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Steps To Define Offenses Against the Law of Nations

Robert A. Bloom

PROBLEMS OF definition, always important and at times decisive for clarity, are triply compounded when dealing with the concept "offenses against the law of nations." Not only is a century to be covered, but the last quarter of it is in futuro, and at no time during its first three quarters did any significant consensus develop with regard to the meaning of offenses in international law. The period 1892-1992 represents a deepening in the meaning of "offenses," a broadening and indeed a vast change. This change has been and probably will be so great that it could be said that the difference in meaning over the century has been and will continue to be one of kind rather than of degree.

Perhaps the most significant of the traditional public and nonpublic sources of international law in the development of the "offenses against the law of nations" concept has been the influence of history and national attitudes. It is quite obvious that certain ideas and institutions, however needed and even conceived of at any given time, will not become viable if the time is not ripe. Obviously, it took Nazi bestiality to make the Genocide Convention possible. In similar fashion, such historical forces sensitize international awareness of particular problems, emphasize the need for the creation of new, or the modification of old, offenses, and even help isolate constituent elements of offenses. This view of the role of history will be largely an implicit assumption of this contribution.

I. Emphasis on Control of War and Protection for Individuals Through State Responsibility (1892-1917)

Representing the last quarter-century of relative peace following
the Napoleonic era, this period ended in the catastrophe of World War I. Judging by the actions of contemporary statesmen, fearful expectation of just such a disaster must have been a dominant attitude. Because of this terrible foreboding, there existed a preoccupation with means to make more civilized the commencement and conduct of warfare. The goal was the drafting and ratification of relevant international conventions of which the Hague Conventions and Declarations of 1899\(^1\) and 1907\(^2\) were the most notable.

It takes little more than a glance at the titles of these declarations and conventions to enable one to evaluate the thinking and practical accomplishments of the nations involved. The drafters assumed that there would be future wars and that they would become progressively more terrible if not controlled.\(^3\) Therefore, rules were adopted regarding such aspects as the limitation or prohibition of the use of certain weapons, the conduct of land and naval warfare, the determination of the qualifications of belligerents, and the treatment of the sick and wounded.

This is not the place to discuss the degree of compliance with the terms of these instruments by those ratifying them nor the extent to which they created new international law or were merely declaratory of existing law and custom.\(^4\) From the viewpoint of

\(^1\) Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779 (1901), T.S. No. 392; Convention Governing the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 (1902), T.S. No. 403; Convention for the Adoption for Maritime Warfare of the Principles of the Geneva Conference, July 29, 1899, 32 Stat. 1827 (1901), T.S. No. 396; Declaration Concerning the Prohibition of Throwing Explosives From Balloons, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 994; Declaration Concerning the Use of Gas in War, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 998; Declaration Concerning the Prohibition of Bullets Which Expand or Flatten, July 29, 1899, 26 Martens Nouveau Recueil (ser. 2) 1002.

\(^2\) Among the fourteen conventions and declarations relevant to this subject adopted at The Hague, October 18, 1907, are: Convention Concerning the Laws and Customs of War on Land, 36 Stat. 2277 (1910), T.S. No. 539; Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310 (1910), T.S. No. 540; Convention Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351 (1910), T.S. No. 542; Declaration Regarding the Prevention of Discharge of Projectiles and Explosives From Balloons, 36 Stat. 2439 (1910), T.S. No. 546.

\(^3\) The introductory language of the Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 2279 (1910), T.S. No. 539, 3 Martens Nouveau Recueil (ser. 3) 461 stated: “Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where an appeal to arms may be brought about by events which their solicitude could not avert . . . .”

\(^4\) See the introductory language to the Hague Convention Respecting the Laws and Customs of War on Land, which includes the following:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in
defining offenses, the efforts at The Hague can be seen as an attempt to control the methods of interstate warfare — long the central problem of public international law. Toward the end of a century of relative peace and just prior to the first demonstration that international war could threaten all civilization, it was not yet possible to agree that any limitations upon the basic power of states to resort to war should be imposed. The offenses defined at the Hague Conferences meant merely that once war was chosen as the end of national policy, the state was not completely free in the use of the means. It took the lessons of two more world disasters to make possible some official acts promoting the always-present idea that most wars themselves should be made illegal.

For similar reasons, the time was not yet propitious to agree upon (or perhaps even to widely conceive of) any offenses which could be committed by a state against its own nationals. In addition, the concept of national sovereignty was then still in its most undiluted form, preventing practical consideration of problems such as how far "superior orders" and an "act of state" should be recognized as defenses to allegations of breaches of the provisions of the Hague instruments and the reserved principles of the law of nations. Relevant to this theory of sovereignty was the assumption that only states could be the significant actors in international law. For example, Article 3 of the Fourth Hague Convention on Land War reads:

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

So long as the individual was not seen as having his own international personality, offenses could not easily be defined as either giving him direct protection or imposing upon him direct responsibility.

However, in certain limited areas the "law of nations" imposed individual responsibility. While treaties may have played a part at some time and in certain aspects in the development of the individual responsibility concept, by 1892 the concept had passed into

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5 *Id.* at 2277, 3 Martens Nouveau Recueil (ser. 3) at 461.
6 *Id.* at 2290, 3 Martens Nouveau Recueil (ser. 3) at 479.
customary international law. Thus, in spite of the language and spirit of the Hague Conventions, the principle that individual soldiers could be criminally responsible for violations of the laws of war and be tried by enemy authorities was recognized. Also within the individual responsibility category were such offenses as piracy and trade in slaves and narcotics.

However, then and perhaps to a lesser extent now, the written and unwritten laws of war generally were applied to the individual by means of municipal law. Many criminal acts such as rape were, of course, crimes whether committed in wartime or peacetime, and the controlling municipal law applied equally during both periods. However, the pressures of war also led to the creation of special legislative, administrative, and case law, particularly in such areas as internal security and economic crimes. Finally, wartime brought into play that aspect of municipal law which combined international and non-international elements—military codes and martial law.

In addition to the crucial problems of definition involved in war-related offenses, the area of state responsibility towards aliens was sufficiently developed during this quarter-century to be of interest as a basis of comparison with later evolution of the concept. The source of these rules may have been, to some degree, the desire of the strong powers to protect their citizens while abroad in weaker states. Yet, as Jessup states, international law in this area has been relatively successful in balancing conflicting interests. The rules regarding state responsibility, discussed by Jessup, were probably more effectively imposed by the leading western powers at the turn of the century than is the case today. Jessup said:

Two rules are generally accepted as starting points in the approach to the determination of a state's responsibility for an injury to an alien. The first of these is that the alien, by entering a foreign country, subjects himself to the local law. The second rule is that the state is not an insurer of the safety and lives of aliens. offsetting the first rule is the concept of the international standard which qualifies the supremacy of the local law, including law administration, by asserting that the local law is not the last resort if it falls below the standard in general or in its application to the particular case. . . . The second rule is qualified by a set of subsidiary rules stating the conditions under which the state is liable.

8 Id. at 167, 246.
9 For a review of this area, see Lachs, War Crimes 9-12 (1945).
for an injury to an alien. In general, liability is predicated on fault (culpa).\textsuperscript{11}

More relevant than the examination of the specific content of these rules is recognition of the concept that a state had certain legal responsibilities toward aliens which produced certain rules, the violation of which could be seen as offenses against the law of nations. The specific application of these rules, then as now, sought to protect the person and property of aliens.\textsuperscript{12} It has probably always been true that violation of the principles designed to protect the alien's person as contrasted to those relating to the protection of his property, could be more readily defined as offenses, and with the increasing diversity of economic views and conceptions of property since the 1892-1917 period, it has become even more difficult to define property offenses.\textsuperscript{13}

Another impact of the rules of state responsibility was, intentionally or not, to focus attention upon the individual. This enhanced individual international status even though, formally, the alien had to act through, and at the sole discretion of, his national state. It is probably impossible to accurately assess cause and effect in the sphere of international institutions and ideas. However, intuitively it seems that the theory and practice of state responsibility to aliens must have contributed to the atmosphere necessary for subsequent progress, not only in individual status but also in the shift of perspective represented today by such enactments as the United Nations Covenants and the European Convention\textsuperscript{14} system which seek to give the individual certain rights in international law against his own state.

II. EMPHASIS ON INITIATING WAR AND PROTECTION THROUGH INDIVIDUAL RESPONSIBILITY (1967)

The growth and change of meaning of "offenses against the law of nations" has been most significant and progressively rapid

\textsuperscript{11} Id. at 103-04. (Footnotes omitted.) See also BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916).


\textsuperscript{13} For an example of these difficulties in relation to the expropriation of foreign property, see Banco Nacional v. Sabbatino, 307 F.2d 845 (2d Cir. 1962), rev'd, 376 U.S. 398 (1964).

in the half-century between 1917 and 1967. A very basic question, the role of the individual in international law, received much attention and elicited important answers. This was crucial in developing the meaning of "offenses," since it was relevant to the problem of against whom, and by whom, an "offense" may be committed.

After events such as the two world wars, Articles 227, 297, and 304 of the Versailles Treaty, the Leipzig Trials, Article 5 of the German-Polish Convention for Upper Silesia, the Nuremberg Trial, several decisions of the World Court, and the European Convention on Human Rights system, the individual's status in international law has become more firm with regard to both rights and duties. The two world-wide convulsions have shaken, if not

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16 Treaty of Peace Between the Allied and Associated Powers and Germany, arts. 227, 297, 304, June 28, 1919, in U.S. THE TREATY OF VERSAILLES AND AFTER (1947). Articles 297 and 304 authorized individual nationals of allied states to sue Germany before mixed arbitral tribunals for damages resulting from Germany's use of extraordinary war measures. Id. at 371, 547. Article 227 contemplated the trial of the Kaiser for violating international morality and the sanctity of treaties. This was the cornerstone for the modern practice of trial and punishment of individuals for violations of international law. Id. at 624.

18 For comment concerning the Leipzig Trials of German World War I criminals by the Supreme Court of the Reich, see GLUECK, WAR CRIMINALS, THEIR PROSECUTION AND PUNISHMENT (1944).


21 DROST, HUMAN RIGHTS AS LEGAL RIGHTS — THE REALIZATION OF INDIVIDUAL HUMAN RIGHTS IN POSITIVE INTERNATIONAL LAW — GENERAL DISCUSSION AND TENTATIVE SUGGESTIONS ON AN INTERNATIONAL SYSTEM OF HUMAN RIGHTS (1965); GLASER, INTRODUCTION A L'ETUDE DU DROIT INTERNATIONAL PENAL (1954); GLUECK, op. cit. supra note 16; KATZ, GOVERNMENT UNDER LAW AND THE INDIVIDUAL (1957); LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN (1943); NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); POLITS, THE NEW ASPECTS OF INTERNATIONAL LAW (1928); REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTEL (1960); AUFRICHT, PERSONALITY IN INTERNATIONAL LAW, 37 AM. POL. SCI. REV. 217 (1943); Kelsen, COLLECTIVE AND INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW WITH PARTICULAR REGARD TO THE PUNISHMENT OF WAR CRIMINALS, 31 CALIF. L. REV. 530 (1943);
yet toppled, the foundations of the state system known in the nineteenth century. The wars and their aftermaths have increased the dimensions of state interdependence, have demonstrated the horrors of unrestrained state sovereignty, and have been among the causes of the creation of great numbers of new states not entirely bound by Western European ideologies. All this has tended to weaken the national state and the "classical" rule associated with it, which declared that only states could be subjects of international law. The various treaties, conventions, and decisions discussed are some indication of the individual's emergence to a fuller international personality and the corresponding relative decline of the former completely dominating actor, the national state.

Without question, the national state is still the primary international personality. However, regarding individual responsibility for international offenses, Versailles, Leipzig, and Nuremberg tend to strip away the protective shroud of the state and expose the individual to responsibility. Similarly, the Upper Silesian Convention and the European Convention on Human Rights, inter alia, increase, directly or indirectly, the right, and more importantly, the power of the individual to protect himself from offenses. Thus, in 1967, we are in the midst of a dramatic transition from the nineteenth-century regime minimizing the individual's international personality to an expanded concept of international justice in which the individual can be both perpetrator and victim of international offenses.

A convenient, though not entirely comprehensive, point from which to observe the current content of "offenses against the law of nations" is the Nuremberg Charter and the Nuremberg Tribunal's scheme of "Crimes Against Humanity," "War Crimes," and "Crimes Against Peace."

A. Crimes Against Humanity

Article 6(c) of the Charter which bound the Nuremberg Tribunal defined crimes against humanity as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds in execution of or in connection with any crime within

the jurisdiction of the Tribunal, whether or not in violation of the
domestic law of the country where perpetrated . . . .

Most of these acts would be considered criminal under any system
of law. However, this definition seems to make the relatively new
category of "Crimes Against Humanity" somewhat unique because
of the implicit emphasis upon the commission of acts on a vast scale
and against groups. In other words, perhaps some acts within the
definition — for example, persecution on political grounds — may
not be criminal under municipal or international law when aimed
at an individual, but when addressed to a "civilian population" they
become an international crime.

This emphasis on the collective target was the natural reaction
against defeated Nazism and crumbling colonialism, a reaction
which has set the tone for almost all post-World War II activity
involving international offenses. Obviously, the Genocide Conven-
tion, adopted unanimously by the General Assembly on De-
cember 9, 1948, is another product of this reaction. The Conven-
tion defines genocide as:

any of the following acts committed with intent to destroy, in
whole or part, a national, ethnical, racial or religious group, as such:
a) Killing members of the group; b) Causing serious bodily or
mental harm to members of the group; c) Deliberately inflicting
on the group conditions of life calculated to bring about its phy-
sical destruction in whole or in part; d) Imposing measures in-
tended to prevent births within the group; e) Forcibly transferring
children of the group to another group.

Unlike Article 6(c) of the Nuremberg Charter, the Genocide Con-
vention does not mention political groups. However, it is broader
than Nuremberg in that the crime is clearly one that can be com-
mited in time of peace or war. In addition the Nuremberg and
Genocide principles coincide in sweeping aside official, and even
ruling, status as a defense.

A development converse to the collectivization of the victim in

22 Agreement by the Government of the United States of America, the Provisional
Government of the French Republic, the Government of the United Kingdom of Great
Britain and Northern Ireland, and the Government of the Union of Soviet Socialist
Republics for the Prosecution and Punishment of the Major War Criminals of the Euro-
cited as London Charter]. See also Wright, War Criminals, 39 Am. J. Int’l L. 257
(1945).
24 Id. at 280.
25 Ibid.
these definitions has been the attempt of the London Charter and Nuremberg Judgment to introduce a collective element into the definition of "perpetrator" of the crime. Articles 9 and 10 of the London Charter authorize the Tribunal to declare "a group or organization" criminal and then to find individual members guilty of crime because of membership in such a group or organization. The judgment indicated that a criminal organization was similar to a criminal conspiracy since both involve cooperation for a common criminal purpose. A group was seen as a wider and more embracing term than an organization, though the Tribunal imposed certain limitations upon the concept of criminal organization and group.

Perhaps the greatest pertinent controversy regarding the definitions of the Nuremberg crimes has centered about the determination of the criminality of groups and organizations and the related concept of conspiracy. The difficulty apparently arises because of the relative unfamiliarity of non-common law legal systems with the concept of conspiracy. Even though the criminality of organizations was limited in the various substantial ways already indicated, many have had doubts about it. Kelsen felt that it represented retrogression to primitive notions of collective guilt. Kelsen's fear is obviously well founded. Unless a limitation in addition to those imposed by the Nuremberg Tribunal is added, namely, the restriction of criminality to policymakers and leaders of criminal organizations, grave injustices could occur. It is noteworthy that on December 11, 1946, when the General Assembly unanimously adopted a resolution affirming the principles of the Charter and Judgment of the Nuremberg Tribunal, it omitted reference to the concept of criminal organization. In addition, the concept of collective guilt runs counter to the increasing trend toward the individualization of

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27 Ibid.
28 Judgment of the Tribunal, 1 NUREMBERG OFFICIAL DOCUMENTS 256 (1947).
29 Those limitations were: (1) it must have been "formed or used in connection with the commission of crimes denounced by the Charter"; (2) membership must have been, in general, voluntary and not as a result of conscription or physical pressure; (3) the criminal purpose and activities of the organization must have been so widespread and well known to members that it could be assumed that, in general, members were aware of them; (4) the period of membership involved was limited to the duration of the Second World War; and (5) it excluded certain sub-groups such as janitors and menial laborers, who had no direct part in the criminal acts of the main group. Ibid.
rights and responsibilities, and no convincing reason for the allowance of such an exception has been presented.

Perhaps the most effective steps taken thus far in the twentieth century toward defining "offenses against the law of nations" within the general area of "Crimes Against Humanity" have been those involved with the creation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, its related institutions, and subsequent protocols.

The Convention consists of a preamble and sixty-six articles organized into five sections. The preamble refers to the United Nations Universal Declaration of Human Rights and resolves "to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration." Article 1 contains the obligation of the parties to secure to everyone within their jurisdiction the rights and freedoms listed in section 1.

The section 1 rights and freedoms are generally those "classic" civil and political rights which have become accepted in Western Europe and the Western Hemisphere during the past two hundred years.

Two subsequent protocols are germane to our purposes. The first, signed in Paris on March 20, 1952, consists of six articles, of which three are relevant. The first article deals with property rights and asserts that every national or legal person is entitled to

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33 European Convention, Preamble, 213 U.N.T.S. 221, 224.

34 Ibid.

35 They cover the following: right to life protected by law with certain public interest limitations on this right (art. 2); punishment (art. 3); slavery and forced labor (art. 4); liberty and security of the person except in certain listed cases and in accordance with certain described procedures (art. 5); safeguards of a fair and public criminal trial and procedure (art. 6); prohibition against retroactive criminal guilt with limited exceptions (art. 7); respect for private and family life, home, and correspondence (art. 8); freedom of thought, conscience, and religion (art. 9); freedom of expression (art. 10); peaceful assembly and association (art. 11); marriage (art. 12); effective remedies against violations of Convention rights even if the violator was acting in official capacity (art. 13); enjoyment of rights and freedoms without discrimination (art. 14); when derogation from the rights and freedoms is permissible (art. 15); possible limitation on political rights of aliens (art. 16); rebuttal of implication to destroy any of the rights and freedoms of the Convention (art. 17); and no restrictions for any purpose other than those prescribed (art. 18). European Convention, arts. 2-18, 213 U.N.T.S. 221, 224-34.

the peaceful enjoyment of his possessions and that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law."87 Exceptions in the public interest are permitted regarding taxes, penalties, and control of property use. The second article deals with the right to education and provides a duty to respect the rights of parents to educate their children in accordance with their personal religious and philosophical convictions. The third article provides for free elections at reasonable intervals by secret ballot under circumstances ensuring free expression.

The fourth protocol consists of seven articles, the main purpose of which is to add four new rights to those of section 1 of, as well as protocol number 1 to, the European Convention. These four are: (1) abolition of imprisonment for inability to fulfill a contractual debt; (2) freedom of movement and choice of residence within the state, and freedom to leave any country subject to certain defined public interest exceptions; (3) prohibition of expulsion from, or denial of right of entry to, the territory of the state of which one is a national; and (4) prohibition of collective expulsion of aliens.88

Generally more significant than the rights defined in the Convention and in these protocols has been the relatively effective enforcement machinery provided by the Commission and the court, analysis of which is not pertinent here.

The most pressing question concerning the European Convention system is how relevant are its definitions of rights with regard to the problem of defining "offenses against the law of nations." Can the violation of these rights be considered offenses? If so, can they now, or will they in the future, be considered offenses against the law of nations?

An attempt to answer these questions on a more general level will be made later.89 Specifically, the broad range of the European Convention rights makes some of them immediately relevant, and some of only future relevance. Whether seen from the vantage point of comparative law and "general principles of law recognized by civilized nations," of customary international law, or of widely held moral principles, rights such as those designed to protect life, outlaw slavery and forced labor, and ensure fair criminal trials are basic enough to fit any reasonable designation of "offenses." How-

87 Id. at 411.
88 The text of the fourth Protocol, opened for signature in September of 1963, may be found in ROBERTSON, HUMAN RIGHTS IN EUROPE 265 (1963).
89 See text accompanying notes 48-56 infra.
ever, when dealing with such rights as the protection of private property, the area may be so heavily infused with cultural bias that they are greatly reduced in their universal applicability.

Regarding the place of the European Convention rights in international law, it should be noted that the revolutionary aspect of the European Convention System is that it can protect a citizen against violation of the defined rights by his own state within a framework of international treaties and institutions. Thus while the system is limited because of its regional nature, it represents a dramatic and significant extension of international law in its protective aspects by inserting itself between the individual and his state.\textsuperscript{40} Certainly for the member nations, violation of the Convention's rights can be said to constitute offenses against international law. To the extent that the rights involved can be said to be universally recognized, their statement and effective enforcement by these European states can only help strengthen the claim that these rights must be the basis of general offenses against the law of nations. Whether those rights which rest upon a more particularistic basis will ripen into the basis of such offenses cannot now be predicted with any confidence, but they can be seen as a reference point for future development.

Comparison with the long-debated and recently adopted United Nations Covenants on Human Rights can assist in determining the universality of the European Convention rights and illustrate another possible source for the definition of offenses.\textsuperscript{41} The first

\textsuperscript{40} The power of the Commission to hear petitions from "any person, non-governmental organization, or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention," European Convention, art. 25, 213 U.N.T.S. 221, 236, depends on the deposit of a declaration by a signatory that it will be bound by the provisions of article 25 in which the cited language appears.

\textsuperscript{41} The International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights as well as an Optional Protocol to the International Covenant on Civil and Political Rights were adopted by the United Nations General Assembly on December 16, 1966, after having been on the Assembly's agenda since 1954. These covenants were adopted unanimously; the Optional Protocol was adopted by a vote of 66 for (including most western European countries and the United States), 2 against (Niger and Togo) and several abstentions (including the Soviet Union and all other communist states represented). 21 U.N. GAOR 27-30, U.N. Doc. A/PV. 1496 (1966). For the language of the two Covenants and the Optional Protocol, see 21 U.N. GAOR, 3d Comm., 162-202, U.N. Doc. A/6546 (1966). The Optional Protocol provides for a very mild procedure by which the Human Rights Committee set up by the Covenant could receive certain limited communications from individuals claiming to be victims of violations of any of the Covenants' rights. Its powers would be limited to communicating to the state involved, receiving that state's written explanations or statements, and then forwarding its views to the state and individual concerned.
twenty-seven of the fifty-three articles of the Covenant on Civil and Political Rights\(^{42}\) deal with substantive rights and the permissible derogations of them.\(^{43}\)

A comparison of the language of the European Convention with the language of the Civil and Political Covenant reveals a very considerable similarity of wording, scope, and subject matter. However, the United Nations Covenant is more detailed in certain areas.\(^{44}\) It can therefore be said that, so far as the European Covenants go, they do (in language at least, questions of meaning and implementation aside) express universal ideas about basic civil and political rights. The first protocol to the European Covenant, dealing with private property, can indeed be seen as an exception. On the other hand, the Civil and Political Covenant does have a stronger emphasis upon curbing discrimination based upon any form of personal status.

In addition, Article 1 of both United Nations Covenants provides, in identical language, for the right of self-determination of all peoples and for their freedom to dispose of their natural resources “without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.” This right represents a mixture of economic and political concepts and becomes involved in international polemics concerning expropriation. Logically, this involvement does not make such a right any less likely to become the basis of an offense against the law of nations. However, its insertion in the United Nations Covenants was clearly the result of the desires of the “underdeveloped nations” to protect their resources against “imperialistic nations.” This desire was obviously not a strong factor among the signatories of the European Covenant. Thus, for this and other reasons, “self-determination” may be a less universal concept

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\(^{43}\) These rights concern: self determination and local control of resources, enjoyment of rights without discrimination; “the inherent right to life” and limitations on the death penalty; torture and punishment; slavery and forced labor; liberty of person, arrest, and detention; treatment of detained persons; abolition of imprisonment for debt; freedom of movement within and between states; expulsion of aliens; criminal procedure; ex post facto laws and punishment; recognition before the law; interference with privacy, home, family, and correspondence; freedom of thought, conscience, and religion; freedom of expression; war propaganda and advocacy of discrimination; peaceful assembly; freedom of association; family and marriage; protection of children; freedom to participate in public affairs and to have free elections; equality before the law; and protection of minorities. \textit{Ibid.}

\(^{44}\) See, e.g., \textit{ibid.} (criminal procedure).
than most other rights expressed in both the European and United Nations Civil and Political Covenants.

Of the thirty-one articles of the Covenant on Economic, Social and Cultural Rights, ten describe the rights to be protected. The concepts involved in this covenant are relatively imprecise and necessarily difficult to measure or implement. In addition, it is quite possible that there is a wider disparity of convictions and achievement regarding these rights than those expressed by the Civil and Political Covenant. Therefore, it seems far less likely that the Economic, Social and Cultural Covenant will be a feasible source for the definition of offenses.

During the League of Nations era, the development of international machinery to encourage economic and social cooperation was attempted, but little was done to define human rights or to devise effective means to promote them. However, the United Nations, from its beginning, has consistently striven to define and promote a broad range of human rights, though with variable results. The Universal Declaration and the attempts to translate it into the treaty law of international covenants probably held the spotlight. Ultimately it is quite likely that its work in other areas will have a greater cumulative impact on the promotion of human rights.

Some idea of the more successful efforts of the United Nations is given in General Assembly Resolution 2081 of December 20, 1965. After noting that a previous resolution had designated 1968 as the international year for human rights and asking member states and various organizations to devote 1968 to intensified efforts in the human rights area, the resolution invites all members to ratify, before 1968, the human rights conventions already concluded. The resolution called particular attention to conventions dealing with the abolition of slavery, forced labor, discrimination in employment, equal remuneration for men and women, freedom of association and of the right to organize, discrimination in education, genocide, political rights of women, and racial discrimination. The same resolution urged the conclusion of the draft Covenants on Civil, Political and Economic, Cultural and Social Rights just discussed, a covenant on the elimination of all forms of racial intoler-

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46 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 21 U.N. GAOR 3d Comm., U.N. Doc. A/6546 (1966). Including article 1 just mentioned, these rights deal with areas such as: the right to work; “social security”; family and mothers; standard of living; education; and cultural life. Ibid.


ance, a covenant on freedom of information, and a draft declaration on the status of women so that such covenants could be open for ratification and accession before 1968.48

In sum, United Nations human rights efforts have been divided between comprehensive definitions of human rights in an International Bill translated into the form of two legally binding covenants, on the one hand, and numerous separate covenants enlarging upon some specific aspects of the comprehensive scheme (and adding some others) on the other.

Compared to the European Convention on Human Rights this United Nations activity has been on a far broader scale. However, this does not necessarily mean that the United Nations definitions of rights are so generally accepted as to be the basis of international offenses. First, many have not yet been widely ratified. Second, even though the two general United Nations Covenants are legally binding on the states which ratify them, no effective enforcement machinery is provided. Therefore, enforcement is left to the general sanctions of international law regarding treaties, which can be expected to be particularly ineffective here since the rights largely involve the relationship between the signatory state and its own subjects. Due to the omission of effective international enforcement machinery, the United Nations efforts were not subject to the discipline imposed upon the drafters of the European Convention Protocols by the European Convention's enforcement system of Commission, Court, and Executive Organ. This could very well have been responsible for the very broad range of subjects covered and for the frequently idealistically sweeping language employed by the United Nations.

Furthermore, with regard to the rights presented by the European Convention and, a fortiori, the United Nations efforts, there is a logical (and probably a practical political) gap between the recognition of certain rights, and the willingness to consider them as being so basic to international order as to deem violation of them "offenses against the law of nations." In any event, both the European Convention system and United Nations work in the human rights field can be seen as sources from which the definition of of-

48 Other human rights areas dealt with by the United Nations include: refugees and stateless persons, minorities, children, the right of asylum, apartheid, rights and duties of states including the right of diplomatic intervention, false and distorted news reports, consent to and minimum age of marriage, prisoners of war, and political prisoners.
fenses can be derived when and if that logical and practical gap is bridged.

In addition to the experience of Nuremberg and its related events and the work of the United Nations, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is another significant point from which to assess our current position in the definition of offenses in the "Crimes Against Humanity" classification. As Greenspan states:

World War II brought to a head the need to regulate by law the treatment of civilian populations in time of war. The ruthless application of the doctrine of total war by the Axis powers inflicted vast losses and suffering on the civilian populations of powers against which they waged war. Heightening this cosmic tragedy were the devilish theories of race superiority which demanded the extermination of whole groups of civilian populations. Such shocking crimes compelled the attention of international lawyers to the necessity for creating a comprehensive body of law to deal with such evils, which had hitherto been accorded cursory treatment in a few articles of the Hague Regulations. It is now realized that the laws of war should concern themselves as much with the civilian populations involved as with the armed forces conducting the hostilities.

The Convention applies to armed conflicts with or without a formal declaration of war, to all cases of partial or total occupation of a party, and to all signatories to the Convention in their mutual relations, even if they are also engaged in conflict with a non-signatory. Certain stated minimum rules of conduct bind a party even in case of civil wars within the territory of a party. Essentially, persons protected by the Convention are those who, in case of conflict or occupation, are "in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Convention specifies rights of protected persons and restraints upon conflicting states in great detail. Article 27 contains the crux of the matter by providing:

Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall

at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. . . .

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war. 64

This Convention brings the Hague system of 1899 54 and 1907 55 into step with the lessons taught by intervening history. However, it is based upon the identical assumption that there will be more wars and that therefore they should be humanized as much as possible. The irrelevance of most of the Convention to atomic war is obvious. However, we have had since 1949 and, unfortunately, will probably continue to have, non-atomic international and civil wars for which the Convention will be relevant. In addition, the rights and duties so extensively defined in the Convention clarify and expand the concept of international offenses regarding treatment of civilians in wartime.

B. Crimes Against Peace

A second Nuremberg category of crimes, "Crimes Against Peace," represents an attempt to change or at least supplement the assumption underlying the Hague 57 and Geneva Conventions. 58 The resort to certain kinds of war was itself to be made illegal, not just the inhumane waging of war. Article 6(a) of the London Charter 59 reads: "Crimes Against Peace: namely, planning, prepara-

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54 Id. art. 27, [1955] 3 U.S.T. at 3536, 3538, 75 U.N.T.S. at 306.
57 See material cited notes 1-2 supra.
58 See Conventions cited notes 71-72 infra.
tion, initiation or waging, of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.  

A brief survey is not the place to attempt an exposition of the meaning of this momentous definition as interpreted by the Nuremberg and subsequent post-World War II war crimes tribunals, by the great number of commentators, or by United Nations bodies.  

Stone has sketched the historical background of the Nuremberg definition as it relates to the Kellogg-Briand Pact, the League, and the United Nations system in remarkably precise language which requires little further comment.  Nevertheless, a discussion of some lessons of the past and problems of today involving resort to war may be useful.

The Kellogg-Briand Pact failed to prevent war not only because it was violated but also because, in spite of its seemingly all-inclusive language, it left many loopholes and room for argument. For example, the right of "self-defense" remained; war could arguably still be waged against non-signatories, and war to enforce international obligations was arguably permitted. These and other gaps existed in the face of such phrases as: the parties condemn "recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another"; and "the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be,

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60 Ibid.
64 Id. art. 1, 46 Stat. at 2345-46, T.S. No. 796, 94 L.N.T.S. at 63.
which may arise among them, shall never be sought except by pacific means.\footnote{Id. art. 2, 46 Stat. at 2346, T.S. No. 796, 94 L.N.T.S. at 63.}

In 1947, the General Assembly requested the International Law Commission to formulate the principles of international law recognized in the Charter and Judgment of the Nuremberg Tribunal and to prepare a draft code of Offenses Against the Peace and Security of Mankind indicating the place of the Nuremberg Principles therein.\footnote{Formulation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, G.A. Res. 177, 2 U.N. GAOR Supp. 9, at 111-12, U.N. Doc. A/519 (1947). For the text of the original Draft Code, see International Law Comm’n, Report, 6 U.N. GAOR Supp. 9, at 10-14, U.N. Doc. A/1858 (1951).} This attempt to draft such a code has been notably unsuccessful. It has foundered on the problem of whether to give a general or an enumerated definition. The enumerated approach was abandoned because of the difficulty of ever being sufficiently comprehensive and the undesirability of limiting in advance any future enforcement organ. However, little success has also been obtained with a general definition.\footnote{STONE, op. cit. supra note 62, at 334.}

The Kellogg-Briand Pact and the Draft Code of Offenses\footnote{International Law Comm’n, Report, 6 U.N. GAOR Supp. No. 9, at 10-14, U.N. Doc. A/1858 (1951).} experiences can justify several conclusions. First, it seems rather naive to expect that the desire to make resort to war an offense can be greatly assisted by the codification approach. This opinion is hopefully not determined by common law training alone, but by the recognition that the core issues are too all-encompassing, too little understood, and too enmeshed in basic political passions to be susceptible of simple legalistic categorization. Second, given such passions, such complexity, and the absence of effective international enforcement machinery, the desire to evade even the most perfectly drawn definition of the offense of illegal war in situations of self-perceived need will be overwhelming. Therefore, will it not breed disrespect for laws to define a crime with no reasonable prospect that it will significantly control the conduct of those purportedly subject to the definition?

On a more specific level, the key difficulty involved in attempting to define an offense of “Crimes Against Peace” or “illegal resort to war” is the meaning of “war” and “aggression.” While the logical imperatives of the atomic age could support a definition which outlawed all resort to violence with no conceivable exception,
the political facts of international society render such an effort futile. It is not presently possible to take from the national state the right of self-defense, nor from the international community the right to employ violence to suppress a breach of the peace.

Therefore, it is not prohibition of the use of all violence, but mainly of aggressive violence, which has been the goal. Thus, the issues raised here include: Can the definition of war and aggression be objective, or must the intent of the actor be considered? Can key definitions have any lasting meaning when they will probably be used defensively by the successful user of violence regardless of whether he was in fact the “aggressor”? How can there be established an impartial international enforcement or interpretive body to avoid the use of the offense in a purely might-makes-right manner? How far down the policy-making hierarchy can one go in imposing individual liability for commission of the offense of aggressive war? What should be the place of nulla poena sine lege once it is assumed that not all kinds of undesired violence can be clearly prohibited in advance? How far can the nation-state remain free to determine the “self-defense” character of its resort to violence before any attempt to define it is vitiated? An attempt to deal with some of these questions will be made in the final section of this paper.

C. War Crimes

[The liberty of States to resort to war under customary international law is still a substantial liberty. With it there survives the continued importance in international law of the principles governing the conduct of belligerent States inter se, and of belligerents and neutral States and traders vis-a-vis each other.

The first source of the modern written law of war is, of course, the four 1949 Geneva Conventions dealing with treatment of the Sick and Wounded on Land, or at Sea, Prisoners of War, and Civilian Persons in Time of War. Space allows only a few general

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69 For an excellent review of the problems of definition of war and aggression, see STONE, op. cit. supra note 62, at 304-06.
70 Id. at 303-04.
comments about these Conventions. They represented an attempt to fill some gaps in prior conventions primarily revealed by the horrors of World War II and the international "incidents" of the 1930's.

The responsibility of the individual for commission of war crimes, a principle of international customary law for many years, was made quite explicit by the Convention on the Sick and Wounded in the Field. Provision is made for the transfer of such persons to another contracting party for trial.

The four Geneva Conventions in general, and the language just quoted in the footnotes in particular, illustrate the organic growth of the definition of offenses. As already noted, at the time of the 1907 Hague Conventions, individual responsibility for war crimes was accepted. However, the principle was apparently of neither sufficient strength nor timeliness to be incorporated expressly in the Hague Conventions. The heinousness of the war crimes of World War II contributed to the pressures for clear recognition of individual responsibility which resulted in the Nuremberg Charter definition of War Crimes and the similar language of Article 50 of the Geneva "Wounded and Sick" Convention.


Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, [1955] 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, in force Oct. 21, 1950. "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts." Id. art. 49, [1955] 3 U.S.T. at 3146, 75 U.N.T.S. at 62.

Article 50 defines such grave breaches as any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. Id. art 50, [1955] 3 U.S.T. at 3146, 75 U.N.T.S. at 62.

Article 6(b) of the London Charter of August 8, 1945, defined war crimes as violations of the laws and customs of war, which, shall include, but not be limited to, murder, ill-treatment or deportation to
Roscoe Pound has posed questions fundamental to assessing the potential of efforts to develop universally acceptable definitions of "offenses against the law of nations." He asked:

Can we find how to secure universal ideals of right and justice without, as a first step, setting up an omni-competent, universal, political organization of mankind? Are there individual claims to life and liberty, so general as to be substantially universally recognized and so possible to be secured by an international process of law? Does not the history of civilization teach us that there are . . . ? The common law as the legal order of the English-speaking world has no one politically organized society behind it. The Civil or modern Roman law, which long was and still is to no small extent the legal system of a great part of the world, has had no unified political organization behind it . . . . It has been assumed that to have a world law we must have a world state; that universal political organization must come before universal law. May it not be rather that universal law must precede the universal state which will undertake to put any required force behind it?77

While not necessarily agreeing with Pound's conclusion, the question "law or order first," is quite basic. Much depends upon definitions of the terms involved. If by "law" is meant normative principles explicitly consented to by official public authority, regardless of the empirical effect that they have on conduct, then we may be deceived into believing that "universal law" has been or can be achieved without preceding "universal order." The grim fate of the 1929 Geneva Convention on Prisoners of War78 during World War II when the conditions of war underwent such drastic changes illustrates how superficial such "law" can be.79

On the other hand, regardless of formality or explicitness of recognition, it is conceivable that "law" can be both normatively and empirically effective among politically independent entities. Pound's example of Common and Roman Law, within their respec-

77 Pound, Foreword to Kutner, World Habeas Corpus at v, vi, vii (1962).
tive spheres,\textsuperscript{80} is sound once one assumes the basic similarity of ideas and institutions (if not unity or organization) within each. Since there has not yet been universal political order, any progress thus far made in developing effective definitions must have been based upon some consensus concerning the need for, and intellectual content of, the legal controls represented by the definitions. The relative scarcity of such consensus has prevented more than a small number of offenses from achieving effective universality.

Perhaps the analogy of a coral reef, with its progressive growth by accumulation of numerous organisms, can help to guide speculation about the future growth of the definition of offenses. Thus far, only a tiny number of the marine zoophytes have sufficiently hardened and have been pushed above the water’s surface to effective visibility. Some of these organisms are relatively senile and belong to species such as “piracy” and “trade in narcotics and slaves.” Others have a more significant genealogy with closer ties to the present, such as “state responsibility to aliens.” There are also those well-known but controversial types called “war crimes” which have been above the surface for quite some time but are of widely varying shapes, colors, and potency.

Just below the surface are those which have become enmeshed in the structure of the reef but have not as yet reached the surface of universal visibility. These include “Crimes against the Peace” and “Crimes against Humanity” which have been troubled by amorphism, as well as the “European Convention Violations” which have been important, though confined to but one portion of the reef.

There are those species which have been living in the reef but which have not yet calcified into a permanent connection with it. These range from the “International Covenants on Civil and Political Rights” through the “Genocide Convention” to the “International Convention on the Elimination of All Forms of Racial Discrimination” and the “Draft Treaties on Freedom of Information.”

Finally, there are those animals which have been living near the reef and which may add their substance to it, but which are still free swimming. These are called violations of “general principles of law,” “moral and political philosophy,” “natural law,” or “social custom.” Which of these organisms will prosper and emerge from the depths depends upon many factors, including the amiability of the environment and the position and type of prede-

\textsuperscript{80} Pound, \textit{supra} note 77.
cessors which have calcified into the reef and upon whose remains future growth must build.

This analogy may lead to some specific comments on the central problem of this contribution. First, "international offenses," like the coral reef, grow organically, based upon prior development. The ties between the Nuremberg Judgment and the subsequent Genocide Convention, and between the relatively cautious and effective work of the European Commission on Human Rights and the subsequent creation of the European Court of Human Rights, are examples of such growth. Acceptance of the reality of organic growth should carry with it appreciation of a gradualistic approach to the development of the concept of offenses (to the extent that they are subject to conscious control at all). It was preferable to make acceptance of the European Court of Human Rights depend on a voluntary and separate act apart from ratification of the European Convention itself so that the first moves could be taken and given a chance to prove themselves.\(^1\)

Second, ideas, like marine organisms, will not flourish unless the environment is friendly. The idea that those who determine the use of violence on the world scene should be subject to certain limitations has long been involved with religious thought and institutions, and with thinkers like Grotius and Suarez. However, no meaningful steps to implement these thoughts took place until war became a clear threat to all civilization and until there existed a relatively comprehensive forum for discussion of the problem. In brief, the store of truly original ideas is quite limited, and progress depends upon their fortunate combination and historical "ripeness."

What combination of ideas will be able to emerge in the next quarter-century regarding international offenses? It is likely that the trend of the last seventy-five years to increase the number and types of situations encompassed by the term "offense" will continue. For example, "war crimes" was broadened by one of the 1949 Geneva Conventions\(^2\) to include more detailed provisions regarding mistreatment of civilian populations. \textit{In futuro}, regardless of the debate upon the legality and precedent value of the Nuremberg Judgment, the United Nations' efforts to draft a code of offenses

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\(^1\) One authority, Bilder, is sympathetic to this approach. He advocates a flexible attitude towards human rights problems which would allow adherence to any human rights solution on a limited basis (hopefully to be enlarged) with liberal use of protocols, reservations, and optional clauses. He also favors the use of incentives as well as sanctions to promote human rights. See Bilder, \textit{The International Promotion of Human Rights: A Current Assessment}, 58 Am. J. INT'L L. 728 (1964).

\(^2\) See Conventions cited note 71 supra.
against the peace and security of mankind indicates some acceptance of the idea that "aggressive war" is the ultimate international offense. Whether such a code will ever be widely adopted or not, and regardless of its effectiveness even if so adopted, it will become increasingly difficult to assert freedom from some form of organized international judgment when force is used in international affairs.

The similarity in definition of those rights found in the European Covenant and the United Nations Civil and Political Covenant indicate that, on the verbal level at least, agreement upon the existence of certain basic human rights is possible. It is obvious that meanings of even clearly phrased rights can vary widely depending upon the motivation and background of the interpreter. In addition, methods used to enforce these rights are crucial to their real importance. Nevertheless, it can be expected that the longer the international community lives with even the verbal identity of such rights formulations, the easier it will become to claim that disregard of them constitutes an international offense. This type of "offense" should be considered international even if just on a comparative basis the definitions can be classified as general principles of law recognized by most nations. In addition, they should be so classified because they will have their origin in international conventions with at least some international enforcement, even if merely by reports and communication of views among nations and with an international organization.

Finally, relevant to the broadening of the content of "offenses," it seems quite possible that certain clearly "sub-universal" concepts will gain support and become raw material for new international offenses. Likely prospects are in the economic area and may very well focus on problems like control of resources and manipulation of markets in basic commodities upon which the survival of whole societies can depend. The results of another political or economic upheaval such as have been all too frequent in the last seventy-five years could, of course, give impetus to areas as unforeseeable now as genocide was not long before World War II.

Regarding the formal sources of development of definitions, the role of conventions and declarations will probably increase. International law and affairs are somewhat subject to phases of in-

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It has been an obvious assumption of this article that a right or value must gain more than local acceptance before its violation can be the basis of an international offense. It may be inherently fruitless and certainly beyond the scope of this contribution to delve into questions such as what constitutes sufficient acceptance and in what form must it be expressed before a right can be said to be "universal."
World War I was followed by increased interest in protection of minorities. World War II naturally produced the intensive efforts to define and enhance human rights described in the second section of this paper. This broadened international interest in human rights is likely to continue for the next twenty-five years, and along with it will go a more frequent use of regional and universal conventions and declarations to embody any agreements that may be reached. This tendency will vary directly with the degree of international peace. Preoccupation with individual and group survival in an atomic era is not conducive to the development of new definitions of offenses, and it puts a hard-to-resist strain on the possibilities of respecting those already existing.

The prospects for the increased importance of international tribunals in the growth of the concept of offenses do not appear too bright. The International Court of Justice is not likely to be given much more of an opportunity than it has had in the past to decide basic human rights questions. If the European Court on Human Rights becomes a viable institution, it could act as a catalyst for the development of similar courts in other regions. It may very well be that municipal courts will become the principal judicial creative force in the area. If regional organizations like the European Convention System grow, and if basic international human rights documents like the United Nations Covenants become widely adopted, there will be in effect in many nations a comprehensive list of internationally recognized basic rights. These rights must first be protected within municipal legal systems since it is not likely that the doctrine of exhaustion of local remedies will be relinquished in the near future.

If attention to definition and refinement of basic rights continues to be high, the role of "publicists" in this area should become increasingly significant. An intuitive assumption of this contribution has been that the major developments in the definition of offenses have been largely predetermined by relevant historical events and attitudes. The fear of impending war was probably the main factor in the calling of, and in the results of, the Hague Conferences of 1899 and 1907. The vogue of "self-determination" and its incomplete implementation by the post-World War I settlements produced great interest in the protection of minorities during the inter-

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84 The European Court on Human Rights came into effect on September 3, 1958, with the deposit of the eighth declaration pursuant to Article 46 of the European Convention on Human Rights, 6 EUROPEAN YEARBOOK, 1958, at 227.
war years. Once this bow to “historical determinism” has been made, it should be recognized that there is, of course, room for conscious creative effort by statesmen, lawyers, writers and other leaders of thought. This area of influence will vary directly with the rate of change in the concept of “offenses” since this should increase susceptibility to informed suggestion.

If publicists desire to maximize their influence in the international arena they should adopt a conscious “deculturalization” attitude. In addition to following the general rules of clear thinking such as examination of conscious assumptions, great effort should be made to discover and weigh unconscious guiding principles. The particularly dangerous ideas which too often determine the output of too many writers are those which are unstated and culturally acceptable at any given time. Whether the sanctions for not accepting these assumptions be moral, economic, physical, or otherwise, the attempt must be made to resist automatic surrender to them or else the result will be exercises in academic justification of the culturally expedient.

It is easier to laud martyrdom than to live it. However, does it take a martyr, particularly in a relatively “free” society, to criticize his nation’s clear violation of the basic rights of his fellow citizens or of foreigners just because many of his fellow citizens raise no protest? How refreshing and conducive to the development of an international consensus it is when a scholar honestly attacks what he thinks is his own nation’s dogmatic viewpoint on an issue relative to an international offense. In short, to avoid academic rationalization of national expediency, and to prevent unnecessary scholarly support for atomistic hardening of conflicting positions, the international publicist should place the burden of proof on the assumptions of his own culture. In this way the controlling historical mood can best be taken advantage of and possibly even diverted somewhat to desired goals.

In sum, since 1892 we have seen a great broadening and deepening of the traditional concept of international offenses. We now have the Nuremberg triad of “Crimes Against Peace,” “War Crimes,” and “Crimes Against Humanity” and the continuous filling in of each of these categories. In addition, there are the movements to define universal basic economic, political, social, and cultural rights. Some guesses at future development of these concepts both in content and source have been attempted. Is there a generalized definition of “offenses against the law of nations” which may be
useful as a bridge between the present and the future? The definition should be broader than the usual connotation of the word "crime." It should also not be so comprehensive as to include transient and non-universal fads. A suggested definition of an offense against the law of nations is: any violation of an elemental individual, group, national or international value so basic and permanent in importance that the necessity for its protection is recognized by most of the recognized actors on the world scene.