems at variance with the democratic ideology. Since international law until recently was essentially European and the European countries largely subscribed to the democratic ideology, it was relatively simple to conclude that international law imposed no obligation whatsoever to protect foreign states whose political ideology was particularly distasteful. This argument, however, has lost all its useful meaning today when some eighty states of diverse political systems have come to play a vital role in the World Community process thus transforming the exclusive European nature of inter-

19. In this connection, the Permanent Court of International Justice said: "While on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force." Advisory Opinion on Treatment of Polish Nationals in Danzig, P. C. I. J., Ser. A/B, No. 44 at 24 (1932).

20. Alvarez, *The Reconstruction and Codification of International Law*, 1 INT'L L.Q. 469, 471 (1947).

21. Thus, Lauterpacht, *op. cit. supra* note 4, at 117; Wright, *The Crime of War-Mongering*, 42 AM. J. INT'L L. 128, 134 (1948).

22. Lauterpacht, *op. cit. supra* note 4, at 117.

national law into a world wide system.²³ The peaceful coexistence of these states in the World Community would seem to suggest that their governments be secured against revolutionary activities and hostile propaganda coming from other jurisdictions.

It can of course be argued that to accept the above analysis would amount to asserting that the international community may become a system of mutual assistance thus helping to perpetuate tyrannical governments.²⁴ Though there may be substance in this view, it should be recalled that because of the concentration of power in the modern state popular revolutions are doomed to failure²⁵ and that, therefore, the interest of the World Society in the maintenance of peace is greater than the well intentioned desires of sporadic groups of individuals to overthrow an existing totalitarian government. It certainly runs counter to justice to plunge the World Society into a world conflagration because of the toleration of private activities designed to overthrow the government of another state. Peace is the first duty of the World Society that every state must promote and cultivate. This is an overriding moral obligation.

Even from the standpoint of territorial sovereignty, it must be recognized as axiomatic that the rights inherent in this concept must be exercised in a manner consistent with the equally protected rights of other nations. In this connection, there can be no doubt that a state has a right to independence and to the peaceful enjoyment of its institutions and that this is a right protected by international law. But it so happens that this right is put in danger by revolutionary acts stemming from private individuals under the protection of another country's sovereignty. It is, therefore, a reasonable expectation of every state that the territorial sovereignty of another should not be used in a manner which seriously threatens the former's safety and independence.²⁶ It would indeed be highly inconsistent with the independence of states if the citizens of one state were allowed to plot against the institutions of a friendly nation. The force of this argument reveals itself with all its cogency when considering that if a state does not suppress revolutionary actions and subversive propaganda taking place within its jurisdiction, the customary

23. JENKS, *THE COMMON LAW OF MANKIND* ch. 2 (1958).

24. JESSUP, *A MODERN LAW OF NATIONS* 184-87 (1948).

25. Cf. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 59 (1951).

26. Thus, Article 2 (6) of the Draft Code of Offenses Against the Peace and Security of Mankind prepared by the International Law Commission of the United Nations in its third session in 1951, makes an offense against the peace and security of mankind "The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authority of a State of organized activities calculated to carry out terrorist acts in another State." For text, see Doc. A/CN.4/48, July 30, 1951, and 45 *AM. J. INT'L L. SUPP.* 103, 128 (1951).

right of intervention on the part of the menaced government is readily conceded.²⁷

The foregoing observations, though usually overlooked, are in the present view the most satisfactory ones, for a World Society of States, where the rights of sovereignty and the equality of states are postulates of the law, would of necessity imply a mutual obligation to suppress revolutionary acts directed against a friendly foreign nation.²⁸ The real issue is, therefore, whether a state values the interest of the World Society in peaceful coexistence sufficiently to impose upon itself the obligation to prevent and and punish revolutionary activity which endangers good relations between nations.²⁹ Indeed, Vattel asserted such an obligation derived from a mutual duty to promote justice between nations in the following terms :

The Nation, or the sovereign, must not allow its citizens to injure the subjects of another State, much less to offend that State itself ; and this not only because no sovereign should permit those under his rule to violate the precepts of the natural law, which forbids such acts, but also because Nations should mutually respect one another and avoid any offense, injury, or wrong ; in a word, anything which might be hurtful to others. If a sovereign who has the power to see that his subjects act in a just manner permits them to injure a foreign nation, either the State itself or its citizens, he does no less a wrong to that nation than if he injured it himself. Finally, the very safety of the State and of society at large demands this care on the part of every sovereign.³⁰

It would seem, therefore, that in a World Society deeply concerned with order and justice, the state ought to be bound to prevent anything which constitutes a danger to foreign nations. This is not to imply that the state has the duty to protect actively the constitution of a foreign government, however distasteful that government may be to its own citizens.³¹ What it does imply is a duty of prevention, that is, of preventing injurious acts against foreign governments regardless of whether

27. Cf. THOMAS AND THOMAS, *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* 274 (1956).

28. Kuhn, *The Complaint of Yugoslavia Against Hungary With Reference to the Assassination of King Alexander*, 29 AM. J. INT'L L. 87, 89 (1935).

29. Lord Jowitt, *The Value of International Law in Establishing Cooperation Among Nations*, 1 INT'L L.Q. 295 (1947).

30. VATTEL, *DROIT DES GENS* bk II, ch. VI, § 72 (Fenwick's transl. 1916).

31. Lauterpacht, *op. cit. supra* note 4, at 129.

such acts proceed from official sources or from private individuals.³² The international responsibility of the state is in either case engaged.³³ If friendly relations between nations be to the international common good, then it is of the essence that the international society constitute a cohesive and integrated whole by insisting upon a system of rights and mutual obligations, instead of being divided into a multiplicity of societies with diverse loyalties and contrasting sentiments, shattering the conception of a community of interests.

Looking comprehensively at the manner in which the states fulfill their obligations in this area, three criteria immediately emerge, which suggest the classification of the states into three clearly defined categories. One group, which includes the United States and Great Britain, restricts the duty to prevent subversive acts to obligations arising under the laws of neutrality. The other group, which includes Continental European and South American countries, bases the duty of prevention on the security of the state by avoiding complications with foreign nations. And, finally, the third group, which includes recent legislation from the Soviet Union and other Iron Curtain-countries, considers subversive acts and propaganda against foreign states as an offense against the peace and security of mankind. The application of these principles will be discussed in dealing with the legislation and case law of the various countries.

II. THE PRINCIPLE OF NEUTRALITY

(1) *The Law of the United States*

The law of the United States in respect to subversive acts planned or being committed against a foreign state by private individuals is exclusively confined to obligations resulting from the laws of neutrality relating to an international or a civil war. It is not surprising, therefore, that political plots against foreign nations are made punishable in the United States only when such acts adopt the form of a military or naval expedition or enterprise against a state with which the United States is on friendly terms.³⁴ The American position in this regard leaves no room for doubt. Thus, in 1885 when the British Government inquired whether participating in the Irish National League, an organization to promote revolutionary movements in Ireland, was an offense against the

32. Kelsen, *Principles of International Law* 126 (1952).

33. As to private individuals, it is said that this creates an indirect responsibility on the part of the state. For these views, see note 2 *supra*.

34. García-Mora, *International Law and The Law of Hostile Military Expeditions*, 27 *FORDHAM L. REV.* 309 (1958).

sedition statutes of the United States, the State Department succinctly answered that "treason and sedition made punishable under those statutes are treason and sedition against the United States, and they do not make punishable treason and sedition against foreign sovereigns."³⁵ Similarly, in 1907 the Mexican Government protested that revolutionary plots were being fomented in the United States for the purpose of launching attacks in Mexican territory. The Attorney General, while admitting that there had been publications in this country, by citizens of Mexico residing in the United States, of newspapers and circulars directed against the administration of President Díaz and intended to incite uprisings and foment revolutionary movements in Mexico, declined to act on the ground that there was not yet any evidence that the persons involved had violated the neutrality laws of the United States by initiating a military expedition to be carried on from the United States against Mexico.³⁶ In a communication of July 31, 1885, addressed to the Spanish minister, relating to revolutionary activities of the supporters of the Cuban insurrection, the State Department expressed similar views in an even more definite form: "It [the United States] does not assume to visit with penalty conduct, which if committed within a foreign jurisdiction, might be punished therein."³⁷ Finally, President Cleveland's fourth message to Congress, in referring to the revolutionary activities of Cubans in the United States, deplored that "the spirit of our institutions and the tenor of our laws do not permit [revolutionary activities] to be made the subject of criminal prosecution."³⁸

The body of evidence thus far gathered would seem to make it clear that in American law three conditions must exist in order to convert an otherwise unpunishable revolutionary act into a criminal offense. First, the purpose of the alleged offense must be an attack or invasion against a foreign country; second, it must proceed from the territory of the United States; and, finally, it must take the form of a military or naval force.³⁹ In the absence of these conditions, the United States is reluctant to extend the restrictions placed upon its residents and declines to

35. See Note from Secretary of State Bayard to the British Representative, Mr. Harris, April 2, 1885, 2 MOORE, *op. cit. supra* note 16, at 431-32.

36. Note of Ambassador Creel to Secretary of State Root, March 4, 1907, 2 HACKWORTH, *op. cit. supra* note 18, at 337-38. It should be added that subsequently the persons involved were convicted for violations of the neutrality statutes when they pleaded guilty to the charge of beginning and setting on foot a military expedition against Mexico. *Id.* at 338-39.

37. Note of Secretary of State Bayard to Minister Valera, July 31, 1885, U.S. FOREIGN REL. 1885 at 776 (1886).

38. U.S. FOREIGN REL. 1896 at xxxi (1897).

39. *United States v. Tauscher*, 233 Fed. 597, 599-600 (D.C. S.D.N.Y. 1916).

punish revolutionary activities confined to incitement to revolt or to fomenting uprisings in a foreign state.⁴⁰

The foregoing point is also applicable to libel and seditious publications against foreign governments.⁴¹ For in so far as these are private publications, governmental action in this area is likely to give rise to difficulties involving the Constitutional guarantee of freedom of speech and of the press.⁴² Concurrently with this is the fact that in the United States there is no federal common law of crimes and, thus, federal crimes must be established by statute.⁴³ Inasmuch as no federal statute exists providing punishment for the defamation of foreign governments, a criminal prosecution in such cases would only be cognizable in the courts of the states.⁴⁴ Most of these principles are well illustrated in the communications of the State Department answering complaints of foreign governments for libelous propaganda published in newspapers in the United States. On such occasions, the State Department, in explaining the inability of the United States to act, has invariably referred to freedom of speech and of the press which is, "under the Constitution of the United States, absolutely assured to those dwelling within its jurisdiction,"⁴⁵ while at the same time calling to the attention of the foreign government in question that an action against the publisher could possibly be maintained in the proper state court.⁴⁶

It is to be immediately observed that such assertions of the State Department can scarcely meet the international obligations of the United States to afford foreign governments adequate protection against revolutionary propaganda and libelous publications.⁴⁷ As propositions of law, their validity is dubious. It certainly is no argument to assert that a state is not bound to accede to requests from foreign nations which are

40. See note 36 *supra*.

41. Dickinson, *The Defamation of Foreign Governments*, 22 AM. J. INT'L L. 840 (1928), dealing specifically with the alleged defamation of the Mexican Government by the Hearst newspapers in 1927.

42. See the note of Secretary of State Knox to the Mexican Ambassador De Zamacona, June 7, 1911, 2 HACKWORTH, *op. cit. supra* note 18, at 142.

43. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1813). See also for discussion, Maschziske, *Common Law and Our Federal Jurisprudence*, 74 U. PA. L. REV. 109, 270, 367 (1925-1926).

44. 2 MOORE, *op. cit. supra* note 16, at 432. It seems, however, that the laws of the United States make a penal offense the secret transportation of explosives from the United States to any foreign country. *Id.* at 431. See also the case *Daeche v. United States*, 250 Fed. 566 (2d Cir. 1918), involving the conviction of a person for attempting to blow up ships leaving the port of New York loaded with munitions for the Allied Powers in World War I.

45. Note of Secretary of State Knox to the Mexican Ambassador De Zamacona, June 7, 1911, 2 HACKWORTH, *op. cit. supra* note 18, at 142.

46. Note of Secretary of State Knox to the Mexican Chargé d'Affaires, February 15, 1911, 2 HACKWORTH, *op. cit. supra* note 18, at 142.

47. Dickinson, *supra* note 41, at 843.

incompatible with its laws and constitution.⁴⁸ For not only can the federal government act under the constitutional power of Congress "To define and punish . . . Offenses against the Law of Nations,"⁴⁹ but it is common learning that statutes in the United States have imposed criminal liability for seditious utterances and publications injurious to public morals and such statutes have been upheld by the courts against attacks grounded upon freedom of speech and of the press.⁵⁰ The operation of this type of legislation, however, has been carefully circumscribed, for the courts have explicitly required that it must meet the "clear and present danger" rule, which essentially means that before an utterance can be penalized by the government it must ordinarily have occurred "in such circumstances" or have been of "such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the power of the government to prevent.⁵¹ Thus viewed, it is difficult to see why legislation penalizing revolutionary activities and hostile propaganda against foreign governments could not be applied within the same limits.⁵² It must be added that it is most questionable on grounds of public policy whether the United States can remain totally passive in the presence of activities calculated to create hostile feelings in foreign states and, more specifically, to cause a breach of peace between nations.⁵³ This last argument commends itself most cogently in practice, for it is indissolubly linked with the respect which nations owe each other at all times.⁵⁴

48. Cf. Lauterpacht, *supra* note 4, at 123. Professor Fenwick dismisses this whole area by simply saying that "The protection given to freedom of speech in the constitutions of democratic States has made it difficult to restrain the acts of private individuals." FENWICK, *INTERNATIONAL LAW* 305 (3d ed. 1948).

49. U.S. CONST. art. I, § 8.

50. See in this connection, *Schenck v. United States*, 249 U.S. 47 (1919), affirming a conviction under the Federal Espionage Act, 40 Stat. 217 (1917), for causing or attempting to cause insubordination in the military forces of the United States by sending to men, who had been newly drafted into the army, pamphlets denouncing conscription and urging them to assert their rights in opposition to the draft. Also *Dennis v. United States*, 341 U.S. 494 (1951), affirming a number of convictions for violation of § 2 of the Smith Act, 54 Stat. 670 (1940), for advocating, advising and teaching the desirability of overthrowing the government by force. And, finally, *Gitlow v. New York*, 268 U.S. 652 (1925), dealing with a similar sedition law of New York.

51. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

52. Wright, *supra* note 21, at 134.

53. It should be observed that when the First Committee of the General Assembly discussed measures to be taken against propaganda and the inciters of a new war, the majority of the delegates felt that defamation of leaders of foreign governments was a form of war propaganda. See in particular the opinion of the Australian Delegate, Dr. Evatt, *General Assembly, 2d Session, First Committee, 79th Meeting*, 184-88 (1947).

54. This has been considered by some publicists as the basis of international law. See, 1 OLIVART, *EL DERECHO INTERNACIONAL PUBLICO EN LOS ULTIMOS VEINTICINCO ANOS* 537 (1927) and Lord Jowitt, *supra* note 29, at 295.

(2) *The Law of Great Britain*

Like its American counterpart, the law of Great Britain has been predominantly based on the principle of neutrality and, therefore, does not punish revolutionary plots and treasonable acts against foreign states unless they form part of a military or naval expedition.⁵⁵ But despite this substantial similarity between the two laws, significant differences may nevertheless be observed.

First, when revolutionary activities assume the character of publications against the person of a foreign sovereign the English law treats them as criminal libel and punishable as such. The *raison d'être* of this rule is the well founded apprehension that if such hostile publications are permitted to go unpunished, peaceful relations with foreign nations may thereby be disturbed.⁵⁶ Thus, when in 1762 the King of Denmark complained of a scandalous and indecent publication contained in the *London Chronicle*, the Attorney-General emphatically stated:

[S]candalous and injurious reflections published in derogation of the Honour and Dignity of Foreign States and Princes in Amity with his Majesty may be punished criminally by Information or Indictment as libel, because such Reflections tend to interrupt the Harmony and Confidence which subsists between the Crown of Great Britain and Its Allies. . . .⁵⁷

The English courts have been similarly strict in dealing with cases of defamation of a foreign sovereign. In this connection, in *King v. Vint*,⁵⁸ involving a libelous publication against the Emperor of Russia, the Lord Chief Justice declared:

I can only say, that if one were so to offend another in private life in this country, it might be made the subject of an action; and when these papers went to Russia and held up this great sovereign as being a tyrant and ridiculous over Europe, it might tend to his calling for satisfaction as for a national affront, if it passed unrepobated by our government and in our courts of justice.⁵⁹

In a somewhat similar vein, in *King v. Peltier*,⁶⁰ involving a libel

55. Foreign Enlistment Act of 1870, 33 & 34 Vic. ch. 90.

56. 1 OPPENHEIM, *op. cit. supra* note 2, at 283 n. 1.

57. Cited by McNair, *Aspects of State Sovereignty*, 26 BRIT. YB. INT'L L. 1949 at 6, 27 (n.d.).

58. 27 Howell's State Trials 627 (1799), per Lord Kenyon, C.J.

59. *Id.* at 641.

60. 28 Howell's State Trials 529 (1803), per Lord Ellenborough, C. J.

against Napoleon Bonaparte as First Consul, the court unmistakably laid down as a proposition of law that "any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries."⁶¹

It seems likely, however, that the liberal conceptions of freedom of the press and of expression of opinion which obtained in the twentieth century have somewhat limited the above holdings to the special circumstances of their origin.⁶² This proposition is instructively illustrated by the more recent case of *King v. Antonelli & Barberi*,⁶³ involving a libel in the form of a pamphlet, attempting to justify the crimes of assassination and murder, and to incite persons to commit those crimes upon the sovereigns and rulers of Europe. The significance of this decision lies in the fact that, contrary to previous rulings, the court held that "a document published in this country, which is calculated to disturb the government of some foreign country, is not a seditious libel, nor punishable as a libel at all."⁶⁴

Secondly, incitement to assassinate the head of a foreign government is also rigorously punishable under English law. Thus, the Act of 1861 dealing with Offenses Against the Person provides in its pertinent provision:

All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade or endeavour to persuade, or shall propose to any person, to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor. . . .⁶⁵

The foregoing provision has occasionally come before the courts. The leading case in this connection is *Regina v. Most*,⁶⁶ involving the publication and circulation of an article, written in German in a newspaper in that language in London, exulting in the murder of the Emperor of

61. *Id.* at 617. See also *King v. Lord George Gordon*, 22 Howell's State Trials 175 (1787), involving a libel against the Queen of France and the French Ambassador.

62. English writers seem to agree on this point. See, 1 McNAIR, INTERNATIONAL LAW OPINIONS 10-14 (1956) and Lauterpacht, *supra* note 4, at 114-15.

63. 70 J.P. 4 (1905), 14 The English and Empire Digest 99 (1956).

64. *Ibid.*

65. Offenses Against the Person Act of 1861 § 4, 24 & 25 Vic. ch. 100.

66. [1881] 7 Q.B. 244.

Russia and commending it as an example to revolutionists throughout the world. In affirming the defendant's conviction, the court held that the publication and circulation of a newspaper article might be an encouragement to persuade to murder, within the statute, although not addressed to any person in particular.⁶⁷ A similar principle was applied in *King v. Antonelli & Barberi* previously cited.⁶⁸ There the court, in deciding upon the sufficiency of the indictment in regard to the contention that no prospective victim of the act had been specifically mentioned, held that "sovereigns of Europe" specified a sufficiently definite class and, therefore, that the counts of the indictment were good. It should be added that the Act is clearly applicable to subjects and aliens alike,⁶⁹ within and without the realm,⁷⁰ as long as there exists a permanent or temporary allegiance to the Crown.

It is of some interest to note that the Canadian Criminal Code follows closely the principles of the English law. Its pertinent provision states that "Everyone is guilty of an indictable offense and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state."⁷¹ It is quite obvious that this provision is calculated to punish libels against foreign governments and not revolutionary acts of a treasonable character. As to the latter, the Canadian law seems to follow the traditional Anglo-American law in that such acts must be a part of a military or naval expedition.⁷²

III. THE PRINCIPLE OF SECURITY

Unlike Anglo-American law, the legislation of a number of states has regarded private revolutionary acts as well as hostile publications against foreign states as criminal offenses. The underlying motive be-

67. See also the Opinion of the Law Officers of the Crown in respect to a complaint of the Turkish Ambassador relating to an alleged incitement to assassinate the Sultan. The Opinion is printed in McNair, *Aspects of State Sovereignty*, 26 BRIT. YB. INT'L L. 1949 at 28-29 (n.d.).

68. See note 63 *supra*. It is significant that the same principle was applied in *King v. Bowman*, 76 J.P. 271 (1912), 15 The English and Empire Digest 781 (1957), dealing with an incitement to mutiny. The Court held that "an indictment framed under the Incitement to Mutiny Act, 1797 (c.70), need not specify any particular person or persons serving in His Majesty's forces by sea or land who have been approached by accused in contravention of the above Act."

69. *Regina v. Sandoval*, 56 L.T.R. (n.s.) 526 (Q.B. 1887), per J. Willis.

70. *Regina v. Jameson*, [1896] 2 Q.B. 425, per Lord Russell, C.J.

71. CAN. REV. STAT. c. 36, § 135 (1927).

72. See, Canadian Act Respecting Foreign Enlistment, April 10, 1937, Art. 10, 1 DEAK AND JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES 236, 239 (1939).

hind this type of legislation appears to be a firm desire to avoid complications with foreign governments rather than a recognition of an international obligation towards foreign states. The security of the legislating state is therefore of paramount significance, though occasionally some legislative provisions make reference to the maintenance of friendly relations between states.

In line with the foregoing considerations, the French Penal Code clearly provides that a person shall be liable to punishment for "any hostile act which exposes the State to a declaration of war, or the State or a French citizen to reprisals."⁷³ It seems generally agreed that this provision is only designed to prevent the commission of revolutionary and subversive acts within French territory. However, the Act Concerning the Freedom of the Press of July 29, 1881,⁷⁴ punishes hostile utterances against heads of foreign states and foreign diplomatic agents. More specifically, Article 36 of this law punishes "Insults uttered publicly against the Heads of Foreign States, Heads of Foreign Governments and Ministers of Foreign Affairs of Foreign Governments." Similarly, Article 37 punishes "Insults uttered publicly against Ambassadors and Plenipotentiary Ministers, Envoys, *Chargé d'Affaires* or other diplomatic agents accredited to the Government of the Republic."⁷⁵

The Italian law on the subject seems to apply exclusively to revolutionary acts and there seems to be no specific provision dealing with hostile propaganda against foreign governments.⁷⁶ Thus, the pertinent provision of the Italian Penal Code stipulates that "any person shall be liable to punishment who by enlistment or other hostile acts unauthorized by the government exposes the State to the danger of war or reprisals, or, in general, who disturbs the friendly relations between the Italian Government and a foreign State."⁷⁷ The corresponding provision of the Swiss Penal Code establishes that "If a person attempts, from Swiss

73. CODE PENAL arts. 84 and 84. For text, see 1 DEAK AND JESSUP, *op. cit. supra* note 72, at 583.

74. For text of this Act, see 2 U.N. FREEDOM OF INFORMATION: A COMPILATION 30, 34 (1950).

75. These two provisions were included in articles 92 and 93 of the Act Regulating the Press, of June 30, 1947. For text, see *Id.* at 44, 45. Though the articles are substantially the same, Article 92 merely increases the fine to 10,000 to 5,000,000 francs instead of the former 1,000 to 1,000,000 francs in regard to insults against heads of foreign states.

76. This appears from the reply which the Italian Government gave the United Nations Secretariat, Department of Social Affairs, as found in 1 U.N. FREEDOM OF INFORMATION: A COMPILATION 10-11 (1950). In any event, the Act of February 8, 1948, establishing Provisions Concerning the Press, does not have any provision dealing with hostile propaganda against foreign states. For this law, see 2 U.N. FREEDOM OF INFORMATION: A COMPILATION 67-69 (1950).

77. Italy, Penal Code, art. 113, as quoted in Lauterpacht, *supra* note 4, at 119.

territory, to disturb the political order of a foreign State by violence, he shall be liable to imprisonment."⁷⁸ But the Code is not exclusively confined to revolutionary activities, for another of its provisions punishes hostile propaganda in the following terms: "If a person publicly insults a foreign State in the person of its Head, its diplomatic representative or its Government, he shall be liable to imprisonment or a fine."⁷⁹ The interpretation of this last provision clearly indicates that attacks in the press are included.⁸⁰ It should be observed, however, that prosecution under these two articles can only be undertaken at the request of a foreign government and only if reciprocity is assured.⁸¹

In addition to the above provisions, the laws of a small number of states punish libelous publications by individuals against foreign states. Thus, the Iranian Act of February, 1908, Concerning the Press,⁸² makes a penal offense "Attacks against the Sovereigns of Friendly States,"⁸³ as well as casting "slurs on the honor of foreign officials and members of foreign political assemblies."⁸⁴ In like manner, the Swedish Constitutional Act of March 23, 1949, Relating to the Freedom of the Press,⁸⁵ prohibits utterances which are an "affront to the flag or shield of a foreign Power or to any other symbol of its sovereignty or libel or other defamatory act against the head or representative of a foreign Power here in the Kingdom."⁸⁶ Apparently, similar legislation is presently found in India,⁸⁷ Lebanon,⁸⁸ and Norway.⁸⁹

Being much troubled by internal revolutions, the Central and South American countries have similarly enacted legislation punishing revolutionary activities emanating from their jurisdiction. Thus, the Penal Code of Peru makes it an offense to violate the territorial sovereignty of

78. Switzerland, Penal Code, December 21, 1937, as amended, art. 299.

79. Art. 296.

80. See the reply of the Swiss government to inquiry from the United Nations Secretariat, Department of Social Affairs, 1 U.N. FREEDOM OF INFORMATION: A COMPILATION 214-15 (1950).

81. Switzerland, Penal Code, December 21, 1937, as amended, art. 302. Though Switzerland is traditionally a land of refuge for the politically persecuted, hospitality is granted under the condition that refugees restrain from hostile acts against their own government. There have been many instances of deportation of political refugees for failure to abide by this condition. See, DUMAS, *op. cit. supra* note 2, at 59.

82. For text, see 2 U.N. FREEDOM OF INFORMATION: A COMPILATION 60, 63 (1950).

83. Art. 40.

84. Art. 41.

85. For text, see 2 U.N. FREEDOM OF INFORMATION: A COMPILATION 69, 74.

86. Art. 4. These are listed among the Offenses Against Freedom of the Press in Chapter 7 of the Act.

87. India, Foreign Relations Act, 1932, as reported in 1 U.N. FREEDOM OF INFORMATION: A COMPILATION 212 (1950).

88. Lebanon Government Decree of May 6 (1924), *id.* at 212.

89. Norway, Penal Code of May 22, c. 23 (1902), *id.* at 213.

a foreign state as well as the commission of acts designed to alter by force the political order of other states.⁹⁰ Also the Penal Code of Panama punishes any one who within Panamanian territory commits an offense against the head of a foreign state, and adds that in such cases prosecution is to be had at the request of the foreign government in question.⁹¹ Similarly, the Penal Code of the Dominican Republic not only makes it a criminal offense to libel and slander the head of a foreign friendly nation,⁹² but also punishes any hostile act disapproved by the Government which exposes the Republic to a declaration of war.⁹³ It is of some interest to note in reference to these provisions that when in 1927 two journalists published libelous remarks against a deceased ex-President of the United States, the Dominican court interpreted them as applying to the head of a friendly nation and not to a deceased person who held the position when alive.⁹⁴ More recently, the Federal Supreme Court of Argentina denied habeas corpus to an Uruguayan citizen whose internment had been asked by the Uruguayan Government because of his seditious activities in Argentine territory to disturb the political order of Uruguay.⁹⁵ The Supreme Court relied upon the Treaty of International Penal Law of Montevideo of January 23, 1889, which in guaranteeing the right of asylum, imposed upon the asylum state the duty to prevent "those taking asylum from carrying out on its territory acts which put in danger the public peace of the nation against which they have offended."⁹⁶

The foregoing recital of municipal codes and legislation is a commendable recognition that friendly relations between states is a value of the World Society and that these relations may be impaired by revolutionary activities and hostile propaganda on the part of individuals. Admittedly, the protection afforded foreign governments is motivated by considerations of security, thus being in reality incidental to the legislating nation's own interest.⁹⁷ As a practical matter, however, the line between the protection of the state's security and that of foreign states is not so very clear and in particular cases is fairly difficult to mark. It may be further noted that in this type of legislation there is at least an attempt to balance these interests so as to foster the development of re-

90. Peru, Penal Code, § 297 (1924).

91. Panama, Penal Code, art. 115 (1922).

92. Dominican Republic, Penal Code, arts. 367 and 369 (1927).

93. Arts. 84 and 85.

94. This case is anonymously reported in 2 U.N. FREEDOM OF INFORMATION: A COMPILATION 191 (1950).

95. *In re Barreta*, Argentina, Federal Supreme Court, 1933-34 Annual Digest of Public International Law Cases 259 (Lauterpacht ed. 1940).

96. *Id.* at 260.

97. Research in International Law under the Auspices of the Harvard Law School. *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 552 (1935).

reciprocal obligations along a course not wholly independent of the necessity for peaceful intercourse between nations. This requirement seems entirely proper, both on principle and policy, if revolutionary activities and hostile publications by private individuals against foreign states are to be adequately controlled. It may be entirely relevant to add that though a cloud of pessimistic gloom has been cast upon laws dealing with hostile propaganda,⁹⁸ this fact only emphasizes the urgency and necessity for their strict application.

IV. AN OFFENSE AGAINST THE PEACE AND SECURITY OF MANKIND

Ironically enough, it is the legislation of the countries of the Soviet bloc that has emphatically classified private hostile activities against foreign states within the broader head of war propaganda and, thus, punishable as an offense against the peace and security of mankind. In this connection, the Peace Defense Act of the Soviet Union enacted on March 12, 1951, states that "war propaganda, in whatever form conducted, undermines the cause of peace, creates the danger of a new war and is therefore a grave crime against humanity."⁹⁹ More specific is the Czechoslovak Act on the Protection of Peace enacted on December 20, 1950, which provides that "Any person who attempts to disturb the peaceful communion of nations by inciting in any way whatsoever to war, by propagating war or otherwise supporting war propaganda, shall commit a criminal act against peace."¹⁰⁰ Similarly, the East German Law on Defense of Peace enacted on December 16, 1950, states that "Whoever slanders other peoples and races, incites against them, and demands their boycott in order to disturb peaceful relations between them and to involve the German people in a new war, shall be punished by imprisonment or, in grave cases, by imprisonment at hard labor."¹⁰¹ The Albanian Law on Defense of Peace passed on January 10, 1951, provides that—

Whoever directly or indirectly, orally or by means of the printed word, radio, or any other media, attempts to provoke an armed aggression of one state upon another; advocates the increase of armaments, the use of such weapons of mass destruction as the atom bomb, chemical and bacteriological weapons, and the like; advocates and propagates the doctrine of

98. MARTIN, *INTERNATIONAL PROPAGANDA* 207 (1958); and Whitton, *Radio Propaganda—A Modest Proposal*, 52 AM. J. INT'L L. 739, 744-45 (1958).

99. Art. 1. For text, see 46 AM. J. INT'L L. SUPP. 34 (1952).

100. § 1, ¶ 1. For text, *id.* at 35.

101. § 1. For text, *id.* at 99.

hatred among nations for the purpose of unleashing a new war; or commits any other acts aimed at the military and economic preparation of future aggression and causing in the minds of the people anxiety and fear of the possibility of a new war, shall be committing the crime of incitement to war and war propaganda.¹⁰²

The Bulgarian Law on Defense of Peace enacted on January 12, 1951, states that "Instigation to war is committed by a person who endeavors directly or indirectly—by means of press, radio, speech, or other media—to provoke armed aggression by one state against another."¹⁰³ It must also be noted that strikingly similar laws have been enacted by Hungary,¹⁰⁴ Poland,¹⁰⁵ Rumania,¹⁰⁶ and the Outer Mongolian Republic.¹⁰⁷

The above legislative provisions are very impressive indeed. Their approach is useful on two grounds. First, such legislation is directed against private hostile propaganda thus implicitly assuming that the toleration of such activities engages the responsibility of the state. Secondly, by adopting the broader concept of war propaganda, the legislative provisions here reviewed make it reasonably clear that the interest violated is not that of the menaced state but, more significantly, an interest of the World Society in the maintenance of peace. That incitement to commit aggression against another state is included in the crime of war propaganda can scarcely be denied. But the fact that the assumptions of the Communist legislation in defense of peace are in principle sound does not mean that their practical application must therefore be accepted. For the value of these provisions is partly deceptive both because of the use of carefully concealed language for the promotion of Communist objectives,¹⁰⁸ and because of the deep malice of Communist policy towards all non-Communist States. This latter factor is not lightly to be set aside, for it is of some significance to observe that the East German law specifically makes allusion to an alleged "aggressive policy of the imperialist governments of the USA, Great Britain, and France. . . ."¹⁰⁹

In view of the preceding observations and considering the Marxist social theory that the capitalist world is doomed to perish,¹¹⁰ it follows logically that the Communist laws in defense of peace are only designed

102. § 1. For text, *id.* at 101.

103. § 2. For text, *id.* at 102.

104. Enacted on December 10, 1950, § 1. For text, *id.* at 103.

105. Enacted on December 31, 1950, § 1. For text, *id.* at 103.

106. Enacted on December 16, 1950, § 2. For text, *id.* at 104.

107. Enacted in 1951, art. 1. For text, *id.* at 105.

108. Kulski, *Soviet Comments on International Law*, 46 AM. J. INT'L L. 131 (1952),

109. See the preamble of the East German Law, note 101 *supra*.

110. KELSEN, *THE COMMUNIST THEORY OF LAW* chs. 1, 3 (1955).

to protect countries having a Communist ideology, thus implicitly identifying threats to peace with the policy of the capitalist countries.¹¹¹ It is not at all surprising, therefore, that hostile propaganda against capitalist countries may be regarded by the Communist governments as merely hastening the inevitable process of their destruction.¹¹²

V. INTERNATIONAL REGULATION

(1) *Under the United Nations Charter*

The traditional principle that states are under no obligation to suppress revolutionary activities and hostile publications by private individuals against foreign states breaks down altogether in the presence of obligations imposed by the United Nations Charter. For the Charter represents a turning point in efforts to suppress threats to peace coming from whatever source. It is pertinent to recall in this connection that the Charter declares in its preamble that the peoples of the United Nations will "practice tolerance and live together in peace with one another as good neighbors."¹¹³ It is of capital importance to add that among the purposes of the United Nations is the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."¹¹⁴ The twin assumptions concerning the equality of states and the rights of all peoples to choose the form of government under which they wish to live seem to have permeated this provision.¹¹⁵ Since these assumptions are basic postulates of universal peace,¹¹⁶ it is not easy to see how the legality of a state's passivity in the presence of private revolutionary activities can be internationally admitted and the existence of a duty to prevent them be so emphatically denied.

The preceding argument is reflected quite explicitly in Resolution No. 2 adopted by the United Nations Conference on Freedom of Information held at Geneva in March and April of 1948.¹¹⁷ The pertinent part of the Resolution states that the Conference "Condemns solemnly

111. Grzybowski and Pundeff, *Soviet Bloc Peace Defense Laws*, 46 AM. J. INT'L L. 537, 539 (1952).

112. Cf. STONE, *Legal Controls of International Conflict* 59 (1954).

113. U.N. CHARTER, Preamble, para. 5.

114. U.N. CHARTER art. 1, para. 2.

115. GOODRICH AND HAMBRO, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 61-62 (1946).

116. These principles are designed to maintain peace and security, which is one of the purposes of the United Nations.

117. See, Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT'L L. 73 (1949).

all propaganda either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression, and all distortion and falsification of news through whatever channels, private or governmental, since such activities can only promote misunderstanding and mistrust between the peoples of the world and thereby endanger lasting peace which the United Nations is consecrated to maintain."¹¹⁸ It is also to be noted that in almost identical tones some governments expressed the belief that "all governments owe a duty not only to their own citizens but also to international law to suppress all activities which might prejudice international peace or law and order. . . ."¹¹⁹ Such assertions resolve themselves into a clear picture of what international law and the World Society should be if the objectives of the United Nations Charter are to be attained. And when the argument is thus reduced to an imperative of international life, the conclusion of law that private hostile activities prejudice international peace becomes, in turn, a demand that the states be required to suppress them.¹²⁰ Such a demand then falls naturally into place alongside the duties inherent in territorial sovereignty. Viewed in that position, its conclusiveness upon every state becomes fairly plain.¹²¹

If the foregoing observations be correct, the interesting question arises whether a state's tolerance of revolutionary activities and hostile propaganda by private individuals is such a threat to the peace of the world that the matter properly falls within the peace enforcement powers of the United Nations.¹²² Clearly, the Security Council may, as Article 34 of the Charter makes explicit, "investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." This broad phraseology roughly corresponds to Article 11 of the League of Nations Covenant which in paragraph 2, "declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends."¹²³ Cer-

118. *U.N. Conference on Freedom of Information*, Final Act, Doc. E/Conf. 6/79, April 22, 1948, at 23.

119. Cited by Whitton, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT'L L. 73, 77 n. 19 (1949).

120. See on reciprocal aid to suppress crime, DUMAS, *op. cit. supra* note 2, at ch. 7.

121. JESSUP, *op. cit. supra* note 24, at 178.

122. U.N. CHARTER chs. VI, VII.

123. GOODRICH AND HAMBRO, *op. cit. supra* note 115, at 145-46.

tainly, under the Charter the Security Council has broad authority to concern itself with any dispute or situation which is likely to endanger the maintenance of international peace and security. A close analysis of this proposition will immediately reveal that the power of the Security Council does not come into operation when the dispute or situation has already endangered international peace or security. The power of the Security Council is immediately operative upon the existence of a dispute or situation well in advance before it threatens the peace of the world. But under Article 34 the power of the Security Council is limited to two functions: (1) to investigate any dispute or situation; and (2) to determine whether its continuance is likely to endanger the maintenance of international peace and security.¹²⁴ Limited though these powers are, it nevertheless remains true that these are only preliminary to further action, and they in reality permit the Security Council to make determinations of fact precedent to the exercise of its peace enforcement functions.¹²⁵

Against this background, revolutionary activities and hostile propaganda by private individuals against foreign states fall into proper perspective. For in terms of the kind of international peace and security which the United Nations seeks to achieve, toleration by a state of private hostile activities against nations with which it is presumably on friendly terms is probably a situation likely to endanger the maintenance of international peace thus falling unmistakably within the provision of Article 34 of the United Nations Charter and clearly within the investigatory powers of the Security Council.¹²⁶ It may even constitute a

124. The matter may be brought to the attention of the Security Council by any member of the United Nations, by a state which is not a member, or the Security Council itself may take notice of the dispute or situation. See in this connection, U.N. CHARTER arts. 34 and 35.

125. U.N. CHARTER art. 36.

126. Thus, the Mutual Security Act of 1951, enacted by the United States Congress has been said to be of doubtful character from the standpoint of international law, for Section 101 (a) of the Act appropriates up to \$100,000,000 "for any selected persons who are residing in or escapees from the Soviet Union, Poland, Czechoslovakia, Hungary, Rumania, Bulgaria, Albania, Lithuania, Latvia, and Estonia, or the Communist dominated or Communist occupied areas of Germany and Austria, and any other countries absorbed by the Soviet Union either to form such persons into elements of the military forces supporting the North Atlantic Treaty Organization or for other purposes, when it is similarly determined by the President that such assistance will contribute to the defense of the North Atlantic Area and to the security of the United States." For text, see Public Law 165, 82nd Congress, 1st Sess. (H.R. 5113); 65 Stat. 373-74 (1951). For a discussion of the questionable character of this provision, see BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 46-47 (1958). For the complaint against the United States by the Iron Curtain countries, see *Official Records of the General Assembly*, 6th Session, First Committee, 472nd to 475th Meetings at 99-121 (1951). Dr. Fenwick also believes that this Act is violative of Article 2, paragraph (5) of the Draft Code of Offenses Against the Peace and Security of Mankind in that it undertakes and encourages ac-

danger to justice according to Article 2, paragraph 3 of the United Nations Charter, which forcibly commands the members of the United Nations to "settle their international disputes by peaceful means in such a manner that international peace and security, and *justice*, are not endangered."¹²⁷ It should be recalled in reference to this latter provision that Vattel regarded such conduct as a violation of the mutual duty to promote justice between nations.¹²⁸

The foregoing analysis is powerfully supported by the experience of the League of Nations on the subject. For the legal problems involved were thoroughly explored in the complaint presented on November 22, 1934, by Yugoslavia against Hungary in respect to the assassination of King Alexander while paying an official visit to France.¹²⁹ Essentially, the Yugoslav Government maintained that the assassination of the King was the result of plots and terrorist activities by Yugoslav refugees in Hungarian territory. It is highly significant to point out that the Yugoslav complaint was squarely based on Article 11, paragraph 2, of the Covenant of the League of Nations which has been seen to correspond substantially to Article 34 of the United Nations Charter. It should be similarly observed that the complaint did not invoke the first paragraph of Article 11, which referred to "any war or threat of war."¹³⁰ More specifically, the Yugoslav note asked the League to investigate "this situation, which seriously compromises relations between Yugoslavia and Hungary, and which threatens to disturb the peace and good relations between nations."¹³¹ It can hardly be denied that such a situation was a danger to the maintenance of peace, for Czechoslovakia and Rumania associated themselves with Yugoslavia in almost identical notes, and the discussion in the Council of the League reached matters involving the peace settlement of 1919. This turn of events shows remarkably well that there was a growing conviction among the members of the League that the issue was not simply one of settling responsibility for the assassination of King Alexander. The more far-reaching question was presented whether a state is obligated by international law to suppress activi-

tivities calculated to foment civil strife in another state. See, Fenwick, *Draft Code of Offenses Against the Peace and Security of Mankind*, 46 AM. J. INT'L L. 98, 99 (1952).

127. Italics supplied.

128. See note 30 *supra*.

129. For a discussion of this case, see Kuhn, *supra* note 28.

130. Article 11, para. 1 provided: "Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case such emergency should arise the Secretary-General shall on the request of any Member of the League forthwith summon a meeting of the Council."

131. As quoted by Kuhn, *supra* note 28, at 88.

ties subversive of the political and social order of a foreign nation. That the Council answered this question in the affirmative is not seriously open to doubt, for it unanimously approved a resolution on December 10, 1934, clearly stating that "it is the duty of every State neither to encourage nor tolerate on its territory any terrorist activity with a political purpose;" and that "every State must do all in its power to prevent and repress acts of this nature and must for this purpose lend its assistance to governments which request it."¹³² It would appear, therefore, that the League of Nations regarded the general principle concerning the duty of a state to protect other states from injurious acts originating within its jurisdiction, which is historically traceable to the *Alabama Claims Arbitration*,¹³³ as being susceptible of wider application. On this view, the widely applied distinction between organized hostile expeditions which are condemned by international law and revolutionary acts by individuals which are not has no defensible basis, for in either case there seems to be enough ground for liability.

If the experience of the League has any value, the Yugoslav-Hungarian dispute appears to be conclusive upon two points. First, the action of the League was essentially a recognition that as regards private revolutionary activities the state has a definite obligation to prevent them. Secondly, a state's tolerance of such activities engages its international responsibility amounting to an international delinquency. This conclusion is not only inescapable, but the United Nations cannot safely afford to ignore it.¹³⁴

(2) *Under International Conventions*

It was precisely because of the deep implications of the Yugoslav-Hungarian dispute that the Council of the League set up a committee of experts with a view to adopting an agreement for the suppression of terrorism. This committee drafted a Convention which was adopted at Geneva on November 16, 1937.¹³⁵ Though this Convention never en-

132. It should be pointed out that this resolution was based upon Article X of the Covenant which stated: "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all the Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled." The corresponding provision of the United Nations Charter is art. 2, para. 4.

133. *United States v. Great Britain* (1871). For the record of this arbitration, see 7 MOORE, *op. cit. supra* note 16, at 1059-67.

134. In Resolution 380 (V) of November 17, 1950, the United Nations General Assembly declared that "fomenting civil strife in the interest of a foreign Power" is aggression. Cited in 45 AM. J. INT'L L. SUPP. 128 (1951).

135. Convention for the Prevention and Punishment of Terrorism. For text, see 7 HUDSON, INTERNATIONAL LEGISLATION 862 (1941).

tered into effect, it is believed that a recital of its pertinent provisions is in order, if only to show the conviction of the states that private terrorist activities ought to be suppressed. Thus, the Convention "re-affirmed the principle of international law in virtue of which it is the duty of every State to prevent terrorist activities directed against another State and to prevent the acts in which such activities take shape," and imposed upon each state the obligation "to prevent and punish activities of this nature and to collaborate for this purpose."¹³⁶ In a subsequent article, the contracting parties agreed to enact legislation punishing "any incitement to commit" terrorism.¹³⁷ It is of some significance to add that under the auspices of the League a Convention was adopted in November, 1937,¹³⁸ creating an International Criminal Court with jurisdiction to try persons accused of offenses dealt with in the Convention for the Prevention and Punishment of Terrorism. Under the United Nations system, the Draft Declaration on Rights and Duties of States, prepared by the International Law Commission, provides in Article 4 that "Every State has the duty to refrain from fomenting civil strife in the territory of another State, and to prevent the organization within its territory of activities calculated to foment such civil strife."¹³⁹ Similarly, Article 2, paragraphs (5) and (6) of the Draft Code of Offenses against the Peace and Security of Mankind, also adopted by the International Law Commission, not only prohibits the fomenting of civil strife within the territory of a state but also the undertaking or encouragement of terrorist activities in another state.¹⁴⁰ Though these offenses may be said to be committed by the authorities of the state, the International Law Commission itself has acknowledged that criminal responsibility of private individuals under international law may arise under the provisions of paragraph 12 of Article 2, which considers as an offense against the Peace and Security of Mankind any act which constitutes conspiracy, incitement, attempt or complicity to commit the preceding offenses.¹⁴¹

In the field of international propaganda, the Convention Concerning the Use of Broadcasting in the Cause of Peace was adopted at Geneva on September 23, 1936.¹⁴² It is highly interesting that this Convention imposes upon the contracting parties the obligation "to prohibit and, if

136. Art. 1, para. 1.

137. Art. 3, para. 2.

138. For text of this Convention, see 7 HUDSON, *op. cit. supra* note 135, at 878.

139. For text, see 44 AM. J. INT'L L. SUPP. 16 (1950).

140. See, *Report of the International Law Commission Covering the Work of its Third Session*, 16 May-27 July, 1951; U.N. General Assembly, Official Records, Sixth Session, Supplement No. 9 (A/1858) at 12 (1951).

141. *Id.* at 13.

142. For text, see 7 HUDSON, *op. cit. supra* note 135, at 409.

occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party."¹⁴³ It is clear from this provision that no distinction has been made between governmental and private propaganda. In the same area, it should be observed that a number of treaties of peace ending World War II contain a clause imposing upon the defeated nations the obligation to prevent hostile propaganda against the Soviet Union or any one of the United Nations. Thus, the Peace Treaty with Finland signed in 1947¹⁴⁴ provides that "Finland, which in accordance with the Armistice Agreement has taken measures for dissolving all organizations of a Fascist type on Finnish territory, whether political, military or para-military, as well as other organizations conducting propaganda hostile to the Soviet Union or to any of the other United Nations, shall not permit in future the existence and activities of organizations of that nature which have as their aim denial to the people of their democratic rights."¹⁴⁵ Almost identical provisions are found in the Peace Treaties with Bulgaria,¹⁴⁶ Hungary,¹⁴⁷ and Rumania.¹⁴⁸

The foregoing international experience is powerfully reinforced by a similar experience of the Inter-American system, which has been deeply preoccupied with the problem both of revolutionary activities and of hostile propaganda. As early as 1889, the South American countries signed and adopted the Treaty of International Penal Law at Montevideo on January 23, 1889, which, in dealing with the right of asylum, provided: "Asylum is inviolable for those under prosecution for political crimes, but the nation of refuge has the duty to prevent those seeking asylum from carrying out on its territory acts which put in danger the public peace of the nation against which they have offended."¹⁴⁹ Subsequently, the General Treaty of Peace and Amity signed by the Central American States at Washington, D. C., on December 20, 1907,¹⁵⁰ provided that

143. *Convention Concerning the Use of Broadcasting in the Cause of Peace*, art. 1. See also arts. 2, 3, and 4, imposing more specific obligations in the presence of certain crises.

144. Signed on February 10, 1947. For text, see 42 AM. J. INT'L L. SUPP. 203 (1948).

145. Art. 8.

146. Signed on February 10, 1947. Art. 4. For text, see 42 AM. J. INT'L L. SUPP. 179 (1948).

147. Signed on February 10, 1947. Art. 4. For text, see 42 AM. J. INT'L L. SUPP. 225 (1948).

148. Signed on February 10, 1947. Art. 5. For text, see 42 AM. J. INT'L L. SUPP. 252 (1948).

149. Art. 16. For text, see note 95 at 260.

150. For text, see 2 AM. J. INT'L L. SUPP. 219 (1908).

"Every person, no matter what his nationality, who, within the territory of one of the contracting Parties, shall initiate or foster revolutionary movements against any of the others, shall be immediately brought to the capital of the Republic, where he shall be submitted to trial according to law."¹⁵¹ It is of some interest to observe that this particular provision came before the Central American Court of Justice in 1908 when Honduras accused Guatemala and El Salvador of unneutral conduct in that refugees in the latter countries were permitted to foment revolution against Honduras.¹⁵² After issuing an interlocutory decree in which the court ordered Guatemala, El Salvador and Nicaragua not to assist revolutionary movements within their territory and to confine to one place the political refugees from Honduras, final judgment was rendered on December 19, 1908, absolving the defendant governments of the charges brought against them.¹⁵³ The court seemed to have proceeded upon the theory that diplomatic negotiations between the parties had not been exhausted and that Honduras failed to maintain the burden of proof in respect to its allegations.

It is, however, in the area of hostile propaganda where more positive results seem to have been reached. Thus, the South American Regional Agreement on Radio Communications signed at Buenos Aires on April 10, 1935,¹⁵⁴ obliges the contracting parties to avoid broadcasts containing offensive or defamatory words or ideas against other signatory countries as well as "all kinds of transmissions which have an obvious tendency to jeopardize good international relations."¹⁵⁵ Subsequently, the Inter-American Conference for the Maintenance of Peace held at Buenos Aires in 1936 approved several resolutions urging the American Republics to adhere to the Geneva Convention Concerning the Use of Broadcasting in the Cause of Peace of 1936,¹⁵⁶ and to avoid broadcasting likely to disturb the peaceful relations between the signatories.¹⁵⁷ It may be added that the Charter of the Organization of American States adopted in Bogotá in 1948 has a specific provision prohibiting the intervention of one state in the internal affairs of another.¹⁵⁸ It is submitted, however,

151. Art. 17.

152. See 2 AM. J. INT'L L. 835 (1908).

153. See 3 AM. J. INT'L L. 434 (1909).

154. For text, see 7 HUDSON, *op. cit. supra* note 135, at 47.

155. Art. 7, § 2.

156. For text of this Convention, see note 142 *supra*.

157. Cited by Whitton, *Radio Propaganda—A Modest Proposal*, 52 AM. J. INT'L L. 739 (1958).

158. This is article 15 which says: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the

that though this provision may be broad enough to include hostile propaganda,¹⁵⁹ it is addressed to governmental action and not to activities of private individuals. Of perhaps more significance is the resolution adopted at Bogotá in 1948 in which the American Republics agreed to adopt measures against any kind of activities originating from abroad and designed to overthrow their political institutions, to foment internal disorder or to disturb "by means of pressure, subversive propaganda, threats or by any other means," the right of their peoples to govern themselves.¹⁶⁰ It may be significantly noted that in 1953 the Inter-American Council of Jurists adopted a Draft Convention on the Regime of Political Exiles, Asylees and Refugees, in which the pertinent provision stated:

Freedom of expression of thought and of speech, granted by domestic law to all inhabitants of a State, may not be ground for complaint by a third State on the pretext of opinions expressed publicly against it or its government by political exiles, asylees, or refugees, *except when they constitute propaganda tending to incite to the use of force or violence against the complaining State.*¹⁶¹

As an added measure of protection, a number of states have entered into bilateral treaties binding themselves to suppress both revolutionary

State or against its political, economic and cultural elements." For text, see 46 AM. J. INT'L L. SUPP. 43, 46 (1952).

159. THOMAS & THOMAS, *op. cit. supra* note 27, at 292.

160. As quoted by Whitton, *Radio Propaganda—A Modest Proposal*, 52 AM. J. INT'L L. 739, 743 (1958).

161. Article 6. Italics supplied. For text, see 5 ANNALS OF THE ORGANIZATION OF AMERICAN STATES 166 (1953). It is to be observed that two important cases have come before the Council of the Organization of American States which may throw some light upon this problem. One case was that of Costa Rica against Nicaragua, in which Costa Rica charged Nicaragua with invading its territory. The investigation ordered by the Council showed that both governments were negligent for not having taken adequate measures to prevent the development in their respective territories of movements tending to overthrow each other's government. For a discussion of this case, see García-Mora, *The Law of the Inter-American Treaty of Reciprocal Assistance*, 20 FORDHAM L. REV. 1, 15-22 (1951). The other case was that of Haiti against the Dominican Republic, in which the Government of Haiti claimed that it was the victim of "moral aggression" in that a former colonel of the Haitian Army, having taken refuge in Santo Domingo (today Ciudad Trujillo), was engaged in the latter state in plots to overthrow the Haitian Government. After the matter had been submitted to the Council, the two states settled it amicably agreeing not to "tolerate in their respective territories the activities of any individuals, groups, or parties, national or foreign, that have as their object the disturbance of the domestic peace of either of the two neighboring Republics or of any other friendly Nation." 1 ANNALS OF THE ORGANIZATION OF AMERICAN STATES 326; see also *id.* at 217-19, 325-26 (1949). The significant point about these cases is that private subversive activities and propaganda in another state may constitute, according to the Inter-American Treaty of Reciprocal Assistance signed at Rio de Janeiro in 1947, an aggression which is not an armed attack, thus falling within the provision of Article 6 of the Treaty. For text of this Treaty, see 42 AM. J. INT'L L. SUPP. 53 (1949).

designs and hostile propaganda proceeding from each other's territory. One of the earliest treaties of this kind was the Treaty of Paris of October 8, 1801,¹⁶² signed between France and Russia, which provided:

The two Contracting Parties . . . engage not to suffer their respective subjects to maintain any correspondence, direct or indirect, with the enemies of the present government of the two States, or to propagate principles contrary to their respective constitutions, or to foment disturbances, and that in consequence of this Agreement, every subject of one of those Powers inhabiting the States of the other, who shall do anything to its safety, shall be removed from the said country and transported beyond its frontiers without having any claim to the protection of its own government.¹⁶³

In the inter-war period, the Soviet Union concluded a series of bilateral agreements with a number of states designed to suppress revolutionary activities against the Soviet Government abroad as well as to afford a similar protection to other governments in respect to revolutionary acts originating in Soviet territory. Thus, in the peace Treaty between the Soviet Union and Esthonia signed on February 2, 1920,¹⁶⁴ both parties agreed "to prohibit the creation and presence in their territories of organizations and groups which claim to be the government of the territory, or a part of the territory of the other contracting party, or of representations and officials of such groups and organizations as aim at the overthrow of the government of the other contracting party."¹⁶⁵ In the same category must be included the short-lived Roosevelt-Litvinov Agreement of November 16, 1933,¹⁶⁶ in which the Soviet Government undertook—

Not to permit the formation or residence on its territory of any organization or group—and to prevent the activity on its territory of any organization or group, or of representatives or officials of any organization or group—which has as an aim the overthrow or the preparation for the overthrow of, or the bringing about by force of a change in, the political or social order of the whole or any part of the United States, its territories or possessions.¹⁶⁷

162. As cited by Lauterpacht, *supra* note 4, at 120.

163. Art. III.

164. As cited by Lauterpacht, *supra* note 4, at 120.

165. Art. VII.

166. For text, see 1 HACKWORTH, *op. cit. supra* note 18, at 305.

167. Para. 4.

In similar vein, the Tangiers Agreement of 1929 signed between France, Great Britain, Italy and Spain¹⁶⁸ is of singular interest in that it provides that "any agitation, propaganda or conspiracy against the established order in any of the Zones of Morocco or in any foreign country is prohibited."¹⁶⁹ Finally, it seems that since the end of World War II only one bilateral treaty has been entered into, namely, the Treaty of 1948 between India and Pakistan, in which the parties mutually promised to—

ensure that their respective organizations handling publicity, including publicity through radio and the film, refrain from and control: (a) propaganda against the other Dominion, and (b) publication of exaggerated versions of news of a character likely to inflame, or cause fear or alarm to, the population, or any section of the population in either Dominion.¹⁷⁰

These persuasive recitals would seem to be conclusive as to the obligation of a state to prevent revolutionary activities and hostile propaganda by private individuals against foreign states. In default of such a duty, the state has incurred an international responsibility. It is therefore concluded that the view that international law is not violated by private hostile actions against foreign governments may well have become an archaic hangover not at all consonant with international morality and must probably be regarded as unsound.¹⁷¹ It may be said to be a principle emerging from the international conventions here reviewed that a state's tolerance of private revolutionary activities and hostile propaganda against foreign nations is not only illegal under modern international law but it is also a disservice to the cause of international peace and security.

VI. CONCLUSION

The body of international and domestic law above discussed would seem to establish beyond any reasonable doubt the existence of a duty to prevent the use of a state's territory for hostile private actions designed to change the political or social order of foreign states. While this proposition seems unquestioned, the argument may be advanced that such a duty exists among the states only on the basis of a treaty. On this view, it is readily concluded that even the multilateral conventions here reviewed seem to be based on the assumption that no such duty exists

168. For text, see 23 AM. J. INT'L L. SUPP. 238 (1929).

169. Art. 10.

170. U.N. Doc. E/CN.4/Sub. 1/105 at 29, and quoted in Whitton, *Radio Propaganda—A Modest Proposal*, 52 AM. J. INT'L L. 739, 741 (1958).

171. Cf. Paoli, *Contribution a l'etude des Crimes de Guerre et des Crimes contre L'Humanité en Droit Penal International*, 39 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 129, 146 (France 1941-45).

apart from treaty.¹⁷² The validity of this argument is, however, highly deceptive, for this branch of the law is only a phase of the general duty of a state to prevent the commission within its jurisdiction of injurious acts against friendly foreign countries. This duty of prevention is a prescription resulting from the exercise of territorial sovereignty and unmistakably falling within the competence of general international law. It is therefore submitted that the inclusion of this duty in a number of conventions is a recognition on the part of the states of the existence of a rule of general international law, whose validity in terms of substantial justice and policy can scarcely be denied.

172. This matter is brought out by Professor Stone as regards hostile propaganda on the part of the government, but it is believed that the same observations are applicable to private propaganda. See STONE, *op. cit. supra* note 112, at 319.

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