be permitted, that Congress had not directly authorized the diversion in question but had conferred authority on the Secretary of War to regulate the diversion, provided he acted in a reasonable and not arbitrary manner, and that the permit of March 3, 1925, issued by the Secretary to the Sanitary District authorizing an average diversion not exceeding 8500 cubic feet per second was legally valid. In the light of all the conclusions, Mr. Hughes recommended that the bill be dismissed by the court without prejudice to the right of the complainants to institute suit to prevent a diversion in case it were made without authority of law. He added, however, that "if a situation should develop in which the defendants were seeking to create or continue a withdrawal of water from Lake Michigan without the sanction of Congress or of administrative officers acting under its authority, the complainant States have such an interest as would entitle them to bring a bill to restrain such action."

At the present writing the Supreme Court has taken no action on Mr. Hughes' recommendation. In case it adopts the recommendation, the diversion authorized by the permit of March 3, 1925, will continue until December 31, 1929, after which the whole matter will have to be determined by Congress, which body, according to the opinion of Mr. Hughes, has full authority to determine whether and to what extent the diversion should be permitted. It is therefore expected that the controversy between the complaining and defendant States will now be shifted to Congress.

It may be remarked that Mr. Hughes in his conclusions does not discuss the international aspects of the case; he was concerned only with questions of municipal law, and more particularly with the question of what authority in the United States has jurisdiction to regulate, permit or prohibit the diversion in question. That important rights and interests of Canada, founded on both the treaty of 1909 and upon well recognized principles of customary international law, are involved, no on will deny.[1] But they are matters which obviously do not fall within the jurisdiction of the Supreme Court of the United States. They involve political questions which must be dealt with through the diplomatic channel and not by the judicial tribunals of either riparian party.

J. W. GARNER.

THE DEFAMATION OF FOREIGN GOVERNMENTS

The recent publication in a chain of American newspapers having wide circulation of what purported to be documents abstracted from the secret archives of a neighboring state has suggested some interesting queries with respect to individual and national responsibility for attacks upon the good name of a friendly foreign government. The circumstances revealed in

[1] As to the law and practice regarding the diversion of boundary waters, see Hyde, International Law Chiefly as Interpreted and Applied by the United States, Vol. I, pp. 316 *ff.*

contemporary press reports and brought out more fully in an investigation by a committee of the United States Senate [1] were briefly as follows:

In November, 1927, the Hearst newspapers, of which there are more than a score published in different cities throughout the United States, printed documents which were claimed to have been abstracted from the secret archives of Mexico and which tended to support a charge that President Calles of Mexico had financed the Sacasa revolution in Nicaragua. Difficult negotiations, it will be recalled, were in progress between Mexico and the United States at the time. The Government of Mexico promptly denounced the documents as forgeries and charged that their publication was part of a plot to "hinder an accord between the two governments in matters at present under negotiation." [2]

In December, 1927, the same newspapers published what purported to be further documents from the Mexican archives showing the allocation of more than a million dollars of Mexican public funds to pay certain United States Senators for pro-Mexican propaganda. The United States Senate promptly ordered an investigation.[3] Denounced in the Senate while this investigation was pending, Mr. Hearst published a reply in the form of an advertisement in the press in which he reasserted the authenticity of his so-called documents and repeated his principal charges against the Government of Mexico.[4] His charges included "the general distribution of Bolshevist propaganda . . . in the United States," "outrageous action . . . in supporting with money and with arms and with every possible influence, the revolution in Nicaragua," efforts to "support financially and morally social uprisings and revolutionary movements in other parts of the world," association with the Bolshevist government of Russia, bribery of the umpire of a mixed claims commission, and provocative policies calculated to arouse enmity between the United States and Japan. The advertisement carried the inference that Mr. Hearst's purpose in publishing the documents was to arouse the United States Congress to the seriousness of what Mr. Hearst chose to regard as an international crisis.

Two weeks later, before the Senate investigating committee, counsel for Mr. Hearst announced that experts whom they had employed meanwhile had examined the documents and pronounced them forgeries. Government experts condemned the documents even more emphatically as brazen forger-

[1] Hearings Before a Special Committee to Investigate Propaganda or Money Alleged to Have Been Used by Foreign Governments to Influence United States Senators, U. S. Senate, 70th Cong. 1st Sess., 1928 (cited as Hearings). For an account of proceedings before the Senate committee, see N. Y. Times, Dec. 16, 1927, p. 1, col. 3; Dec. 20, 1927, p. 18, col. 2; Dec. 28, p. 13, col. 1; Jan. 5, 1928, p. 1, col. 4; Jan. 7, 1928, p. 3, col. 1; Jan. 8, p. 5, col. 1.

[2] See N. Y. Times, Nov. 15, 1927, p. 3, col. 1; Nov. 16, 1927, p. 5, col. 4; Nov. 17, 1927, p. 9, col. 4.

[3] The Senate resolution is printed in Hearings, p. 1; also in N. Y. Times, Dec. 10, 1927, p. 3, col. 6.

[4] See N. Y. Times, Dec. 21, 1927, p. 18, col. 5.

ies and examples of "impudent ignorance," and expressed the opinion that anyone accepting them as genuine must have been "in a very receptive mood." [5] The Senate investigation revealed, in short, that the Hearst documents were a batch of very inartistic counterfeits, that the principal test applied by the Hearst staff to establish their validity consisted in "planting" an unprincipled spy in the office of the Mexican Consul General in New York, and that they had been published without anything like an adequate investigation of their authenticity.[6]

So brazen and impudent an imposition, perpetrated at a time when difficult negotiations were in progress between the two governments chiefly affected, would seem adequately characterized only as the grossest abuse of the freedom of the press. That it might have furnished the basis for a civil action for libel seems abundantly clear.[7] It is also clear that the libel could have been prosecuted criminally at common law.[8] The reason usually given by English courts for the common law rule is the disturbance of peaceful relations with foreign states if such publications are permitted to go unpunished. Thus, in summing up to the jury in King *v.* Vint, in which the accused was convicted of a libel on the Emperor of Russia, Lord Chief Justice Kenyon said:

> I can only say, that if one were so to offend another in private life in this country, it might be made the subject of an action; and when these papers went to Russia and held up this great sovereign as being a tyrant and ridiculous over Europe, it might tend to his calling for satisfaction as for a national affront, if it passed unreprobated by our government and in our courts of justice.[9]

And in King *v.* Peltier, in which the accused was convicted of a libel on Napoleon Bonaparte, Lord Ellenborough laid it down as law that "any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the pacific relations between the two countries."[10] In Holt on the *Law of Libel*

[5] See Hearings, pp. 219, 298, 321, 322, 334; N. Y. Times, Jan. 5, 1928, p. 1, col. 4; Jan. 7, 1928, p. 3, col. 1.

[6] See N. Y. Times, Jan. 12, 1928, p. 9, col. 1.

[7] A report that the Government of Mexico would sue Hearst for slander was denied by the Acting Foreign Minister of Mexico. N. Y. Times, Jan. 9, 1928, p. 2, col. 5.

[8] See King *v.* D'Eon, 1 W. Bla. 510; King *v.* Gordon, 22 St. Tr. 175; King *v.* Vint, 27 St. Tr. 627; King *v.* Peltier, 28 St. Tr. 529; Holt, Law of Libel, 1st Am. from 2d London ed., ch. 4; Starkie, Law of Slander and Libel, 3d ed., 657. See also Regina *v.* Tchowzewski, 8 St. Tr. (N. S.) 1091; Lewis, Foreign Jurisdiction and the Extradition of Criminals, pp. 63 ff.

[9] 27 St. Tr. 627, 641. The accused had published the following: "The emperor of Russia is rendering himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency; he has now passed an edict prohibiting the exportation of timber, deals, etc. In consequence of this ill-timed law, upwards of 100 sail of vessels are likely to return to this Kingdom without freights."

[10] 28 St. Tr. 529, 617.

it is said: "If it be incumbent on the magistrate to restrain all such disorders of speech or writing as have a tendency to disturb the peace of families and individuals, still more essential is it to repress such excesses as might eventually lead to embroil nations, and thereby bring upon society that greatest of evils, national war."[11] Holt adds that "few cases have occurred under this head, but they are sufficient to give the rule."[12] And Starkie says:

> Every publication is intrinsically illegal which tends to produce any public inconvenience or calamity. Under this division those rank highly, in respect of the magnitude of their results, which tend to disturb the amicable relations which subsist between this and other nations, by malicious reflections upon those who are possessed of high rank and influence in foreign states. As the natural tendency of these is to involve the government in a foreign war, their authors have, in several instances, been punished as offenders at common law.[13]

In the United States, of course, there is no federal common law of crimes. All federal crimes are made so by statute. Since there is no federal statute providing punishment for the defamation of governing officials of a foreign state, a criminal prosecution in such a case as that presented by the Hearst publication of forged documents would have to be initiated in one of the State courts. Yet it seems clear that the subject is one which ought to be cognizable in the federal courts. It is submitted that Congress, under its express power "to define and punish . . . offences against the law of nations,"[14] should enact appropriate legislation to remedy this deficiency in the federal code. Indeed, it is suggested that such an amendment of the federal law of crimes is indicated, not only as a measure of municipal expediency, but also as the fulfillment of an international obligation to afford foreign governments a minimum of local protection against defamation.

The United States has already incorporated in its federal criminal code considerable legislation enacted in fulfillment of international obligations to safeguard the interests of foreign states. While it is not always easy to say just how far such legislation is dictated by international obligation, on the

[11] *Op. cit.*, 86.

[12] Citing King *v.* D'Eon, *supra*; King *v.* Gordon, *supra*; King *v.* Vint, *supra*; and King *v.* Peltier, *supra*.

[13] *Op. cit.*, 657. See also Russell, Crimes, 9th Am. from 4th London ed., I, 350. "The reason why libellers in such cases were prosecuted was not simply on the ground of their having libelled foreign Sovereigns, but because such libels were calculated to create a hostile feeling in foreign States, and to cause a breach of the peace between this country and those foreign Powers; and it was therefore proper and just, when such cases arose, that the prosecutions should be conducted, not by the foreign Governments, who were only incidentally involved, but by the law officers of the British Crown—the laws and peace of this country having, in truth, been attempted to be violated, and such probable violation being the real ground of prosecution." Lord Chancellor Cranworth, in Debate on Foreign Refugees in House of Lords, Hansard, 3d series, CXXIV, 1046, 1059, 1060.

[14] U. S. Const., I, viii, 10.

one hand, and how much of it is merely national policy expressed in law for reasons of municipal convenience, on the other, it is evident that substantial parts of the federal statutes rest upon the former as well as the latter justification. Certainly this may be said of much of the penal legislation for the enforcement of neutrality,[15] of legislation for the protection of the diplomatic representatives of foreign states,[16] and of enactments providing punishment for the counterfeiting of foreign currencies.[17] Probably the federal laws protecting the uniform of friendly nations,[18] punishing conspiracy to destroy the property of foreign governments abroad,[19] and penalizing aid to insurrection in friendly states,[20] may be said to rest in a measure upon the same broad foundation. With respect to other legislation the justification of international obligation is more debatable.[21]

The existence of an international obligation to protect foreign governments locally against defamation seems amply supported by principle and analogy. Such legislation should assure at least a minimum of protection.[22] Beyond the minimum indicated by international duty, Congress may go as far as constitutional authority permits and wise policy seems to require.

EDWIN D. DICKINSON.

THE INSTITUTE OF INTERNATIONAL LAW

The thirty-fifth session—the most recent—of the *Institut de Droit International*, was held from August 21 to August 28, 1928, in the city of Stockholm which is now, and for seven continuous centuries has been the capital of Sweden, and whose beauty is so obvious and so compelling as to require mention even in the chronicle of a scientific gathering.

Important as are the resolutions of the Institute, which have given it

[15] U. S. Criminal Code of 1909, §§ 9–18, 35 U. S. Stat. L. 1088, 1089; Act of 1917, c. 30, Tit. V, 40 U. S. Stat. L. 217, 221; U. S. Code Ann., Tit. 18, §§ 21–38.

[16] U. S. Rev. Stat., §§ 4062–4065; U. S. Code Ann., Tit. 22, §§ 251–255. See Respublica *v.* De Longchamps, 1 Dall. 111.

[17] U. S. Criminal Code of 1909, §§ 156–161, 35 U. S. Stat. L. 1088, 1117; U. S. Code Ann., Tit. 18, §§ 270–275. See Emperor of Austria *v.* Day, 2 Giff. 628; United States *v.* Arjona, 120 U. S. 479.

[18] Act of 1918, 40 U. S. Stat. L. 821.

[19] Act of 1917, c. 30, Tit. VIII, § 5, 40 U. S. Stat. L. 217, 226.

[20] In addition to legislation for enforcement of neutrality cited note 15, *supra*, see Joint Resolution of 1922, 42 U. S. Stat. L. 361; U. S. Code Ann., Tit. 22, §§ 236–237. See DeWutz *v.* Hendricks, 2 Bing. 314; Kennett *v.* Chambers, 14 How. 38.

[21] See U. S. Rev. Stat. §§ 4071–4073. *Cf.* U. S. Rev. Stat. § 753. *Cf.* also Act of 1917, c. 30, Tit. II, § 3, and Tit. VIII, § 2, 40 U. S. Stat. L. 217, 220, 226.

[22] Canada's Criminal Code contains the following: "Every one is guilty of an indictable offence and liable to one year's imprisonment who, without lawful justification, publishes any libel tending to degrade, revile or expose to hatred and contempt in the estimation of the people of any foreign state, any prince or person exercising sovereign authority over such state." Revised Statutes of 1927, c. 36, §135.