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INTERNATIONAL CRIMES

by

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With kindest regards
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Max Radin†

ALMOST everywhere at the present time a "crime" is defined by statute and understood in common speech to be a punishable act. The fundamental purpose of criminal law is to find some test by which we may distinguish punishable acts from those which any person is free to do or not to do as he likes. The forms of punishment vary greatly. They include imprisonment, expulsion, execution, fine, disqualification from office, cancelling of privileges. In ancient—but not very ancient—law, there were such punishments as mutilation, torture, and enslavement, all three of which have been revived in modern times among the Nazis, less as punishments than as expressions of stark savagery.

If punishment involved only the idea of doing harm to some one, it is evident that this could be done by private persons as well as by communities. When it is done by the victim of a wrongdoer, it takes the form of vengeance. Both Christianity and in a lesser degree Judaism and Buddhism forbid altogether or disapprove of private vengeance. None the less throughout the world, in Christian communities as well as in others, the desire for vengeance is regarded as either commendable or at least not reprehensible. In some communities, Christian and non-Christian alike, it has been popularly regarded as a duty.

As a matter of fact, punishment of punishable persons by the community is popularly thought of as "vengeance" on the part of the state on the person that has defied it. We can go still further and say that a powerful factor in supporting severe punishments is the tendency of great masses of persons to identify themselves in imagination with the victim of the wrong. But the basis of punishment by the state is historically a wholly different thing.

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I have elsewhere[1] attempted to show the sources of the idea of punishment in Western civilization. One of these sources is the notion of the *piaculum*. Some persons by their acts or character have incurred divine displeasure. Their presence is a continuing danger to the entire community. They must be removed and their removal—generally by death—is usually carried out by a form of ritual. "Go, lictor," ran the command in ancient Rome, "Veil his head. Scourge him within and without the city enclosure. Hang him upon a withered tree."[2]

This aspect of punishment brings out fully, if crudely, the basic idea that for the community the proper basis of punishment is the removal of something or someone that imperils the safety of the community. The development of this idea has shown that it readily lends itself to abusive practices, but its essence is unassailable. The community acts primarily because communal harm is threatened.

But in developed states, communal harm is threatened less by persons who are assumed to have incurred divine displeasure than by those who frustrate the purpose of communal life. When every community was an armed camp and every able-bodied male a soldier needed for yearly campaigns or forays, indiscipline was one of the most serious of crimes and the most obviously punishable of acts. If we speak of order as the first duty of government, we are to a certain extent harking back to that situation.

However, there is another purpose of government recognized in the early stages of civilized society. This is the securing of the welfare of the citizens. Welfare was, to be sure, imagined in what might be called the elementary terms of security of life and safety of tangible property. But it was a distinct step forward when this welfare which was at first entirely a matter remitted to private protection and private vengeance became a matter of communal concern.

The difficulty was to find some way for the community to act. The most obvious fashion for a community to guard its interests was, so long as it was small, to do so by mass action. We have an illustration of it in the Bible, in an incident that can be dated very close to 850 B.C.

> And there came in two men, children of Belial, and sat

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[1] Radin, *Enemies of Society* (1936) 27 J. AM. INST. CRIM. L. & CRIMINOLOGY 328.

[2] Livy 1, 26; Cicero, pro Rab. 5, 15.

> before him: and the men of Belial witnessed against him, even against Naboth, in the presence of the people, saying, Naboth did blaspheme God and the king. Then they carried him forth out of the city, and stoned him with stones, that he died.[3]

The "crime" was one of those already mentioned. Naboth blasphemed. He endangered the relations of the people to God. The people were the judges and the mass executioners.

But when it is an individual who suffers, the interest of the community is less clear, and the mechanism by which the community enforces its interest was slow to grow.

Greeks and Romans solved it at first by encouraging public-spirited citizens to appear on behalf of the injured man and enforcing the judgment if one was obtained. Under the Roman Empire, the power of the magistrates to reach misconduct against individuals was established as an alternative method of punishment. But it was not till modern times as an outgrowth of the centralized organization developed in post-Renaissance Europe that officials—prosecutors and police—were created who undertook the public duty of protecting citizens from wrong.

It will be noticed that in the early stages of the history of punishment there was never any question that the act or fact which occasioned punishment also justified it. The issue was the guilt or innocence of the accused and perhaps the regularity of the proceedings or the authority of the magistrate. But no one doubted that blasphemy or public defiance of a magistrate made a man punishable. Nor did theft or mutilation, assault, slander or homicide need to prove themselves as acts which were wrongful and justified reprisal or an enforced compensation by or on behalf of the persons injured.

There was another offense which was developed most fully in Rome and which has a history of a special kind. That was treason. Rebellion was, in ancient times, the risk that every king knew was inherent in the very idea of kingship. There was something in that idea which implied it, as Sir James Frazer has so well established.[4] At any rate long dynasties were few and the question of the successor even among continuing dynasties was always doubtful at the death of every king. While rebellion was drastically suppressed, there was no moral turpitude in failure, even in ignomin-

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[3] I Kings 21:13.

[4] 4 FRAZER, GOLDEN BOUGH (3rd Ed. 1911) 9-159.

ious failure. The notion of treason in our sense had not yet appeared.

It does appear in an offense that the Romans called the *crimen maiestatis,* which was in effect a challenge to the supremacy of Rome among the nations of the Empire and to the position of the emperor as the embodiment of the position of Rome. It became in medieval times, the original notion of "*felonia,*" the breach of the feudal vow of allegiance.[5] In this aspect an effort was made to associate it with a sort of sacrilege, but the recreant vassal, even when drawn and quartered and otherwise horribly dealt with, did not really become a criminal in our sense.

The crime of treason, in fact, is essentially political. It is not a violation of moral standards established by the community—except so far as it involves association with the public enemy—but is rather an offense against the constitution. As the mocking rhyme tells us, it owes its character as an offense to its failure.[6] Successful treason is triumphant revolution.

The crime of treason is the latest of crimes to develop, and it is the one that is most unmistakably associated with a special and particular nation. The same was true of those earliest aspects of crimes already mentioned, those which threatened military safety or provoked supernatural anger. But, as has been seen, the offenses which were originally vindicated only by the offended person also came to engage the interest of the community, and these required in Europe the creation of an official and necessarily communal organ or prosecutor.

It is this last type of crimes, which were treated originally rather as torts than as crimes, which now make up the largest part of every body of punishable offenses in modern states. When penal codes are set up, offenses against the persons and property of individuals constitute much the largest part of these codes, and offenses like treason or public disorder are few and relatively unimportant. There are also offenses against public morals, like adultery, incest, prostitution, or gambling, which take the place of the offenses against religion which are no longer, in most countries, dealt with by governmental authority.

Different as communities are, crimes against individuals are very much alike everywhere. Most civilized communities declare mur-

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[5] *Cf.* my HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) 148, n. 7.

[6] "Treason doth never prosper, what's the reason?
For if it prosper, none dare call it Treason."
—Sir John Harington

der, mayhem, theft, assault, burglary, and kidnapping to be punishable acts. Persons who indicate by their conduct that they have these tendencies are persons whom the community must repress if it wishes to take over the duty of protecting its citizens, instead of imposing that right on the citizens themselves. Since the community prevents private vengeance, it finds itself obliged to combine vindictiveness with what in its origin is merely a policy of prevention. It is for that reason that any single act makes a person punishable, whether it proves a dangerous tendency or not. We may grant each dog his first bite. We cannot grant each murderer his first homicide.

From the time of Herodotus, a great deal has been made of the wide discrepancy that is found among different communities about what in Herodotus' time was called the "laws." These, for the most part, were customs of living which acted as laws in the penal sense, because violation of these customs was sure to be sharply —often capitally—punished. The same discrepancy has been frequently emphasized by modern writers eager to repudiate doctrines of "natural" law.

It is quite true that almost no conduct is universally regarded as a punishable act, not even murder or the graver forms of incest. But to make this statement requires us to take "universally" as covering all observable places and all recorded history. If we take what for ordinary purposes is quite sufficiently universal, a world which includes the culture-areas we regard as most developed, *i.e.*, the Mediterranean area and the inheritors of that civilization, the Mesopotamian, Iranian, Indian, and Sino-Japanese cultures, there are as many striking similarities as there are divergences, and the acts of misconduct of man toward man listed before are nearly everywhere regarded as punishable.

Punishability and, therefore, crime as well, do not quite depend on the peculiarities of national or communal development. They do so depend in cases of blasphemy, treason, or military insubordination. In the case, however, of acts which usually typify crime to us, they depend on certain ideas sufficiently common among men of different—widely different—nationalities to make it possible to say that human society develops out of itself a need for dealing with these acts as criminal, and of seeking to get rid of the men who commit them.

The fact of communication, which is one of the things that create bonds between persons of different nations, also creates the danger that criminal acts will be committed across the borders of any

given community. *A*, a citizens of State I, is the victim of a crime committed by *B*, a citizen of State II. If *B* is found within the limits of State I, the solution is easy. State I can punish him—leaving out certain exempt categories such as ambassadors and quasi-ambassadors—just as though he were its own citizen. Indeed, at all times to his disadvantage, the "stranger within the gates" has been assimilated to the citizen, sometimes in a roundabout manner.

But if *B* commits a crime against *A* in State II or State III, or if he flees to State II or III after the crime, the state to which *A* belongs, State I, is helpless to protect its citizen except by urging State II and III to do so. If State I is sufficiently powerful, it might demand that *B* be surrendered to it and could, if necessary, enforce its demands by war. Or else, as is largely the case at the present time, several states might agree among themselves to surrender such men as *B* if *B* should flee for refuge.[7]

But they rarely agree that they will surrender *B*, if the crime has not been committed in State I. It is generally declared that in that case, State I has no "jurisdiction" at all. And if States II or III to which *B* belongs or where he happens to be will do nothing about it, the act will go quite unpunished.[8]

The situation is intensified when, as happens frequently, the crime is one that is prepared and planned in State II and executed in State I. The perpetrator may be caught, but those whom State I is most concerned to reach are the planners, those who in law would be called the "principals."

When, in earlier times, these acts were raids into State I over the border, followed by retreats into the territory of the raiders outside of the jurisdiction of State I, the difficulty was finally settled by war. Indeed, these raids were themselves a form of war. But crimes planned in one state and executed in another are generally some form of treason, that is, they are intended to be attacks against the government and they are usually financed by groups opposed to the ruling authorities. Bitter complaints were made

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[7] A draft convention with comment and bibliography on the subject of extradition is found in PART I, RESEARCH IN INTERNATIONAL LAW, published in 29 AM. J. INT. L. (1935) SUPP. A full discussion with cases is found in 4 DIGEST OF INTERNATIONAL LAW, DEPT. STATE BULL. (1942) by Green H. Hackworth, which amplifies the material of the digest prepared by John Basset Moore.

[8] *Cf. Draft Convention on Jurisdiction with Respect to Crime,* 29 AM. J. INT. L. (1935) SUPP. *Extraterritorial Crime* is discussed in 2 DIGEST OF INTERNATIONAL LAW 179-206. (See n. 7, *supra.*)

throughout the nineteenth century that England permitted disaffected groups of Italians and Germans to plot assassination and rebellion on the Continent. The same was frequently charged against Switzerland. Germany during the Empire was more than ready to prevent such plots in its borders against Russia and permitted Russian secret police to ferret out offenders.

But outside of crimes which are crimes against the governments of states and which are therefore thoroughly national in character, even if they have international implications, crimes rarely are dealt with on an international level, except in regard to the problem of jurisdiction and extradition. Nearly all treaties of extradition specifically exclude "political" crimes. And they exclude in fact, although rarely in terms, acts which are not quite generally reprehended in all the contracting states. We have in other words a recognition of a large area in which the same acts are deemed punishable and within which the governments of the different states of the area aid each other in punishment.

We may go further. Not only is the question of what crimes are punishable determined by a common understanding which transcends national boundaries, but how the crimes are to be punished attains a certain uniformity. Demands for extradition by State I are often enough resisted in State II on the plea that the person sought will not get a fair trial. This means that certain elementary prerequisites, such as a hearing, a right to call witnesses, a right to be confronted with hostile witnesses, must be present. If State I had no form of trial, except the ordeal, let us say, or used torture as a means of eliciting evidence, or inflicted peculiarly savage punishments, it is likely that extradition would be refused.

There is therefore an already existing international penal law which recognizes that certain harmful acts should be generally punishable and has a common and fairly definite feeling about what procedure is to be used in determining who the punishable man is. To a much more limited extent there is a general agreement about what the punishment should be—or better, what the utmost limit of punishment should be.

If, accordingly, the countries which have made extradition treaties with each other were to form a single huge community, whatever other difficulties there might be in establishing institutions for this super-state, there would be no difficulty in finding a substantial penal law that would merely need formulation and verbal expression. Essentially it is already there.

We need not depend upon mere conjecture for this conclusion.

Nearly all modern civilized countries have a penal code. If we were to put these codes side by side, we should find that different as they are in a great many respects, most of the acts which shock moral sensibilities in one country, do so in the others, and these acts are listed as punishable offenses, or crimes, in all of them. Further we should find that the degrees of punishability are very largely the same. In all of them murder is an extremely serious crime. In all of them there is a limit which divides severely punishable theft from theft that is lightly punished and this limit depends on the value of the things stolen. A great many other striking similarities would appear on any analysis.

If we compared penal procedure on the other hand, the existing similarities would be fewer, but there would none the less be some that may well be called fundamental. Nearly everywhere there is some provision made for expediting trials of accused. Nearly everywhere accused are allowed counsel. Nearly everywhere a certain degree of publicity of trial is insisted upon. Further, in many states there is at least a formal acceptance of the presumption of innocence. The common law institution of *habeas corpus,* designed to protect men against arbitrary arrest, has made considerable headway in Latin-American countries.

It would accordingly not be difficult to prepare a penal code of substance and procedure that would easily find general acceptance among most of the civilized nations of the world because in essence it is already accepted by them. The acts made punishable would be "international crimes" in a wholly different sense from that which usually attaches to the word. They would not be acts which impair the relations between states, acts like those which instigate war or the violations of treaties. They would be acts which the moral sense of the unorganized but real international community has, independently of formal international relations, already condemned and treated as punishable.

The world has watched with absorbed interest the proceedings at Nuremberg. We may disregard for the moment the controversies that the trial has elicited and treat the situation merely as one which attempts to establish the doctrine that there may be crimes against an international community, however unorganized. These are the crimes described in the indictment found against the defendants at Nuremberg as Count Four and there denominated "crimes against humanity."

The indictment was prepared under the authority of a "Char-

ter"[9] setting up an "international military tribunal," and this charter again was drawn up by virtue of an agreement[10] of four governments, the United States of America, the Provisional Government of the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics. The crimes under Count Four are the atrocities committed by Nazis during and before the war. The twenty-two defendants at Nuremberg are charged with complicity in them, either by knowingly ordering the atrocities or by being accessories either before or after the fact. These atrocities are in every case acts which would be murder, robbery, rape, mutilation, assault, kidnapping, and enslavement, even if they were not accompanied by the brutal tortures and abominable incidents which demonstrably took place.

The agreement of the four nations, therefore, did not for the first time in history denounce these acts as punishable. On the contrary, not only have these acts been punishable for a long time within the borders of the four signatory powers, but they are equally punishable in all the civilized countries of the world. They are international crimes in the sense indicated before.

The term "crime against humanity" is not mere rhetoric. It suggests a situation in which for millenia acts have been punished because they were offenses against all humanity. This was done in the case of pirates, who were formally declared to be "enemies of the human race," "*hostes humani generis.*"[11] Piracy is probably as old as sea-faring and was at one time a legitimate, if perilous, enterprise. It became criminal in the Mediterranean, and doubtless in other culture areas, when international needs created a demand for peaceful trade-intercourse. Treaties of some sort were required to deal with piracy in certain sections, but before Alexander there had already evolved a sort of tacit agreement among the peoples of the Mediterranean area that any pirate found anywhere could be punished without reference to the place of his depredations.

But it may be said that in spite of the expression "enemies of the human race," pirates were punished by various communities chiefly because they felt themselves potential victims of the pirates,

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[9] *Charter of the International Military Tribunal,* XIII DEPT. OF STATE BULL. 223 (1945).

[10] XIII DEPT. OF STATE BULL. 222 (1945).

[11] *Cf.* RESEARCH IN INTERNATIONAL LAW, Harvard Law School (1932) pts. IV and V; 2 DIGEST OF INTERNATIONAL LAW 681-695. (See n. 7, *supra.*)

rather than because they were roused to indignation against men who violated a general duty to humanity. We must take the term "*hostes*" almost literally. It means enemies in war, rather than anti-social persons. There were in fact nations of pirates and sometimes, as in Cilicia during the first century B.C., a quasi-nation was organized for the purpose of piracy.

The ancient conception of piracy was accordingly merely that of a group that made war irregularly. They represented no recognized state, with which treaties could be made and diplomatic relations maintained. Captured enemies had in general no right against their captors, but custom had to some degree regulated their treatment and an indiscriminate slaughter of surrendered enemies was rare and, if unprovoked, was regarded as a violation of the "rules and usages of war." Pirates, on the other hand, were executed on capture wherever found.

The "crimes against humanity" of the indictment at Nuremberg have no connection with any type of organized or unorganized warfare. They are punishable acts by their nature and not by the fact that they are committed by persons who have not formally qualified as belligerents. They are thus punishable acts by common consent, by the common agreement of civilized nations that they should be punishable.

But if the indictment did not give these acts a character they did not have before, they did, however, accomplish something else. They created a "jurisdiction" that did not exist before.

The mysterious word "jurisdiction" has troubled lawyers for centuries. It is meaningless to laymen as most technical terms of the law unfortunately are. It means in very broad terms the right to pronounce valid judgments. If we were to apply the existing rules, the only judges who had "jurisdiction" would be those of Germany. The crimes were committed either in Germany or in places which were occupied by German armies. Some of the crimes —chiefly those against the Jews—were committed against men who were Germans by national allegiance, or in those cases in which German citizenship had been cancelled, were committed against persons who had no other allegiance. The hitherto prevailing rules about "jurisdiction" are therefore being disregarded here. In this sense there is no doubt that the procedure is "unprecedented." The curious thing is that laymen rather than lawyers use this term as if it meant "unjustified."

It is impossible in this place to examine the rôle and significance of the idea of precedent in law or in society. It must suffice here

to say that contrary to popular belief, the mere absence of a precedent, as distinguished from the presence of a contradictory precedent, has never seemed conclusive in the law. Precedents—new precedents—are constantly being set in the law.[12] It is really impossible to have a legal system without the power to set new precedents. The common law has a technical term for an unprecedented case. It is called a "case of first impression." And even in countries which have codes which presume to be exhaustive so that what is not in the code is not in the law, the same result is reached by a slight indirection. It is merely necessary to find a new "interpretation" of some generality in the code.

We may therefore examine the precedent of establishing a new jurisdiction, not as if it implied a serious wrong by being unprecedented, but to determine whether it violates accepted standards of right. It can be said at once that except for the purposes of a technical defense the general feeling of most persons in any of the countries we call civilized would be quite indifferent to whether the jurisdiction had no precedent or not. More than that, I think it is highly probable that, again by general consent, the establishment of a new precedent in jurisdiction would be fully approved if it became clear that unless the precedent were established, those who had done these acts would remain unpunished, so that whatever value punishment has in society would be quite lost so far as these peculiarly horrible crimes were concerned.

We may then accept the trial at Nuremberg under the Charter and the International Agreement which made the trial possible as valuable evidence that international crimes can be punished. Four countries, the combined population of which runs to nearly 300,000,000, had independently and long ago regarded certain conduct as highly punishable, and they now join in punishing them, in disregard of jurisdictional difficulties. This, in effect, means that the national character of crimes like these ceases to be of first-rate significance. The international attitude to these acts is expressed in this newly and specially created tribunal.

What has been done by four large nations can be done by the forty or more nations of the United Nations or by the seventy or more nations that were admissible to the now defunct League. If these nations succeed in forming a permanent organization, they may either under the San Francisco Charter or under some future amended form of it establish a whole system of courts and deter-

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[12] *Cf.* my HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY (1936) 343-358.

mine their jurisdiction. They may do so even without forming a new super-state in the sense in which the United States is a super-state and, of course, without forming a wholly new integrated state which would wholly supersede existing national units, as France has superseded the various feudal states that once were within its present geographical borders.

If a series of courts is established by the United Nations, even under its present loose and unintegrated form of organization, what type of jurisdiction will be assigned to it? We may recur to the precedent of Nuremberg. The need for a new tribunal was based on the fact that no other adequate way existed to punish these acts whose punishable character is unquestioned. Whenever such a situation is once more presented, a court created *ad hoc* by the United Nations, or some court so created of a more permanent character, may be seized of the power to judge the issues.

The obvious analogy is the old English Chancery as the seat of residual judicial power in that country. The condition precedent to bringing a matter before the Chancery—as is still the case in those courts derived from the Court of Chancery—is to show that no other adequate remedy exists. An international penal tribunal might in the same way, under existing international conditions, require a strong showing of inadequacy elsewhere in other courts before it assumes jurisdiction.

Such a showing could of course be made at Nuremberg. In two respects, existing penal machinery turned out to be inadequate. The courts that normally would have jurisdiction are not functioning and could not be trusted if they were recreated and allowed to function. The persons injured are in many cases stateless persons or citizens and residents of Germany, and their injuries would not be within the range of jurisdiction of any other national court. Clearly under such cases, an international court may be properly constituted.

The Court at Nuremberg established a procedure which, except for the absence of a jury, closely follows what in the United States is regarded as the basic pattern of a just procedure. The accused face their accusers. They are allowed counsel. They call witnesses and cross-examine hostile witnesses. They are heard publicly. That certainly provides sufficient security. But difficulties have arisen in relation to prosecution.

We have seen that in Western history prosecution has been carried on in various ways. There is first of all the victim-prosecutor. Then we find the witness-prosecutor. Next is the public-spirited

citizen-prosecutor. And finally we have the official prosecutor, a procurator of the Crown in ancient France, of the Republic in modern France, a district attorney in the United States, a *Staatsanwalt* in Germany, or the police in England.

It would, of course, be possible to establish an official prosecutor under the United Nations. There might even be a tribunal of prosecution, just as there is in France. In that country as in other Continental countries, besides the prosecutor, there is a "*juge d'instruction*" and in addition a "*chambre des mises en accusation*". This type of court—and it is one—is unknown in common law countries and is generally misunderstood there. It is the function of this branch of the judicial system to examine accusations, to determine whether a real basis for the charge exists, and then to prepare the prosecution which the official prosecutor, the "*procureur,*" conducts.

Suppose there were under the United Nations a formal "Commission of Accusation." This would mean that any accusation made by either an individual or a group within a nation might make a charge which it would be the duty of the "commission of criminal prosecution," or something like it, to sift before it is presented as a proper case for an international court to exercise its exceptional jurisdiction. It would be better obviously to have a quasi-judicial body do this than a single official even with an elaborately organized staff.

If something of this sort is put together, there is no reason why we may not deal with international crime in the way in which crime is dealt with in modern states. Anybody can make an accusation, but it is only where an official person or an official body certifies the accusation as sufficiently supported that it becomes a matter for a court to try. And if it is so certified, the burden of the prosecution is placed not on the victim or the witness but on the public officer, and the expense is borne by the public.

Evidently while the United Nations or any other form of international organization is in its present nascent and precarious state, the actual interposition of an international criminal court will be attended with difficulties. When the persons dealt with are like those of Nuremberg, members of a defeated nation whose national existence is at the moment suspended, the only protests against the jurisdiction of the court will be on the part of the defendants themselves, or on that of individuals whose theories of penology or of international law are disregarded.

But if it were attempted in more normal circumstances to apply

the procedure here suggested and to establish a court with jurisdiction over international crimes committed by individuals either in public office or as private citizens, we should undoubtedly meet resistance. In most instances, the jurisdiction would be challenged on the ground that redress can be adequately obtained within the country where the wrong was committed. If an American or a Briton were robbed or murdered in France or in Russia, it would certainly be declared that the French or Russian authorities could deal with the case and the necessary condition to seize the international court of jurisdiction would not have been fulfilled.

There are situations in which the responsibility of governments might be engaged. The United States, for example, never accepted responsibility for the mob-killing of Italian citizens in New Orleans in 1892, but it paid indemnity to the families of the victims.[13] Similar situations have been known in which the injury to a foreign citizen has been caused by official neglect or misconduct, and international complications have followed. In the main, however, it would be claimed by every state, and it would be demonstrable in many of them, that the local authorities both can give redress and are likely to do so.

When either of these two situations is not fulfilled, the international criminal court might function if the case were clear—and under present circumstances the case must be very clear indeed—and if it were supported by an international public opinion sufficiently powerful and sufficiently explicit. Under the present organization of the United Nations, it is possible to determine whether international public opinion would support the effort to redress an international crime which national authorities are either unable or unwilling to deal with.

To take a concrete instance, Americans and Europeans in countries which seemed to them backward or in which they felt peculiarly separated from the body of the people, as in the Orient, demanded and by reason of their military superiority were able to force these countries into granting them extra-territorial privileges. The rationalization was that a foreigner would encounter so much prejudice if tried in a "native court" that he would not receive a fair trial. Prejudice against foreigners is, however, not confined to Oriental countries, and that the rationalization mentioned is just that and little more is demonstrated by the fact that these extra-territorial courts were not set up, in spite of a strong prejudice against foreigners, where the privilege was not extorted

[13] *Cf. Mafia Incident* (1891) 3 DICT. AM. HIST. 323.

by immediately available force. The setting up of these courts was in general an act of international arrogance. They were meant to enforce the fact that the country in which they were established was deemed incompetent in general to be entrusted with either civil or criminal suits where certain foreigners were concerned. But it would be a different matter, if the proof of inadequacy was required specifically in every case and if the court were a recognized international court and not the court of a particular nation vested with extra-territorial powers.

If under the conditions set forth, *A*, within the boundaries of State I, injures *B* by an act which by the general consensus of civilized nations is a crime and if State I will not or cannot punish him, under the proposed international criminal procedure, a formal accusation may be brought by any person or group before an international chamber of prosecution or accusation, and this chamber or court or commission or office must determine whether it will have *A* formally arraigned before a proper international court. Evidently it will proceed with caution and equally evidently it will in most cases reject the application, since as a rule it will not be possible to furnish sufficient proof that the authorities of State I are powerless, corrupt, or indifferent. But unless a system something like this is established, there can be no effective realization of an international concept of crime in a sense that parallels the ordinary understanding of crime as an act regarded as punishable by general public opinion.

A further step in the development of such a concept of crime will be taken when national boundaries in jurisdiction are disregarded not only when there is diversity of citizenship between the victim and the wrongdoer, but when the victim is a member of the community in which he is abused. This is intensified when it is the government of his own community that is guilty of injuring him or is obviously responsible for it. The latter situation has been illustrated in recent years by both systematic and casual persecution of national and religious minorities in Europe. The most striking example is of course that of the German Jews under Nazi rule. But the same accusation has been made on behalf of Ruthenian and Ukranian minorities against the government of Poland, on behalf of Croatians against Yugoslavia, on behalf of both Hungarians and Jews against Rumania, Hindu nationalists against Britain, economic groups against Soviet Russia, Armenians against Turkey. And we should be less than honest if we omitted the treatment of negroes in the southern states of the American Union and of

Japanese and Chinese in Oregon and California. If it can be said in the case of the United States that the mistreatment of minorities was not directly the work of the government, it can also be said that no serious effort, until very recently, was made by governmental authority to prevent that mistreatment.

So far as the crimes can be traced to governmental authority, they can become a matter of international concern without involving the intervention of penal law. Under the Charter of the United Nations, the welfare of minorities within nations has been formally declared to be one of the purposes of international organizations and one of the conditions of international security. And even before the Charter or any approach to it, the persecution of the Armenians by the Turkish imperial government and that of the Jews by Rumania were held to justify diplomatic representation, feeble as this intervention was so far as securing the lives or property of the victims was concerned.

While international intervention is not the same thing as punishment of international crimes, it is a prerequisite. Unless international intervention becomes effective under some plan of organization like that adumbrated rather than proposed in the Charter, we shall be as helpless in these cases as we have been in the past. If, however, such intervention does become effective, it will not be sufficient unless it is supplemented by the establishment of criminal responsibility on the part of those individuals to whose activity the persecution of minorities can be properly charged.

We may recur once more to the trial at Nuremberg, where at least two of the defendants, Rosenberg and Streicher, are charged not with specific acts of murder and robbery but with instigation of such acts, directed against an entire racial group. No one who has examined the history of Germany under the Nazis con reasonably doubt that the guilt of these two is quite as great as that of Kaltenbrunner. The latter merely executed the brutalities which were specifically incited by both the pseudo-philosophic ideologist, Rosenberg, and the obscene pamphleteer, Streicher.

It would not be hard to find in the other cases of persecution of minorities which have been mentioned men of the same sort, demagogues in and out of legislative halls, journalists and writers, organizers and sponsors. It is not a question of preaching a gospel of class or racial hatred. In most cases, definite and quite unmistakable incitements to violent suppression can be discovered in the words, acts, and writings of persons in this class, and the connection

between these incitements and their translation into criminal acts can be clearly enough shown.

When this happens, the international intervention that seeks to check any governmental policy anywhere in the world which organizes or permits the persecution of minorities must be followed by the prosecution of international criminals of this class, or else international intervention remains a mere gesture like "diplomatic representations."

If the nations of the world form something more than a federation and become an organized world-community, international crime will have something of the relation to national crime that a violation of the Federal penal code of the United States does to that of the several states. But the analogy will not be exact. The Federal system specifically denies the existence of a common law of crime. That was historically conditioned by the situation in which the United States found itself in the early stages of its history. While the development of the American Union presents useful and encouraging analogies, there is no reason why a developing world-union must pass through every stage through which American federal history has passed. The conditions that present themselves in many countries of the world render advisable an early acceptance of a concept of crime and of penal jurisdiction that we have not reached ourselves in the United States but which the protection of human society seems to need.

The original "crime" in the sense of a direct attack on the community—the crime illustrated in blasphemy, sacrilege, military insubordination, rebellion, and treason—has as its nearest analogy in the indictment at Nuremberg the crimes under the Second Count which are called "crimes against peace" and which are defined as "preparing, planning and waging an aggressive war or a war in violation of existing treaties." Whether such acts can be denominated as crimes under the international system in force at the present day is doubtful and has been denied, but under the Charter of the United Nations as confirmed by the nations that have accepted it, we can readily designate any act that specifically attacks the organization so prepared, or any act that attempts to violate the fundamental purpose of that organization—which is the maintenance of peace—as a punishable act and therefore a crime.

When it is a government that so violates it, we must depend on the military intervention of the Security Council, as provided in the Charter. But there is no reason why individuals should not

be held in the same way as individuals who commit crimes of the ordinary sort.

This would not involve an agitation to repeal the Charter, even if carried on with vigor and intensity. An attempt to repeal the Charter by means of ordinary political propaganda is no more a crime against the international community than effort to amend the Constitution of the United States is treason, even if the attempt is directed to replacing the Constitution by a wholly new one. But an effort by an individual or a group to disregard the inhibitions of the Charter, to foment war or aggression in defiance of the Security Council, is a form of treason to the world and should be so punished.

The concept of international crime is at best a hope. It will need concerted and systematic effort to make it a reality. But it will not need either a formal international penal code nor yet will it need an elaborate system of courts, interlocking with one another and involving a rigid ceremonial of procedure and rules. It is quite possible that an international penal code, couched in general enough terms, will in due course be formulated. It will add to the expedition and the clarity of our concepts. It is equally likely that rules of procedure abstracted from actual practice and reducing formalities to a minimum will get itself established. But with good will, we need not wait for that, not even for the formulation of an international bill of rights of which so many projects have been proposed. If it seems curious that the idea of international crime should be taken as a step toward world unity, it may be remembered that the idea of feudal crime which was a violation of the "peace" of some feudal lord made for national unity when the "peace" of any minor lord or jurisdiction was absorbed by the king's "peace." If an international indictment were drawn up on the theory that a punishable act was one violating the "peace of the United Nations," in the sense which the word had originally, it would repeat an historical process. That is not a small recommendation.

J. W. Wi H

1. Secure bus
2. avoid smoking
3. regulate with sub K
4. locate in assisting & locating necessary component parts to total assembly
5. Price control matters
6. expedite delivery of product
7. supplied reports on condition of sub contractors
8. secured collections