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INTERNATIONAL LAW AND THE LAW OF HOSTILE MILITARY EXPEDITIONS

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INTERNATIONAL law unmistakably postulates that a neutral State must maintain an attitude of strict impartiality toward belligerents in the presence of a war. Included in this obligation is the duty of a neutral State not only to abstain from participating in the conflict but also to refuse the use of its territory and resources for the organization of military expeditions against States with which it is at peace. A similar obligation exists in the presence of a civil war or an insurgency in the territory of a foreign State. It can thus be seen that the duty to prevent the formation of military expeditions is not in any way limited by the relations of neutrality. It is a duty which exists in peacetime as well. Though the law in this regard is relatively clear, it is believed that its somewhat narrow construction has made it susceptible of violations by the States. A critical examination of this law may therefore bring out its deficiencies and the urgent necessity for revision.

THE TRADITIONAL LAW

Present international consensus regards the law of hostile military expeditions as specifically applying to the act of organizing in neutral territory an expedition for the purpose of engaging in military operations against a State with which the former is at peace. It seems similarly agreed that the rules against hostile military expeditions are applicable mutatis mutandis to naval and aerial expeditions organized for similar ends. Though initially developed in connection with neutrality, this branch of the law is only a phase of the general duty of a State to prevent

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1. For a full discussion of this duty of impartiality, see 7 Hackworth, Digest of International Law 372-79 (1943) [hereinafter cited as Hackworth].
2. 3 Hyde, International Law 2254 (2d ed. 1945).
3. The application of the law of hostile military expeditions in respect to civil war is not always well observed, and most discussions take place within the context of neutral-belligerent relations. See Fenwick, International Law 303 (3d ed. 1948).
5. Wiesse, Droit International Appliqué Aux Guerres Civiles 169 (1898).
the commission of injurious acts against friendly foreign countries. It is therefore equally applicable to a civil strife or simply to acts threatening the peace and security of a foreign State. In regard to a civil strife, however, the law has its foundation on the obligation of every State to respect the independence of other nations. Thus, while in the presence of war the obligation of a neutral is one of impartiality, as applied to a civil war the duty is one of noninterference in the conflict irrespective of whether a status of belligerency has been recognized. But whether the State is confronted with a duty of impartiality or with one of noninterference, the obligation to prevent hostile military expeditions from departing from its jurisdiction remains essentially the same. The duty involved has been summarized as one of prevention, and it proceeds largely upon the theory that since international law confers upon every State a power of exclusive control over its territorial domain, concur-

8. Rougier, Les Guerres Civiles et le Droit Des Gens 415, 417 (1903). He seems to believe that this principle applies to a civil war when belligerency has been recognized. Podestá Costa, on the other hand, believes that if the expedition is to help the legitimate government, there is no obligation to prevent it, for this obligation only arises if the expedition is organized with the purpose of aiding the insurgents. See 2 Podestá Costa, Derecho Internacional Público 265 (3d ed. 1955).
10. This duty of noninterference was clearly laid down by Mr. Justice Story in The Santissima Trinidad, 20 U.S. (8 Wheat.) 283, at 337 (1822), where he said: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum, and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality." Despite these commendable words, it has been proven that this duty of noninterference is rather deceptive, for in fact it amounts to intervention on behalf of the one or the other in the rebellion. See Padelford, International Law and Diplomacy in the Spanish Civil Strife 119 (1939).
12. Rougier, however, believes that there is a difference, namely, that in case of war the obligation is of a strictly legal nature, while noninterference in a civil strife is simply a moral obligation which can be disregarded with impunity. See Rougier, op. cit. supra note 8, at 418 n.2. It may be answered, however, that since intervention violates the sovereignty and independence of a State, this is in itself a legal obligation imposed by general international law. See Lauterpacht, op. cit. supra note 9, at 229.
13. Rougier, op. cit. supra note 8, at 423.
14. 1 Fauchille, Traité du Droit International Public 3-10 (8th ed. 1925). Mr. Justice Story referred to this principle as follows: "Every nation possesses an exclusive sovereignty and jurisdiction within its own territory." Story, Conflict of Laws § 18 (8th ed. 1883). Story, supra at § 8.
rent with this is the correlative duty to protect within its territory the rights of other States.\(^\text{15}\) This is, therefore, a prescription resulting from the exercise of territorial sovereignty\(^\text{16}\) and unmistakably falling within the competence of the territorial State. Underlying these principles is the recognition of a community of interests existing in the world society imperatively demanding the suppression within each country's territory of harmful activities directed against foreign States.\(^\text{17}\)

With this background in mind, it may be readily perceived that the violation of the foregoing obligation engages the international responsibility of the State precisely because State inactivity in preventing the organization of a military expedition amounts to complicity in the hostile attack and can logically be regarded as actual governmental participation in the conflict.\(^\text{18}\) It would seem, therefore, that State tolerance raises a presumption of governmental complicity which amounts to an international delinquency.

By thus acknowledging that the principle of international law rendering hostile military expeditions criminal is based upon a failure of a State to fulfill its duty towards another, there is an express recognition of the individualistic nature of international law accordingly concerned with defining the rights and jurisdiction of a State vis-à-vis those of other States and with the possibility of their successful reconciliation.\(^\text{19}\) To pose the matter exclusively in terms of an injury to the State is to simplify the nature of the problem, for the fact will have to be faced that under a modern law of nations deeply concerned with social cooperation, the duties of the State towards the international community are also vitally at stake.\(^\text{20}\) In particular, hostile military expeditions

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15. In this connection, Judge Huber, the sole arbitrator in Island of Palmas (United States v. Netherlands) (1828) said: "Territorial sovereignty . . . involves the exclusive right to display the activities of the State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." For text of this decision, see 2 U.N. Rep. Int'l Arb. Awards 829 (1949); Scott, Hague Court Reports 83 (Perm. Ct. Arb. 1932). Judge Moore, in his dissenting opinion in the Lotus case said: "It is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people." Case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10 at 88 (1927).


18. Curtis, supra note 7, at 34-37.


20. Alvarez, The Reconstruction and Codification of International Law, 1 Int'l L. &
seriously injure the legitimate expectations of the peoples of the world, for it is a value of the international society to localize wars to minimize the danger of their spreading to other nations and to prevent a civil strife from becoming an actual testing ground for the forces and weapons of potential belligerents. The problem is even more acute with the establishment of the United Nations, for in so far as a military action against a State by the United Nations might be involved, the member States are not only obliged to assist the United Nations in carrying out its lawful action but also to refrain from giving any assistance to the State against which enforcement action is undertaken.

If the foregoing observations be correct, the interests of the world society will be adequately served if the States effectively refrain from augmenting the fighting forces of the belligerents in an international war, or the insurgents in a civil strife, or of an aggressor against whom the world organization takes enforcement action. The force of this suggestion reveals itself with all its cogency if it is considered that international conflagrations have their roots in local conflicts between minor States or in civil wars apparently confined to the territory of one State. In situations where the United Nations might be involved, the intervention of the Chinese Communists in the Korean conflict in 1950 shows only too well that but for the United Nations' self-restraint the matter might well have developed into an international war of the greatest dimensions threatening the existence of the world organization itself. This also instructively illustrates the proposition that as long as a strong centralized authority is not yet developed, the obligation to prevent hostile expeditions will have to remain as a fundamental principle of the law.

However, in dealing with this branch of the law, the interaction of law and politics is at once perceivable, and it may not be an exaggeration to say that the law of hostile military expeditions is a principle of international law only by virtue of national policies seeking to support wars


21. Thus, in respect to the Spanish Civil War, the Portuguese Government stated in 1936 that “the civil war in Spain is an international war.” Schwarzenberger, Power Politics—A Study in International Relations 299 (2d ed. 1951).

22. U.N. Charter art. 2, para. 5.

23. 7 Moore, A Digest of International Law § 1298 (1906) [hereinafter cited as Moore].

24. E.g., some writers maintain that World War II actually began in Spain in 1936. See Palmer and Perkins, International Relations: The World Community in Transition 553 (1953). This assertion illustrates vividly the urgent necessity for the effective regulation of hostile military expeditions.
or revolutions where it is most politically advantageous to do so.\textsuperscript{25} Underlying the law, therefore, is the pursuit of self-interest neatly garbed in a deliberate State policy.\textsuperscript{26} Moreover, the impact of the outbreak of war or civil strife is so vast and complicated that the law of hostile military expeditions can be adequately treated only in the context of the interplay of domestic law and politics. A phase of the broader law of neutrality and noninterference which has proven to be peculiarly vulnerable to the vicissitudes of political demands,\textsuperscript{27} the law of hostile military expeditions is bound to meet a similar fate. Because of national policies, this branch of the law exhibits a high degree of instability. These deficiencies are strengthened by the unquestionable fact that international law gives to each State discretion to enforce the duty of prevention as it sees fit.

With this consideration in mind, it is interesting but not at all surprising to note that the legal practice of the States in this area is governed by a variety of rules dependent upon a disturbing number of factors. These will be seen in the substantive treatment of the law of the various States and the frustrated attempts of international law at effective regulation.

**The Law and Practice of the United States**

Municipal statutes enforcing the international duty of preventing military expeditions are historically traceable to the Act of June 5, 1794 making it a misdemeanor for any person, within the jurisdiction of the United States, to "prepare the means for any military expedition or enterprise . . . against the territory or dominions of any foreign prince or state with whom the United States are at peace . . . ."\textsuperscript{28} Although this act was enacted initially as a temporary measure owing to the difficulties experienced by the United States in maintaining a strict neutrality in the wars of the French Revolution, it was perpetuated by the Act of April 24, 1800.\textsuperscript{29} However, with the increased emphasis upon neutral duties arising out of the Napoleonic wars, the prohibition of military expeditions was incorporated in a more effective neutrality law enacted in 1818, which, \textit{inter alia}, made it a crime if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, . . . with whom the United States are [at] peace. . . .\textsuperscript{30}

\textsuperscript{25} Strausz-Hupé and Possony, International Relations—In the Age of Conflict Between Democracy and Dictatorship 354-55 (2d ed. 1954).
\textsuperscript{26} Jessup, Neutrality—Today and Tomorrow 209 (1936).
\textsuperscript{27} Politis, La Neutralité et la Paix (1935).
\textsuperscript{28} Act of June 5, 1794, ch. 50, \S\ 5, 1 Stat. 381, 384.
\textsuperscript{29} Act of April 24, 1800, ch. 35, 2 Stat. 54.
\textsuperscript{30} Act of April 20, 1818, ch. 88, \S\ 6, 3 Stat. 449.
This provision was subsequently incorporated in the Revised Statutes in substantially similar form.\textsuperscript{31} In 1909 the provisions of the statute were enacted in the revision and codification of the criminal law,\textsuperscript{32} and by section 8 of the Act of June 15, 1917,\textsuperscript{33} the pertinent provision of the Criminal Code was amended by adding to the punishable acts not only the preparation but also the furnishing of money for military or naval expeditions, and also by providing that the penalties of fine and imprisonment may be imposed concurrently. The present provision thus states:

Whoever, within the United States, knowingly begins or sets on foot or prepares or provides a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined not more than $3,000 or imprisoned not more than three years, or both.\textsuperscript{34}

The foregoing provision represents the standard treatment of the law of hostile military expeditions in American law. A cursory reading of this provision will show clearly that its injunction is not limited to situations where in the course of a war the United States chooses to remain neutral.\textsuperscript{35} More generally, the brief history of American legislation here outlined shows remarkably well the consolidation of the law of hostile military expeditions in the domestic legislation of a State interested and willing to make it work. It is largely for this reason that there is ample justification in the double assertion that American legislation in this regard has been a model followed by other nations\textsuperscript{36} and that much of international law on the subject is unmistakably traceable to American experience.\textsuperscript{37}

Turning now to the practical application of the statute, it will be shortly seen that to determine the acts which fall within its province is one of the most acute problems of the law. The language of the statute, "military or naval expedition or enterprise,"\textsuperscript{38} suggests a distinction between an expedition and an enterprise and one main source of confusion

\textsuperscript{31} Rev. Stat. § 5286 (1875). See also, 7 Moore 908-09.
\textsuperscript{33} Act of June 15, 1917, ch. 30, § 8, 40 Stat. 223.
\textsuperscript{34} Foreign Relations Act, 18 U.S.C. § 960 (1952). For the application of this provision, see 7 Hackworth § 664. See also the recent indictment, under this provision, of a former President of Cuba and others. N.Y. Times, Feb. 14, 1958, § 1, p. 1, col. 1.
\textsuperscript{35} 3 Hyde, op. cit. supra note 2, at 2254 n.2.
\textsuperscript{36} Stone, Legal Controls of International Conflict 384 n.25 (1954).
\textsuperscript{37} Curtis, supra note 7, at 2. Authors on the subject cite American cases and practice with approval. See Wiesse, op. cit. supra note 5, at 169-74.
\textsuperscript{38} See notes 30 and 33 supra.
is the frequent failure to distinguish between the two. 39 Though their line of demarcation may sometimes be rather shadowy, in reality two different offenses have been established whose exact make-up consists of entirely different elements. It seems clear that to constitute a military expedition two basic factors need be present. First, there must be an association or an organization of a military character within the United States. 40 This condition seems most naturally to assume that unless an actual organization is in operation, a potential injury to a foreign State can hardly be deemed to exist. 41 Behind this condition there is the further supposition that an individual acting alone cannot seriously threaten the peace and security of a foreign State. 42 On this plane, the departure of single individuals or of unorganized groups for the purpose of joining the forces of the belligerents is not a violation of the law and a duty of prevention need not be acknowledged. 43 Thus, during the revolutionary years, when the Mexican Government complained of military expeditions allegedly formed in the United States with the purpose of overthrowing the existing regime, the State Department called attention to the distinction “on the one hand, between the passage of men singly or in small groups across our frontier and into another country, or the sailing of individuals or small groups in the ordinary course of events from one of our ports, and on the other hand, the departure from our territory of organized groups of men avowing the purpose of undertaking belligerent activities in foreign territory,” 44 vigorously asserting that a duty of prevention only existed in the presence of the latter. This distinction is a basic postulate of American law in this area and has been applied with impeccable consistency. As early as 1793, Thomas Jefferson, then Secre-

39. This distinction, however, has been unequivocally endorsed by the courts. See Wiborg v. United States, 163 U.S. 632 (1896), and, subsequently, United States v. Sander, 241 Fed. 417 (S.D.N.Y. 1917).

40. See the note of Secretary of State Marcy to Mr. Escalante, May 8, 1856. 7 Moore 927.


42. However, in United States v. Ram Chandra, 254 Fed. 635, 636 (N.D. Cal. 1917), the court said: “I see no reason, however, why a single individual may not begin or set on foot a military expedition or enterprise, and more especially why a single individual may not well provide or prepare the means for such an expedition or enterprise.”

43. See the note of the Counselor of the State Department to the German Ambassador in the United States, October 6, 1914, 7 Hackworth 412. See also the note of Secretary of State Jefferson to the Minister of France, November 30, 1793, 7 Moore 917.

44. Note of Secretary of State Knox to the Mexican Chargé d’Affaires, June 7, 1911. 7 Hackworth 410. It is also well known that in 1870, during the Franco-German War, 1200 Frenchmen were allowed to depart from New York in two French vessels for the purpose of joining the French Army. The United States Government did not interfere with their departure on the ground that the men were not organized in a body. See 2 Oppenheim, op. cit. supra note 11, at 565 n.4.
tary of State, addressed a note to the Minister of France forcibly stating that "the Government of the United States will not at the request of a foreign government intervene to prevent the transit to the country of the latter of persons objectionable to it unless they form part of a hostile military expedition." 45 This curious paradox of not compromising a State's responsibility even if its territory is being used as a basis of operations by unorganized individuals can only be understood in the light of *laissez faire* conceptions, more particularly the deep conviction that wars were matters between States and that therefore the freedom of the individual should not suffer in his relations with belligerents. 46 It may be added in passing that such assumptions of the American law were faithfully reflected in Article VI of the Hague Convention Number V of 1907 which states: "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separating to offer their services to one of the belligerents." 47 To appreciate the full impact of this provision, it should be compared with Article IV of the same Convention which says that "corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents." 48 When these two provisions are viewed together, the neutral State must prevent its frontier from being crossed by corps or bands which have already been organized on its territory, but may remain indifferent in respect to individuals acting in an isolated manner. 49 Though in thus providing, international law has shown its greatest weakness as will be subsequently seen, 50 for present purposes it is only necessary to emphasize that the American distinction in this regard conforms exactly to the requirements of the law of nations.

The second factor necessary for the existence of a military expedition is the presence of a common design of hostile operation against a friendly State. 51 This condition would seem to follow logically and naturally, for if a hostile criminal intent is lacking, no injury to the foreign State in question can be said to have been committed. Broadly then, it may be said that under the relevant statute and case law, if these two factors are not present, the United States is unwilling to recognize the existence of

45. Note of Secretary of State Jefferson to the French Ambassador, November 30, 1793, 7 Moore 917.
46. Stone, op. cit. supra note 36, at 384.
47. Hague Convention No. V, art. VI, 2 Malloy 2298.
50. This matter is discussed in pp. 325-30 infra.
a military expedition and, consequently, a duty of prevention does not arise.\textsuperscript{52}

In marked contrast with a military expedition, a military enterprise is more comprehensive in scope. The United States Supreme Court has defined it as "a martial undertaking, involving the idea of a bold, arduous and hazardous attempt."\textsuperscript{53} Clearly, then, while a military expedition might conceivably be herein embraced, the concept of a military enterprise gives a wider sweep to the statute and may consequently include various undertakings not only by a number of persons but by a single individual as well.\textsuperscript{54} Thus, generally, but not exhaustively, the miscellaneous acts of sending spies from the United States,\textsuperscript{55} furnishing munitions to rebels,\textsuperscript{56} participating in a scheme to start a revolution in a possession against the mother country,\textsuperscript{57} and conspiring to blow up tunnels between the United States and Canada\textsuperscript{58} have all been characterized by the courts as falling within the purview of a military enterprise and, therefore, punishable under the statute.\textsuperscript{59} It is highly significant that these activities would not have qualified as military expeditions simply because the existence of an organization of a strictly military character was absent.\textsuperscript{60} It should be manifestly clear, however, that even though the United States would seem to go beyond the requirements of Articles IV and VI of the Hague Convention Number V of 1907 previously cited,\textsuperscript{61} in that it prohibits and penalizes a number of acts not embraced in those provisions, nevertheless these acts are prohibited by general international law which imposes the duty to prevent any kind of injurious acts directed against foreign States.\textsuperscript{62}

In recognition of the preceding considerations, the United States has enforced its neutrality laws, in which the prohibition of military expeditions is included, in cases of insurgency in which recognition of belligerency has not been granted. Thus, on June 12, 1895, and July 27, 1896, the President of the United States issued two proclamations noting that Cuba was the seat of serious civil disturbances and admonishing

\begin{itemize}
\item \textsuperscript{52} 3 Hyde, op. cit. supra note 2, at 2255.
\item \textsuperscript{53} Wiborg v. United States, 163 U.S. 632, 650 (1896).
\item \textsuperscript{54} United States v. Sander, 241 Fed. 417, 419-20 (S.D.N.Y. 1917).
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Gandara v. United States, 33 F.2d 394 (9th Cir. 1929), cert. denied, 280 U.S. 612 (1930); United States v. Chakraberty, 244 Fed. 287 (S.D.N.Y. 1917).
\item \textsuperscript{57} Jacobsen v. United States, 272 Fed. 399 (7th Cir. 1920), cert. denied, 256 U.S. 703 (1921).
\item \textsuperscript{58} United States v. Bopp, 230 Fed. 723 (N.D. Cal. 1916).
\item \textsuperscript{59} For other cases, see 7 Hackworth 402-04.
\item \textsuperscript{60} United States v. Sander, 241 Fed. 417, 419-20 (S.D.N.Y. 1917).
\item \textsuperscript{61} See notes 47, 48 supra.
\item \textsuperscript{62} García-Mora, supra note 17, at 567.
\end{itemize}
all persons within the jurisdiction of the United States to refrain, *inter alia*, from forming or taking part in military expeditions in violation of the neutrality laws.\(^{63}\) American courts considered these proclamations as sufficiently authoritative for the application of the United States neutrality laws. Thus, in *The Three Friends*\(^ {64}\) the Supreme Court said:

We are thus judicially informed of the existence of an actual conflict of arms in resistance of the authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place; and it cannot be doubted that, this being so, the act in question [the neutrality statute] is applicable.\(^ {65}\)

A similar proclamation was issued on March 2, 1912 in respect to the Mexican Civil War.\(^ {66}\) These instances strikingly illustrate the proposition that the prohibition of hostile military expeditions is of a permanent character not exclusively dependent upon the existence of an international war.

**THE LAW AND PRACTICE OF OTHER COUNTRIES**

Following American example closely, Great Britain enacted the Foreign Enlistment Act in 1819\(^ {67}\) which remained in force until 1870. As the act failed to prevent adequately the organization of hostile expeditions as evidenced by the *Alabama* controversy,\(^ {68}\) it was subsequently replaced by a new Foreign Enlistment Act enacted on August 9, 1870.\(^ {69}\) The pertinent provision of this act is as follows:

If any person within the limits of Her Majesty's dominions, and without the license of Her Majesty,—

Prepares or fits out any naval or military expedition to proceed against the dominions of any friendly state, the following consequences shall ensue:

(1) Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; and imprisonment, if awarded, may be either with or without hard labour.

(2) All ships, and their equipments, and all arms and munitions of war, used in or forming part of such expedition, shall be forfeited to Her Majesty.\(^ {70}\)

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\(^{63}\) 2 Deák and Jessup, A Collection of Neutrality Laws, Regulations and Treaties of Various Countries 1195-96 (1939) [hereinafter cited as Deák and Jessup].

\(^{64}\) 166 U.S. 1 (1896).

\(^{65}\) Id. at 65-66.

\(^{66}\) 2 Deák and Jessup 1200.

\(^{67}\) Foreign Enlistment Act, 1819, 59 Geo. 3, c. 69.

\(^{68}\) See note 90 infra.

\(^{69}\) Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90.

\(^{70}\) Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90, § 11. This and other provisions of the act have been substantially embodied in Article 955 of the King's Regulations and Admiralty Instructions, 1926. For text, see 1 Deák and Jessup 150-53.
The most authoritative early statement of the conditions under which the statute would apply is that contained in the judgment of the House of Lords in *Regina v. Sandoval*\(^7\) relating to purchases of goods and munitions in Great Britain for the purpose of aiding an insurrection in Venezuela. As to the elements of the offense provided for by the act, the court said that the act of "fitting out" an expedition includes its preparation as well. The court thus concluded that any act which "contributes in any material degree towards setting on foot an expedition fitted for warlike purposes ... is the preparation of that expedition."\(^7\) Similarly, in *The Queen v. Jameson*,\(^7\) involving a British subject accused of assisting to prepare a military expedition to proceed against the South African Republic without the license of Her Majesty, the court advanced a step forward in holding that if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offense even though he renders the assistance from a place outside Her Majesty's dominions.\(^7\)

In striking similarity to the American practice, the British Government has also applied the Foreign Enlistment Act of 1870 to civil strifes without the existence of a declaration of belligerency. Thus, by a declaration of January 1937, the Foreign Enlistment Act was declared to be applicable to the Spanish Civil War.\(^7\) Though this declaration specifically referred to the provisions of the act prohibiting persons to enlist in the service of either side to the conflict,\(^7\) it is generally accepted that section 11 of the act which deals with hostile military expeditions is probably the only section which is so worded as to make it unmistakably clear that it applies to situations where a formal war has not been recognized.\(^7\) This interpretation clearly indicates that the operation of the Foreign Enlistment Act, like its American counterpart, is not at all dependent upon the existence of war in the technical legal sense.\(^7\)

The adoption by other countries of substantially similar provisions prohibiting the formation of hostile military expeditions shows remarkably well the full measure of agreement existing on the subject. Thus, the French Penal Code, though not specifically referring to military expeditions, more generally prohibits any hostile action which exposes

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71. 56 L.T.R. (n.s.) 526 (1887), per J. Wills.
72. Ibid.
73. [1896] 2 Q.B. 425, per Lord Russell, C. J.
74. Id. at 430.
76. Foreign Enlistment Act, 1870, 33 & 34 Vict., c. 90, §§ 4, 5.
78. Lauterpacht, Recognition in International Law 235 n.4, 273 n.7 (1947).
the State to a declaration of war.\textsuperscript{79} Pursuant to this provision, measures of a temporary character have been enacted in the presence of particular wars.\textsuperscript{80} In applying this legislation, the Civil Tribunal of the Seine held in \textit{In re Florsheim}\textsuperscript{81} that a contract made with a view to forming a hostile military expedition against a foreign State is null and void and, thus, unenforceable in court.\textsuperscript{82} This case compares with the early American case, \textit{Kennett v. Chambers},\textsuperscript{83} involving a contract between citizens of the United States and an inhabitant of Texas whereby the latter agreed to convey land in Texas to the former in consideration of advances of money to enable him to raise and procure men to carry on the war with Mexico. The Supreme Court held the contract to be contrary to the United States policy toward Mexico and, therefore, unenforceable in the federal courts.\textsuperscript{84}

One could, of course, cite other countries' legislation and case law prohibiting the formation of hostile military expeditions within their jurisdiction.\textsuperscript{85} It suffices to say that so general is this domestic position that one can experience no difficulty in inferring a general principle of law recognized by civilized nations which the Statute of the International Court of Justice regards as a source of international law.\textsuperscript{86} This assertion is bolstered by the fact that these domestic principles merely enforce a duty which international law imposes on the States to respect within their territory the rights of other States.\textsuperscript{87}

\textbf{Measures of Prevention}

Much of the uncertainty touching the application of the preceding rules arises not only from the doubts and indeterminacies affecting their interpretation, but also from the fact that international law nowhere prescribes the test by which a duty of prevention must be enforced. Accordingly, many writers as well as much of State practice proceed on the assumption that each State can determine by its own national stand-

\textsuperscript{79} Code Penal, art. 84 (Fr. 1810). For text, see 1 Deák and Jessup 583.
\textsuperscript{80} See Article 5 of the Declaration of Neutrality in the American Civil War, June 10, 1861, and the Law of January 21, 1937, authorizing the Government to take the necessary measures to prevent the departure of volunteers for Spain. For texts of these documents, see 1 Deák and Jessup 590, 603.
\textsuperscript{81} [1932] Ann. Dig. (Lauterpacht ed. 1938) 31 (No. 9).
\textsuperscript{82} Id. at 32.
\textsuperscript{83} 55 U.S. (14 How.) 38 (1852).
\textsuperscript{84} Id. at 50. The Court at 49 also stated that the contract was not only void, but the parties who advanced the money were liable to punishment in a criminal prosecution.
\textsuperscript{85} See, e.g., Article 10 of the Canadian Act Respecting Foreign Enlistment enacted on April 10, 1937, 1 Deák and Jessup 239.
\textsuperscript{87} See note 15 supra.
wards the nature and extent of the measures of exertion. Though various attempts have been made to determine exactly the obligations of a neutral in this regard, perhaps the most comprehensive statement of the obligation is contained in the celebrated "Three Rules" of the Anglo-American Treaty of Washington of May 8, 1871. These rules were accepted by the parties as a legal guide in the arbitration of the **Alabama Claims**, involving the international liability of Great Britain for her alleged failure to prevent the building and equipping in its ports of naval expeditions in the service of the Confederate States in the American Civil War. The first and third rules bound a neutral Government: "First to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use and "thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of [these] obligations and duties." Though the United States and Great Britain agreed upon the "Three Rules," they failed to agree upon their interpretation. The crux of the difficulty lay in the true construction of the phrase "due diligence." While Great Britain contended that due diligence "signifies that measure of care which the government is under an obligation to use for a given purpose," the United States, on the other hand, suggested that it must be a diligence "proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it." Without in any way adopting either of these interpretations, the tribunal decided that it must be a diligence exercised by neutrals "in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part . . . ." The rule has therefore developed that the responsibility of the State in cases of military or naval expeditions departing from

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88. 2 Oppenheim, op. cit. supra note 75, at 530. Cf. 3 Hyde, International Law 2327 (2d ed. 1945).
89. Treaty With Great Britain, May 8, 1871, art. VI, 17 Stat. 863, T.S. No. 133. Text of the treaty is also in 1 Malloy 700.
90. United States v. Great Britain (1871). For the record of this arbitration, see 7 Moore 1059-67 (1906).
94. Id. at 634.
95. 7 Moore 1067.
its territory is to be determined by the degree of "due diligence" that it has shown in discharging its international obligations.\textsuperscript{96} However, dissatisfaction with the standard established by the term "due diligence" has led international conventions to adopt a different terminology believed to yield more satisfactory results. Thus, Article VIII of the Hague Convention Number XIII of 1907,\textsuperscript{97} while reproducing the first of the "Three Rules" in almost identical terms, replaces the phrase "to use due diligence" with the admittedly less ambiguous "to employ the means at its disposal." Similarly, the Pan American Convention on the Duties and Rights of States in the Event of Civil Strife signed at Habana on February 20, 1928,\textsuperscript{98} binds the parties "to use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife."\textsuperscript{99} Finally, the rules adopted by the Institute of International Law on August 13, 1875,\textsuperscript{100} impose upon the neutral Government the obligation "to exercise vigilance to prevent its territory from becoming a center of organization or point of departure for hostile expeditions against one or both of the belligerents."\textsuperscript{101}

The foregoing exposition would seem to make it fairly clear that the criterion of "due diligence" has been abandoned in favor of supposedly more ascertainable standards. But, apart from these modifications, there can be no doubt that the obligations contained in the "Three Rules" of the Treaty of Washington were declaratory of existing international law\textsuperscript{102} and that whether one refers to "due diligence" or to "the means at its disposal" as a standard of obligation, these terms are limitative in nature and do not impose upon the State an absolute obligation of prevention.\textsuperscript{103} It may be argued accordingly that the responsibility of

\textsuperscript{96} Fenwick, International Law 301 (3d ed. 1948).
\textsuperscript{100} For text, see Resolutions of the Institute of International Law 12 (Scott ed. 1916).
\textsuperscript{101} Rules of Institute of Int'l Law, Aug. 13, 1875, art. 1.
\textsuperscript{102} Stone, Legal Controls of International Conflict 391 (1954); Accioly, Manual de Direito Internacional Público 416 (1948); Rousseau, Droit International Public 692 (1953). For the opinion of international lawyers of the time, see 7 Moore 1067-71. Contra, 2 Oppenheim, op. cit. supra note 88, at 577.
\textsuperscript{103} Thomas and Thomas, Non-Intervention—The Law and Its Import in the Americas 217 (1956).
the State will not be involved unless it is unequivocally established that
the State has neither exercised due diligence, nor employed all the means
at its disposal in preventing the organization of military expeditions.
This interpretation is most certainly desirable, for it reflects the unassail-
able assumption that a duty of prevention cannot be exercised at all
times. If one starts with the proposition that a State in discharging its
obligations must do so faithfully and in good faith, then it cannot
reasonably be doubted that whether the duty of prevention will be
effectively discharged depends wholly upon the physical possibility of
doing so. Or, to put the matter in different terms, whether a State is to
prevent the formation of a hostile expedition is inevitably limited by the
capacity of the State, which must be interpreted as being as far as pos-
sibilities will reasonably permit.

It is perhaps for this reason that the Institute of International Law
said that "the mere fact that a hostile act has been committed upon
neutral territory is not sufficient to make the neutral State responsible.
Before it can be admitted that it has violated its duty it must be
shown that there was a hostile intention (dolus), or manifest negligence
(culpa)." Similar sentiments had already been expressed by Secretary
of State Cass in a communication to the Central American governments
as follows: "A Government is responsible only for the faithful discharge
of its international duties, but not for the consequences of illegal enter-
prises of which it had no knowledge, or which the want of proof or
other circumstances render it unable to prevent." In a somewhat similar
vein, the Government of Chile refused to accept responsibility for the

104. Wiesse, Droit International Appliqué Aux Guerres Civiles 169 (1898). See also
Lawrence, op. cit. supra note 93, at 634.
106. Cheng, General Principles of Law as Applied by International Courts and Tribunals
221 (1953).
107. See the Resolution dealing with the International Duties of Neutral States; Rules
of Washington, Article 5. For text, see Resolutions of the Institute of International Law
12, 13 (Scott ed. 1916). It would seem, therefore, that the principle of no liability without
fault is accepted in international law. The International Court of Justice had occasion
to endorse this principle in the recent Corfu Channel case between Great Britain and
Albania involving the international responsibility of Albania for mines found within its
territorial waters. The court said in this regard: "It is clear that knowledge of the mine-
laying cannot be imputed to the Albanian Government by reason merely of the fact that a
minefield discovered in Albanian territorial waters caused the explosions of which the
British warships were the victims. . . . [I]t cannot be concluded from the mere fact of
the control exercised by a State over its territory and waters that that State necessarily
knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it
necessarily knew, or should have known, the authors. This fact, by itself and apart from
other circumstances, neither involves prima facie responsibility nor shifts the burden of
departure from its territory of an expedition directed against Bolivia in 1872 on the ground that it was not sufficiently informed of the existence of the expedition. This domestic position was unequivocally endorsed by an international arbitral tribunal in the *St. Albans Claims*, where the United States sought to hold the British Government responsible for the attack in 1864 upon the town of St. Albans, Vermont, by a small party of persons who, acting in the interests of the Confederate States, prepared their expedition in Canadian territory. The arbitral tribunal unanimously disallowed the claims on the ground that the expedition was conducted with such secrecy that no care or diligence which one nation might reasonably require of another would have been sufficient to discover it. It would seem, therefore, that the international responsibility of a neutral government is engaged only if it is at fault, and fault is to be determined according to the circumstances of each individual case.

There is, however, one area where the duty of exertion on the part of a neutral seems to be more exacting and stringent. This refers to aircraft which, because of their potential for offensive action, undoubtedly constitute a greater danger to the opposing belligerent than military or naval expeditions departing from neutral territory. It is precisely for this reason that the Hague Air Warfare Rules of 1923 have laid down more strict rules on the part of neutrals. Particularly, Article 46 binds the neutral government to use the means at its disposal:

1. To prevent the departure from its jurisdiction of an aircraft in a condition to make a hostile attack... if there is reason to believe that such aircraft is destined for use against a belligerent Power.
2. To prevent the departure of an aircraft the crew of which includes any member of the combatant forces of a belligerent Power.

While there can be little doubt that the first duty incorporates the spirit of the first of the "Three Rules" of the Treaty of Washington, the second provision imposes upon the neutral an additional obligation which, though considered by some as wholly unnecessary and superfluous, reinforces the obligation to prevent the possibility of its territory being converted into a military base for hostile expeditions against a belligerent. Following closely this international standard in regard to aircraft,
the Danish Rules of Neutrality of May 27, 1938,\textsuperscript{115} provide that "any aircraft in a condition to commit an attack against a belligerent, or which carries apparatus or material the mounting or utilization of which would permit it to commit an attack, is forbidden to leave Danish territory if there is reason to presume that it is destined to be employed against a belligerent Power."\textsuperscript{116} It is submitted that this provision illustrates well the manner in which neutral obligations ought to be observed.

**THE DEPARTURE OF SO-CALLED VOLUNTEERS**

While the departure of volunteers from neutral territory has not traditionally engaged the responsibility of a neutral,\textsuperscript{117} their use in substantial numbers as an instrument of governmental policy produces a situation which imperatively calls for the revision of the old law.\textsuperscript{118} The customary rule in this connection is found in Article VI of the Hague Convention Number V of 1907, which provides that "the responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separating to offer their services to one of the belligerents."\textsuperscript{119} The only prohibition imposed is the formation of combatant corps to assist any of the belligerents as found in Article IV of the Convention.\textsuperscript{120}

As previously submitted, the cardinal distinction embodied in these two articles reflected the nineteenth century *laissez faire* philosophy whereby a line of demarcation could be drawn between the sphere of the government and that of the individual, thus implicitly assuming that the purely private actions of the individual could not be imputed to the State.\textsuperscript{121} However, the totalitarian character of wars and the almost complete State control of the activities of the individual in times of war have made the individual-State dichotomy for the law of neutrality factually nonexistent. Therefore, it is the measure of the inadequacy of the nineteenth century *laissez faire* philosophy that the assumptions on which Article VI of the Hague Convention was founded no longer have any conceivable basis. Consequently, in respect to volunteers, there is no adequate legal obligation under conventional international law.

\begin{itemize}
\item \textsuperscript{115} For the text of this provision, see 1 Deák and Jessup 479. Actually, almost identical rules were adopted by Finland, Iceland, Norway, and Sweden pursuant to a declaration signed on May 27, 1938, adopting uniform rules of neutrality. For text of this declaration, see 2 Deák and Jessup 1518.
\item \textsuperscript{116} Rules of Neutrality, May 27, 1938, art. 15, para. 2 (Den.).
\item \textsuperscript{117} Padelford, International Law and Diplomacy in the Spanish Civil Strife 74 (1939).
\item \textsuperscript{118} Brownlie, Volunteers and The Law of War and Neutrality, 5 Int'l & Comp. L.Q. 570 (1956).
\item \textsuperscript{119} Hague Convention No. V, art. VI, 2 Malloy 2298.
\item \textsuperscript{120} See note 48 supra. See also Raja Gabaglia, Guerra et Direito Internacional 321 (1949).
\item \textsuperscript{121} Stone, op. cit. supra note 102, at 384.
\end{itemize}
Rejecting the fictions and assumptions upon which the older rules rested, there are some conventions of a rather limited character which modify somewhat the law in respect to both international war and civil strife. Thus, as regards civil strife, the General Treaty of Peace and Amity of the Central American States of 1923\textsuperscript{122} provides that “none of the Contracting Parties will permit the persons under its jurisdiction to organize armed expeditions or to take part in any hostilities which may arise in a neighboring country.”\textsuperscript{123} Similarly, the Pan American Convention on the Rights and Duties of States in the Event of Civil Strife adopted at Habana in 1928\textsuperscript{124} binds the contracting States “to use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.”\textsuperscript{125} In respect to foreign war, the Habana Convention on Maritime Neutrality of 1928\textsuperscript{126} while providing that “neutral states shall not oppose the voluntary departure of nationals of belligerent states even though they leave simultaneously in great numbers,”\textsuperscript{127} further states, “but they may oppose the voluntary departure of their own nationals going to enlist in the armed forces.”\textsuperscript{128} Finally, in the General Declaration of Neutrality of the American Republics approved at the Meeting of Foreign Ministers held at Panama on October 3, 1939,\textsuperscript{129} it was provided that the American Republics shall prevent on their respective territories the enlistment of persons to serve in the military, naval, or air forces of the belligerents; the retaining or inducing of persons to go beyond their respective shores for the purpose of taking part in belligerent operations; the setting on foot of any military, naval or aerial expedition in the interests of the belligerents. . . .\textsuperscript{130}

\textsuperscript{122} For text, see Conference on Central American Affairs, Washington, December 4, 1922-February 7, 1923 at 287 (1923).
\textsuperscript{123} General Treaty of Peace and Amity of Central American States, Feb. 7, 1923, art. 14. (Emphasis added.)
\textsuperscript{124} See note 98 supra. See also Podestá Costa, La Revisión de la Convención Inter-americana sobre Derechos y Deberes de los Estados en caso de Luchas Civiles, Inter-Amer. Jur. Y.B. 1949 at 9 (1950).
\textsuperscript{125} Convention with other American Republics, Feb. 20, 1928, art. 1, para. 1, 46 Stat. 2749-50.
\textsuperscript{128} Ibid.
\textsuperscript{129} For text, see 34 Am. J. Int'l L. Supp. 9 (1940).
\textsuperscript{130} General Declaration of Neutrality of the American Republics, Oct. 3, 1939, para. 3(c).
In addition to the above provisions, the legislation of a number of States similarly forbids the departure of volunteers from their jurisdiction. Thus, the United States Criminal Code provides as follows:

Whoever, within the United States, enlists or enters himself, or hires or retains another to enlist or enter himself, or to go beyond the jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people as a soldier or as a marine or seaman on board any vessel of war, letter of marque, or privateer, shall be fined not more than $1,000 or imprisoned not more than three years, or both.\textsuperscript{131}

In like vein, the British Foreign Enlistment Act of 1870\textsuperscript{132} prohibits the enlistment of British subjects in the foreign armed forces of belligerents without the permission of the Crown.\textsuperscript{133} Also the French Law of January 21, 1937,\textsuperscript{134} authorized the government to take the necessary measures to prevent the departure of volunteers to participate in the Spanish Civil War. More particularly, the law prohibited "the enlistment or other acts tending to enlist persons in the forces which presently fight in Spain or in Spanish possessions, including the sphere of influence of Spain in Morocco."\textsuperscript{135} Similarly, the decree of El Salvador regarding the neutrality of the country in foreign or civil war enacted on October 9, 1912,\textsuperscript{136} prohibits the recruiting of volunteers and the organization of military expeditions.\textsuperscript{137} Finally, the East German Law on the Defense of Peace enacted on December 16, 1950,\textsuperscript{138} provides that: "whoever . . . recruits, induces, or incites Germans to take part in warlike actions which serve to subjugate another people, shall be punished by imprisonment or, in grave cases, by imprisonment at hard labor."\textsuperscript{139}

It follows from the preceding exposition that even if no universally binding convention imposes upon the States the duty to prevent the departure of volunteers from their territory, the domestic legislation of the State may explicitly prohibit it. These provisions, concurrent with the conventions previously quoted, show that there is a firm conviction among

\textsuperscript{131} Foreign Relations Act, 18 U.S.C. § 959(a) (1952). It would seem that the "Flying Tigers," organized and recruited by Colonel Chennault in the United States for the war of China against Japan, was a violation of this provision as well as of the neutrality of the United States.

\textsuperscript{132} 33 & 34 Vict., c. 90.

\textsuperscript{133} 33 & 34 Vict., c. 90, §§ 4-7. In 1940, following a League of Nations Resolution, permission was granted to British subjects to enlist in the Finnish Forces fighting the Soviet Union. See Brownlie, supra note 117, at 579.

\textsuperscript{134} For text, see 1 Deák and Jessup 603.

\textsuperscript{135} Law of January 21, 1937, art. 1, § 1, para. (a) (Fr.).

\textsuperscript{136} For text, see 1 Deák and Jessup 566.

\textsuperscript{137} Act of Oct. 9, 1912, art. 3 (El Sal.).


\textsuperscript{139} Law on Defense of Peace, Dec. 16, 1950, § 2, para. 1 (Ger. Dem. Rep.).
the States that the departure of volunteers should be made an interna-
tional delinquency and that Article VI of the Hague Convention Num-
ber V falls short in this regard. It is indeed a matter of the gravest
doubts whether the large influx of volunteers such as that of the German,
Italian, and Soviet volunteers in the Spanish Civil War or of the Chinese
volunteers into the Korean conflict in 1950 could really proceed without
such organization as to avoid the application of Article IV of the Hague
Convention.\textsuperscript{140} One needs no greater effort to realize that any consider-
able amount of volunteers would almost certainly have to proceed through
an organization of some sort.\textsuperscript{141} To insist on calling them "volunteers" to
exempt them from the application of Article IV of the Hague Convention
amounts to concealing the reality of the situation, thereby permitting a
State to participate covertly in a conflict without in any way changing
its privileged status as a neutral. Continuous adherence to this outmoded
concept seriously impairs the possibility of effective regulation of the
subject. It is therefore submitted that no real progress is possible in this
area until such verbal illusions are abandoned. Once this is done, the
hard fact will have to be faced that the departure of volunteers violates
the independence of the State against whom they are directed,\textsuperscript{142} thus
constituting an act of aggression.\textsuperscript{143} Certainly, the Spanish Government,
in a note to the United States Secretary of State, characterized the influx
of German and Italian volunteers as "acts of invasion and aggression"
and desperately appealed to the principles embodied in Pan American
conventions and the Kellogg-Briand Pact of 1928.\textsuperscript{144} In respect to the
intervention of the Chinese Communist volunteers in the Korean conflict,
the General Assembly Resolution of February 1, 1951, found that "by
giving . . . assistance to those who were already committing aggression in
Korea and by engaging in hostilities against the United Nations forces

\textsuperscript{140} Professor Stone persuasively argues this point. See Stone, op. cit. supra note 102,
at 389. Rougier said some time ago that though the formation of corps of volunteers is
surely due to private initiative and not State initiative, its importance is such that it is
impossible to keep it from the knowledge of the government and when this is the case,
it must be prevented. See Rougier, op. cit. supra note 105, at 418.

\textsuperscript{141} Stone, op. cit. supra note 102, at 389.

\textsuperscript{142} Thus, Article 4 of the Draft Declaration on Rights and Duties of States, prepared
by the International Law Commission of the United Nations, provides: "Every State has the
duty to refrain from fomenting civil strife in the territory of another State, and to prevent

\textsuperscript{143} This would be an aggression which is not an armed attack. See The Question of
the Definition of Aggression, Memorandum submitted by Ricardo J. Alfaro to the Inter-

\textsuperscript{144} Note From the Spanish Ambassador to the Secretary of State (1938), 1 Foreign
there," the Central People's Government of the People's Republic of China had itself engaged in aggression.145

The Chinese intervention in Korea offers a contemporary illustration of the totally inadequate range of Article VI of the Hague Convention. Much debate surrounded the question regarding the legal position of the Chinese Communist forces, but the body of opinion in the Political and Security Committee of the General Assembly146 clearly indicated that in any event Article VI was obsolete and that the Chinese intervention fell more properly within the provision of the United Nations Charter which prohibits its members from giving "assistance to any state against which the United Nations is taking preventive or enforcement action."147 While this argument is admittedly open to question since the Chinese Communist regime is not represented in the United Nations, a more defensible position would proceed on the theory that Article VI of the Hague Convention is exclusively limited to volunteers crossing the frontiers individually and singly,148 and not to those crossing the frontier en masse, for the presumption immediately arises that they form part of a fighting organization or unit.149 This presumption is aided by the fact that it is scarcely possible for a substantial number of persons to cross the frontier without some sort of organization.150 Moreover, the present day State control over the movement of persons is so pervading and complete that the departure of a vast number of individuals to participate in a foreign or civil war must necessarily count upon the approval of the State, thus engaging its international responsibility.151 The Chinese intervention forces afford an instructive example of volunteers that ceased to be so within the meaning of the Hague Convention because their disproportionate number made it reasonable to assume the existence of a military organization. Though the arguments of the Soviet and iron curtain country representatives put forth before the Political and Security Committee of the General Assembly were well worn and emotionally charged,152 they

145. U.N. Gen. Ass. Off. Rec. 5th Sess., Supp. No. 20, at 1 (A/1775) (1951). It should be noted, however, that this conclusion could be reached because the original movement of North Korea into the Republic of Korea had already been characterized as an aggression.
147. U.N. Charter art. 2, para. 5. This argument was maintained by the Turkish Delegate and supported by other representatives. See Official Records at 405.
149. See the remarks of the Cuban representative, Official Records at 409-11.
150. The amount was estimated at 268,000 Chinese troops, Official Records at 410.
151. For development of this thesis, see Stone, op. cit. supra note 102, at 411.
152. For some of these views, see Official Records at 415-19. See also Kuski, Soviet Comments on International Law and International Relations, 45 Am. J. Int'l L. 556, 558 (1951).
are nevertheless useful in showing the inadequacy of applying the 1907 Hague Convention, founded on nineteenth century conceptions, to wholly different conditions. It is indeed of some significance to observe that the Soviet Union representative might have been keenly aware of this situation, for in the Convention Defining Aggression concluded between the Soviet Union and her neighbors in London on July 3, 1933, "aid to armed bands formed on the territory of a state and invading the territory of another State" was regarded as an act of aggression. It is only by an extremely narrow interpretation that one can consider the Chinese intervention forces as falling outside the scope of that definition.

It may be finally suggested that whether one considers the Chinese intervention forces as volunteers or not, the inevitable fact remains that in either case such forces were fighting against the forces of the world society engaged in a lawful undertaking. It would seem that when this is the case, the exemption provided for by Article VI of the Hague Convention loses all its useful meaning, for, technically speaking, it could not be applied to States hindering organized community action. That this interpretation was adopted is clearly borne out by the Resolution of the General Assembly of February 1, 1951, branding the Chinese Communist Government an aggressor for its unlawful intervention. This resolution, moreover, stands as a living reminder that, though the matter has been for the present settled, the future possibility of legally imputing international responsibility to a State for allowing large numbers of volunteers to depart from its territory is still to be determined by a revision of the existing conventional law. Because of its urgency and vitality, the formulation of this principle in a revised convention can no longer be postponed.

CONCLUSION

The preceding pages have attempted to point up the inefficiencies of the present law of hostile military expeditions. It has been made abundantly clear that the domestic legislation of some States is far ahead of the requirements of general international law. Thus, while most States forbid the departure of volunteers, international law still refuses to consider their participation in a war as an international delinquency. Therefore, the revision of the law which is advocated clearly applies to


154. For text, see note 145 supra.
the body of conventional international law which presently regulates the subject. But the problem cannot be solved in terms of simple formulas which endeavor to restore to the law of neutrality the nineteenth century dichotomy of the individual and the State. Rather, the solution of the problem must be focused against the background of twentieth century conditions. As such, it demands a frank recognition that in respect to the law of neutrality the State must be made to answer for the private actions of individuals. In so doing, the glaring paradox of allowing a State to remain neutral while at the same time permitting its citizens to participate individually in the conflict will to a great extent be eliminated. It is hoped that this step will in turn remove the loophole which so far has rendered the law rather ineffective. Perhaps it may not be an exaggeration to say that the law of hostile military expeditions is destined to occupy a pivotal position in the present reorganization of the world society.