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COMING TO TERMS WITH TERRORISM—RELATIVITY OF WRONGFULNESS AND THE NEED FOR A NEW FRAMEWORK

Daniel H. Derby*

Although "terrorism" is universally condemned, efforts to coordinate criminal law systems to suppress it have met with only modest success. A cynic might ascribe this to hypocrisy among nations, and there is obviously some truth in the observation, "what is terrorism to some is heroism to others."[1] At the same time, it is apparent that many nations have similar views as to which types of conduct merit that pejorative label, and it seems remarkable that even like-minded groups of nations have done rather little to weld their legal systems into a common anti-terrorism mechanism.[2]

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1. INTERNATIONAL TERRORISM AND POLITICAL CRIMES i i i (M. C. Bassiouni ed. 1974). *See also* Bassiouni, *Ideologically-Motivated Offenses and the Political Offense Exception in Extradition*, 19 DE PAUL L. REV. 217 (1969) [hereinafter Bassiouni].

2. The closest cooperation has been among Western European nations, but even they have been unable to achieve a complete consensus as to which acts of political violence merit international suppression. *See infra* notes 29-32 and accompanying text.

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THE POLITICAL OFFENSE PROBLEM

From a legal standpoint, the impediment to closer coordination among like-minded nations has been the political offense doctrine, which holds that one nation should not extradite to another a fugitive accused of a political offense.[3] As it happens, the term "political offense" has different meanings in different legal systems, and its scope is imprecise in each.[4] Generally, its scope is broad enough to include uses of force in an effort to otherthrow or oppose a government. The result is that many offenses that one state might decry as terrorism involve a political aspect and are classed by another as political offenses, so that cooperation in the form of extradition is withheld.[5]

The tension between the widespread urge to cooperate in punishing terrorism and the established practice of declining to cooperate in punishing political offenses has led to efforts to limit the scope of the political offense doctrine. The underlying philosophy seems to have been that, because the general rule is that states will extradite fugitive offenders, the political offense doctrine constitutes a deviation to be eyed with suspicion. This approach has been described aptly as an attempt to create an exception to the exception to extradition.[6]

The imagined vulnerability of the political offense doctrine to the knives of anti-terrorism theorists has not been demonstrated in practice. On a global scale, minor excisions have been accomplished for offenses against civil aviation,[7] offenses against diplomats,[8] and of-

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3. The doctrine is recognized so widely that it has been described as a rule of customary international law. M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 32-33 (3d ed. 1977).

4. *See infra* notes 19-23 and accompanying text.

5. Historically, formal denials of extradition requests on political offense grounds have been rare, but there have been four instances in the past decade: *In re* McMullen, Mag. No. 3-78 M.G. (N.D. Cal. May 11, 1979), *reprinted in Extradition Act Of 1981: Hearings On S. 1639 Before The Senate Comm. On The Judiciary*, 97th Cong., 1st Sess. 294 (1981); Mackin v. Grant, 668 F.2d 122 (2d Cir. 1981); Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986); Matter of Doherty, 559 F. Supp. 27 (S.D.N.Y. 1984). The next most recent refusal appears to be In re Gonzales, 217 F. Supp. 717 (S.D.N.Y. 1963).

6. 2 M. BASSIOUNI, INTERNATIONAL EXTRADITION §§ 2-79 (1982) [hereinafter EXTRADITION].

7. Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, *entered into force* for the United States Dec. 4, 1969, 20 U.S.T. 2941, T.I.A.S. No. 6768; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, *entered into force* for the United States Oct. 14, 1971, 22 U.S.T. 1641, T.I.A.S. No. 7192; and Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, *entered into force* for the United States Jan. 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570.

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fenses involving hostage-taking.[9] However, an attempt to exclude from political offense treatment offenses "involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons,"[10] was a resounding failure even among the nations of Western Europe, which have an outstanding history of legal coordination, including coordination of criminal law systems.[11]

In the wake of this failure to achieve consensus as to which political crimes merit international suppression, the United States and the United Kingdom have agreed bilaterally to eliminate political offense status for virtually all conduct that is violent or potentially violent, and several non-governmental proposals that would eliminate political offense status for most political violence are receiving serious attention.[12] Also, at the close of the 1986 session, the U.S. Congress issued a call for a global convention to punish terrorism, possibly one featuring a globally applicable definition of that troublesome term.[13]

Thus, two contrary currents are in evidence. On the one hand, most Western nations have shown a preference for the *status quo* over radical reductions of political offense coverage; on the other, two nations and many theorists have shown a tendency to regard the doctrine as expendable. Unless the superiority of the latter approach can be demonstrated, or the policies underlying the two tendencies can be reconciled, a new proposal for a global convention is likely to suffer the same fate as the last U.S. proposal which languished and died in the United Nations.[14] The only remaining hope for progress

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8. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 19, 1973, *entered into force* for the United States Feb. 20, 1977, 28 U.S.T. 1975, T.I.A.S. No. 8532.

9. International Convention Against the Taking of Hostages, Dec. 17, 1979, *entered into force* for the United States Jan. 6, 1985, _ U.S.T. _, T.I.A.S. No. _

10. European Convention on the Suppression of Terrorism, Art. 1(e), Nov. 10, 1976, *entered into force* Aug. 4, 1978, E.T.S. No. 90, *reprinted in* 15 I.L.M. 1272 (1976) [hereinafter European Convention].

11. The failure concerns only Article 1(e), which was rendered ineffective by reservations registered by nearly all signatories. Five sample reservations are *reprinted in* TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 573-74 (R. Friedlander ed. 1983). An attempt to re-vitalize the convention was the Dublin Agreement, *reprinted in* 19 I.L.M. 325 (1980).

12. Supplemental Treaty Concerning Extradition Between the United Kingdom and the United States, S. EXEC. RPT. 99-17, July 15, 1986, _ U.S.T. _ T.I.A.S. No. ___ It excludes from political offense treatment nearly all violence-oriented acts. Other proposals hostile to the political offense doctrine are discussed in J. MURPHY, PUNISHING INTERNATIONAL TERRORISM 124-36 (1985) [hereinafter MURPHY].

13. Omnibus Antiterrorism Act of 1986, Pub. L. No. 99-399, § 1201, 99 Stat. 403-04.

14. Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, U.N. Doc. A/C.6L 850 (1973).

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would then seem to be further incremental agreements treating extremely specific conduct. Such a process of defining terrorism through an exhaustive listing of narrow examples would take a very, very long time.

The possibility must be considered that different nations will be unable to unite behind a single definition of terrorism. However, this would not preclude all possibility of agreement on how to respond to a category of offenses that would include most conduct labeled by various nations as terrorism. It would only preclude an automatic punitive response, and other responses are possible.

That is to say, once the presumption that automatic punishment is the essential outcome for any agreement relating to terrorism is set aside, the need for a precise definition of "terrorism" as the predicate may also be set aside. Such a shift from substantive definitional quandaries would permit concentration on procedural consequences. Specifically, attention could be focused on proposals for acceptable procedures for handling a definable category of violent political conduct.

To see why such a shift is necessary and what kinds of procedures might be acceptable, it is necessary to probe deeply into the policies underlying the treatment nations have given to foreign political offenses.

The thesis of this article is that failure to fully appreciate the policies implicated by the political offense doctrine has resulted in needless sacrifices of important interests in two ways. On one hand, blind adherence to poorly understood traditions has led most states to immunize some conduct even when those states had no interest in doing so. On the other, an over-reaction to terrorism has led the United States and the United Kingdom to commit themselves to punishing some conduct for which punishment may be contrary to their separate interests.

The exposition begins with a review of the historically-noted rationales for the political offense doctrine. It continues with an examination of that doctrine in relation to overall extradition practice. There follows an attempt to relate essential features of extradition practice with criminal law policies of individual states. This culminates in an inventory of the various interests at stake when conduct in the nature of a political offense is in issue.

Next, an interest alignment framework is used to illustrate the relative effectiveness of several possible approaches to such issues, including the latest Western European initiative and a quite novel approach utilizing an international decision-making mechanism. The

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superiority of the novel approach is demonstrated, and options for implementing it are sketched.

I. POLITICAL OFFENSE DOCTRINE IN HISTORICAL PERSPECTIVE

Any attempt to reconcile competing legal rules requires sensitivity to the policies underlying each. The policy basis for a rule that would require criminal law cooperation against terrorism is a presumption that, because most states regard conduct in the nature of terrorism as criminal, states have a common interest in suppressing it. That presumption has intuitive appeal and it encourages the expectation that, to the extent states can agree on what conduct should be classed as terrorism, such states will be willing to cooperate in suppressing it.

However, the political offense doctrine establishes that, for at least some conduct, cooperation has been withheld despite the fact that such conduct is proscribed by all states. Thus joint proscription does not always lead to recognition of a common interest in suppression. Accordingly, it is appropriate to attempt to identify the policy basis for this extraordinary, counter-intuitive doctrine.

The most ambitious exploration of the political offense doctrine is a relatively recent treatise by Dr. Christine van den Wijngaert, a Belgian legal scholar.[15] She offers a painstaking examination of the emergence and operation of the doctrine and of prior commentaries regarding it. A review of some of the highlights of the history of the doctrine is useful.

A. The Received Doctrine

The doctrine emerged in post-Napoleonic European republics first as a matter of extradition practice, then in statutory form.[16] It was obviously responsive to the view that people may oppose their sovereigns, a view that inspired the American Revolution as well as the French Revolution that spread republicanism across Europe, and a view that was actively opposed at the time by Britain, Austria and Russia, which were openly endeavoring throughout the Continent to restore monarchies.[17]

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15. C. VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION (1980) [hereinafter WIJNGAERT].

16. *Id.* at 10-14.

17. *Id.*

From an early point it was recognized that the doctrine embraced not only "pure" political offenses, but also "mixed" ones.[18] The former, typified by treason and espionage, involve conduct that is proscribed for political reasons and to protect a particular sovereign. In contrast, mixed political offenses involve conduct that is proscribed generally, but which is done for a political purpose. A simple example would be killing a guard at an armory in order to obtain arms to wage a revolution. By itself the killing would constitute murder and be extraditable but the revolutionary purpose would raise an issue under the political offense doctrine.

Such issues are determined by each asylum state according to its own standard. The doctrine has spawned three general types of standards, each of which focuses on the relation between the ordinary crime and the political aspect.

The first is exemplified by the French political objective test, which requires that the target be some arm of the state in order for the offense to qualify. Application of this standard by French courts may in practice be sensitive to positions of the government leadership, however.[19]

The second, the Swiss political motivation test, requires that the dominant motive be political and that the harm caused be proportionate to the political goal.[20]

The third, generally called the Anglo-American political incidence test, has two branches. Under both it is required that the offense have been incidental to a general uprising.[21] Under the American branch it is apparently necessary that the uprising have been one that created the prospect of overthrowing a government, at least in a given locality.[22] This test is actually the old British test because the United States, several decades after forcibly breaking its ties with the British monarchy, chose to adopt Britain's political offense standard rather than that of France, its ally during the American Revolution and the Napoleonic wars. In the United States the standard has remained frozen, while British courts have softened it

18. *Id.* at 109-10.

19. Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformed and New Norms Created*, 1 A. STUD. INT'L L. 1, 33-40 (1977). *See also* Blakesley, *Extradition Between France and the United States: An Exercise in Comparative and International Law*, 13 VAND. J. INT'L. L. 654 (1980).

20. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226 (1962).

21. *Id.*

22. Cantrell, *The Political Offense in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQ. L. REV. 777 (1977).

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somewhat so that now uprisings against such local authorities as ship captains apparently qualify.[23]

B. Historical Rationales

Van den Wijngaert found no coherent historical explanation in terms of international law policy for the doctrine's automatic immunization of offenses qualified as political under such standards. She was able to discern four rationales that have been offered to justify the traditional practice of immunizing political offenses, but she found them woefully inadequate.[24]

First, the doctrine prevents human rights violations by preventing delivery of fugitives to states where they might face unfair trials or other forms of persecution due to the political aspects of their conduct. She counters, however, that there is not always a risk of persecution in the requesting state, so that denying extradition for all political offenses is a ridiculously over-inclusive approach. An obviously better-tailored approach would be to deny extradition only when a risk of persecution exists. Moreover, concern for persecution offers no justification for failing to consider local prosecution when extradition is not proper.[25]

The second rationale offered is that non-extradition preserves the neutrality of the requested state in that it is not required to side with another state's government against that government's enemies. Van den Wijngaert notes that non-extradition may be regarded as siding with that government's enemies.[26]

Third, it is said that political offenses do not threaten world public order because they are inherently local in focus. Apparently the argument is that one who has killed a guard at an armory in State A to further a revolution there is not likely to kill anyone in another state. Van den Wijngaert counters that some offenses may reveal a readiness to cause great harm for ideological purposes that may be

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23. Comment, *Unraveling the Gordian Knot: The United States Law of International Extradition and the Political Offense Exception*, 3 FORDHAM INT'L L.J. 83 (1980), and Recent Decisions, *The Political Offense Exception in Extradition: A 19th Century British Standard in 20th Century American Courts*, 59 NOTRE DAME LAW. 1005 (1984).

24. WIJNGAERT, *supra* note 15, at 2-10, 203-07. MURPHY, *supra* note 12, at 45, attributes three rationales to WIJNGAERT, citing pages 2-10. It does seem that her discussion and critique of rationales is pervasive, and that different readers may form differing impressions as to the number of rationales treated.

25. WIJNGAERT, *supra* note 15, at 205.

26. *Id.* at 204.

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insubstantial or that may be served in other settings, making such offenders dangerous to all societies.[27]

Finally, it has been argued that the wrongfulness of political offenses tends to be relative, meaning that a revolutionary group may consider its harmful conduct justifiable while the government opposing it considers such conduct criminal, and the outcome of the struggle will determine what the law of that state will be on this point. Van den Wijngaert counters that this factor need not prevent an uninvolved court from making its own determination of wrongfulness.[28]

The weaknesses Van den Wijngaert points out in the policy bases she describes are striking. The image that emerges is one of a doctrine that runs counter to policy at least as often as not. One would expect such a doctrine to topple in the face of even relatively crude attempts at reform.

However, the traditional political offense doctrine has suffered only minor dents in a half-century of reform efforts. Its resistance to the 1977 European terrorism convention's efforts to create new and substantial dents is especially remarkable because that convention seemed responsive to precisely the policy problems noted by Van den Wijngaert. It contained an anti-persecution clause and mandated local trials when extradition was refused under that clause.[29] Also, it focused on specific classes of conduct associated with great harm,[30] and it was to apply among Western European states having similar forms of government and subject to the European human rights convention,[31] so there was no obvious reason why one such state would regard such harmful conduct as justifiable when directed at the government at another.

Van den Wijngaert apparently attributes the utter failure of the European terrorism convention to make further inroads on the political offense doctrine to technical defects and to nostalgic attachment to the idea of political asylum within Europe.[32] However, it is difficult to believe that technical defects—especially those she highlights—could not be remedied in the course of negotiations or by introduction of a new proposal once the original's failure became ap-

27. *Id.* at 205.

28. *Id.*

29. European Convention, *supra* note 10, at Art. 5.

30. *Id.* at Art. 1(e).

31. European Convention for the Protection of Fundamental Human Rights and Freedoms, E.T.S. No. 5 (1950) [hereinafter Human Rights Convention].

32. WIJNGAERT, *supra* note 15, at 150-52.

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parent. That would leave only nostalgia as an explanation for retaining a doctrine lacking policy validity in the face of a reform proposal responsive to relevant policies. This seems improbable, particularly in view of the countervailing emotional impetus to eliminate all obstacles to suppression of terrorism.

Accordingly, the suspicion seems warranted that the image of policy implications offered by Van den Wijngaert is flawed. In view of the thoroughness of her research and thoughtfulness of her analysis, however, the possibility must be considered that the doctrine's purposes cannot be fully understood through historical international law policy inquiry. This suspicion is further supported by the apparent inability of opponents of the terrorism convention to explain their opposition in policy terms rather than as blind adherence to tradition.

C. The Relevance of Interest Alignment

Such a suspicion is also justifiable on a broader basis because the political offense doctrine is a creature of not only international law but of states' criminal law systems as well, and where such systems of law intersect, analysis may require sensitivity to policies of more than one system. Attempts to identify patterns of behavior that reflect such policies may require a broader base of data.[33] That is, issues of this kind must be analyzed not simply in terms of international law policies, but in terms of states' criminal law policies as well.

The goal of broadened inquiry is to note all non-frivolous interests of the relevant legal systems in order to examine the effects on them of alternative outcomes or actions in relation to the conduct of concern, political offenses. In view of the likelihood of confusion in past efforts to analyze such matters, interests asserted by prior authorities must be validated by behavioral data, and behavioral data must be examined for indications of hitherto unnoticed interests. The point last mentioned seems particularly apt in relation to a phenomenon that has endured for a relatively long period because the interests that brought it into existence may have lost their force, but the same phenomenon may also tend to serve other interests that have emerged over time.

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33. The author makes the full argument for this proposition in Derby, *An Analytical Framework for International Criminal Law: Realism and Interest Alignment*, 1 TOURO L. REV. 57 (1985).

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II. BASIC PATTERNS OF CRIMINAL LAW COOPERATION

A. *Extradition—Aut dedere, aut punire*

The publicity and concern relating to handling of terrorism may distort popular perceptions as to the openness of states to cooperation in suppressing crime. The reality is that there is a great deal of cooperation where ordinary crimes are involved, and there are few legal impediments to achieving cooperation among larger numbers of states or achieving greater degrees of cooperation among a group of states.

The former point is illustrated by the success of the United States in negotiating extradition treaties with well over half of the nations of the world.[34] The latter is illustrated by the success of the United States in achieving agreements on prisoner transfer with several of the nations in which U.S. citizens are especially apt to be convicted of crimes.[35] However, the best example of a high degree of cooperation among states in these matters is the Council of Europe's series of conventions, which include not only extradition and prisoner transfer, but also cooperation in handling evidence and transfer of criminal proceedings.[36]

The principal form of cooperation is extradition, and the general receptiveness of states toward extradition arrangements seems responsive to Grotius' maxim, "*aut dedere, aut punire.*" States should either extradite or prosecute persons accused of common crimes.[37] Most states require a treaty before they will comply with an extradition request, but some will extradite on the basis of reciprocity—an understanding that a future request in the reverse direction will be honored.[38] Moreover, even states that insist upon treaties may use an *ex post facto* treaty to cooperate against an earlier offense.[39]

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34. *See* EXTRADITION, *supra* note 6, at v. 2, Table of Current Treaties; an updated listing is also available at 18 U.S.C.A. § 3181 (West 1987).

35. 18 U.S.C.A. § 4100.

36. There are seventeen conventions relating to criminal cooperation among members of the Council of Europe. For a general discussion, see Muller-Rappard, *Judicial Assistance and Mutual Cooperation in Penal Matters—The European System*, in 2 INT'L CRIM. LAW 95 (M. Bassiouni ed. 1986).

37. EXTRADITION, *supra* note 6, § 2-1 (citing H. GROTIUS, 2 DE JURE BELLI AC PACIS §§ 3-4 (1625)).

38. A. BILLOT, TRAITE DE L'EXTRADITION 422-23 (1874).

39. *In re* De Giacomo, 7 F. Cas. 366, 368 (S.D.N.Y. 1874) (No. 3,747).

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There are several particular conditions that must be satisfied for cooperation in the form of extradition to occur, but there is only one major principle that limits occasions for cooperation. One condition is that requests for extradition must relate to conduct that occurred in a place both states consider to be the territory of the requesting state.[40] Another is that states lacking capital punishment will extradite to states that have such punishment only upon satisfactory assurance that capital punishment will not be applied.[41] There are other qualifications as well.[42] Also, most nations will not extradite their own nationals, but such states are often able to provide comparable cooperation in crime suppression by virtue of their use of active-nationality jurisdiction, which permits local punishment of nationals for criminal conduct abroad.[43]

B. The Sine Qua Non—Double Criminality

The crucial limitation, however, is the requirement that the conduct in question be proscribed not only according to the laws of the state within which it occurred, but also according to the laws of the requesting state. This is called the double-criminality requirement, and unless it is met there will be no extradition or any other form of cooperation.[44] It is not necessary that proscriptions be identical so long as the conduct is prohibited by both and the policies underlying the prohibitions are similar.[45] Also, it is standard practice to ignore the possibility that there may be differences in the criminal defenses available in the two legal systems.[46]

The above conditions are necessary for cooperation, and they are sufficient, in relation to most offenses. However, three kinds of offenses are said to be exceptions to the general rule that cooperation follows when those conditions are met. They are fiscal offenses, military offenses, and political offenses.[47] However, it can be shown

40. EXTRADITION, *supra* note 6, at § 2-2. *But cf.* H. GRUTZNER, INTERNATIONALEN RECHTSHILFEVERKEHR IM STRAFSACHEN (1955) (cited in EXTRADITION, *supra* note 6, at § 3-3).

41. EXTRADITION, *supra* note 6, at § 5-1.

42. *Id.* at § 6 (Specialty—meaning that an offender can be tried in the requesting state only for crimes mentioned in the request and approved by the requested state); *id.* § 4-4 (no prior prosecution for the same offense); *id.* § 4-12 (limitation periods unexpired).

43. *Id.* at § 2-3.

44. *Id.* at §§ 5-1 to 5-26.

45. *Id.* at 22-23.

46. *Id.* at § 5 discusses only similarity of proscriptions and establishment of a *prima facie* case. *See also* Feller, *Double Criminality in the Law of Extradition*, 10 ISR. L. REV. 51 (1975).

47. EXTRADITION, *supra* note 6, at §§ 2-113, 2-109, 2-1.

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rather easily that each of these offenses is designed to protect only one sovereign's interests, which suggests that, despite similarity of states' proscriptions, these offenses do not actually satisfy the double-criminality requirement.

For fiscal offenses, an interesting example is provided in Thoreau's incarceration for refusal to pay a poll tax whose proceeds were earmarked for financing the U.S. war with Mexico.[48] Obviously, the offense for which he was jailed was one designed to serve the interests of one sovereign at the expense of another.

Military offenses obviously have a similar quality where sovereigns are hostile to one another. It clearly would be contrary to the interests of a nation to use its regulations punishing absences without leave (AWOL) in its army to deter AWOL offenses in an opposing army. The case of allied armies, especially in wartime, seems very different, but the difference underlines the point that such offenses are designed to serve one sovereign, and that the question of whether it should also serve another is not one addressed in the design of the proscription. Indeed, it would be difficult to do so in relation to allies because alliances change and similarity of purposes of allied armies may vary.

Pure political offenses present the same aspect as military offenses. For example, to a given nation, the harmfulness of espionage against any other nation cannot be assessed without considering such unusual factors as the identity of the victim and beneficiary nations and the status of its relations with each nation.[49]

C. *Mixed Political Offenses—The Sole Exception?*

This would leave mixed political offenses as the only true exception to the general rule. However, the fact that the above three classes of offenses have been mischaracterized as exceptions indicates that the general rule is more pervasive than had been thought, and that false exceptions have been identified in the past. This suggests that the status of mixed political offenses as satisfying double-criminality should not be accepted blindly.

A closer examination of the nature of political offenses suggests that in fact they do not satisfy the double-criminality requirement.[50]

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48. H. THOREAU, ON CIVIL DISOBEDIENCE (1854).

49. An excellent example of the policy dynamics of espionage is provided by the controversy surrounding the conviction in the United States of Jonathan Pollard on charges of spying for Israel, a close U.S. ally. NEWSWEEK, Mar. 16, 1987, at 26.

50. This observation, though seldom discussed in the literature, is not original, at least in relation to pure political offenses. *See* Marcus and Talloz, *Les Problemes Actuels de l'Extradition*, 39 REV. INT'LE DE DROIT, PENAL 611 (1968) (cited in WIJNGAERT, *supra* note 15, at 107 n.580).

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What makes this apparent is the recognition that the fact that conduct is proscribed by a given legal system is not a sufficient condition to make such conduct punishable; the conduct must also be indefensible.

An example may serve to introduce the discussion or defensibility that follows. A suitable one is Thoreau's incarceration for non—payment of war tax, modified to include an escape from custody in which Thoreau broke the jaw of a guard. The additional conduct, in the context provided, could qualify as a mixed political offense in that the escape and assault are ordinary crimes serving political ends. The escape would deprive the legal system of some of the general deterrent impact it sought to achieve by demonstrating that those who failed to pay the tax would be jailed, which could undermine the effectiveness of the tax and war policy. The escape might also enable Thoreau to spread his anti-war views more effectively than from jail.

Within the U.S. legal system, Thoreau would lack any legal defense because his guard's efforts to keep him in custody were pursuant to lawful authority. However, it would be intensely ironic for any nation that hoped to see Mexico win its war with the U.S. to extradite a fugitive Thoreau to the U.S. for such conduct.

Thus, although each national punishes those who resist its own agents in the course of their lawful efforts to enforce its own laws, different states do not necessarily have the same interest in punishing a particular act. The problem may be perceived as one of mere politics, but the possibility that different notions of substantive criminal law defensibility are at work merits consideration.

III. POLICY AND DOUBLE-CRIMINALITY

A. *Criminal Law Basics*

It may seem obvious that shared notions of wrongfulness are the impetus behind the double-criminality requirement. However, reliance on intutition alone is unwarranted where systematic analysis is possible. Moreover, it seems especially dangerous to rely on intuition alone where the undefined concept of "wrongfulness" is being transported from system to system.

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In order to pinpoint the policy basis for the double-criminality requirement, it is necessary to return to fundamentals of criminal law and cooperation.

The two most basic principles of criminal law are reflected in the Latin maxims *nullem crimen sine lege* and *in dubio pro reo.* That is, without a proscription there is no crime, and any doubt benefits the accused. U.S. lawyers are more familiar with the former in terms of the Constitutional prohibition of *ex post facto* laws,[51] and with the latter in terms of the presumption of innocence in criminal cases.

The requirement of a prior proscription establishes that, even where harm has occurred, and a social protection interest in punishing conduct has arisen, that interest must be sacrificed. This is done for the sake of the interest of individual autonomy on the basis that interferences with such autonomy should be minimized, and that punishment without advance warning is an unnecessarily great interference. After all, a warning that particular conduct would be punishable might have been sufficient to prevent it.

The presumption of innocence also reflects a willingness to sacrifice the interests to be served by punishment in favor of protecting the interest of individual autonomy. While the requirement of a prior proscription mandates for one situation that individual autonomy must prevail even when it is clear that this will frustrate a social protection interest, the presumption of innocence mandates, for all doubtful situations, a general preference for individual autonomy over social protection.

These two principles are also cornerstones of the law of international criminal cooperation and it is upon them that the doctrine of double-criminality rests.

B. Interests and Double-Criminality

1. Criminal law cooperation

Where the state in which an accused is found has no proscription that would render his conduct punishable, it is obvious that such a state—the requested state—has either no social protection interest that would warrant interference with individual autonomy in relation to such conduct or no way to serve such a social protection interest without violating the requirement that there be a prior proscription. Accordingly, had the conduct occurred within the requested state, that state would have suffered the supposed harm, yet it would not

51. U.S. CONST. art. I, § 8.

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have sacrificed that individual's autonomy for the sake of social protection, and this would be the case even if that state had since come to believe that the harm was real.

The fact that the conduct occurred in another state which proscribed it must be evaluated with care. It indicates that the other—requesting—state has a continuing belief that such conduct is harmful, and that it has satisfied the prior proscription requirement so that it can take protective action.

However, the action at issue, once an extradition request is received, is action by the *requested* state. If it does not regard the conduct as harmful, granting extradition would involve it in an interference with individual autonomy for the sake of social protection it regards as unwarranted. Even if it has come to believe that social protection is warranted, granting extradition for an offense that occurred before enactment of its own proscription would involve it in punitive action for which it had provided no timely warning. Because the requested state would not take such action to serve its own social protection interests, it follows *a fortiori* that it would not take such steps merely to serve the interests of another state.

If the attitude of the requested state concerning the need for social protection were characterized as uncertain, the result would be the same due to the presumption of innocence.

The next situation to be considered is the reverse—the requested state has a proscription but the requesting state does not. It is obvious that the requesting state's failure to satisfy the prior proscription requirement should bar it from punishing the conduct in question even if it were acting alone. Because it would regard itself barred under the same circumstances even though its own interests had been harmed, it follows that the requested state would not help another state punish such conduct when its own interests had not been harmed.

However, there remain questions concerning the possible social protection interests of the requested state. The accused, who was residing there when the extradition request was sent, may have engaged in conduct elsewhere that the requested state would consider harmful had it occurred within its territory. Because criminal law uses prior conduct as a basis for measures of social protection, it may appear that the requested state should prosecute such an accused.

Whether this is so depends in no way on the fact that an extradition request was received. It depends instead on the two fundamental

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principles of prior proscription and presumption of innocence, plus the behavior to date of the requested state's legal system.

2. Self-interest of the asylum state

If the accused is a national of the requested state, it is possible that the requested state's proscription would be applicable to his conduct abroad by virtue of an active-nationality jurisdictional provision. For civil law states, such jurisdiction would be likely, thus permitting local prosecution.[52] However, in common law states, such jurisdiction is used sparingly, and it is interesting to note that the offenses for which it is generally used are ones for which extradition is generally unavailable.[53]

It should be noted that the different behavior of common law and civil law systems is complementary to their different treatment of extradition of nationals. Common law systems extradite their nationals, but civil law systems do not.[54] As a result, civil law systems generally are able to serve their social protection interests where their nationals' conduct requires it, but common law systems appear to be largely dependent on extradition to do so.

If the accused is not a national of the requested state, it is unlikely that a local prosecution will be possible because it is unlikely that the requested state's proscription will be applicable, and an *ex post facto* extension of applicability seems unacceptable as a violation of the prior proscription requirement.

Alternatively, if the accused's conduct happened to harm nationals of the requested state, its proscription might be applicable if it employed passive-nationality jurisdiction. However, such jurisdiction is not widely used in all civil laws systems and it is used hardly at all by common law systems.[55] Otherwise, there is little likelihood of an applicable requested state proscription. Some unusual offenses might be covered by common proscriptions, such as offenses directed at governmental interests of that state[56] or calculated to have an effect

52. *See, e.g.*, EXTRADITION, *supra* note 6, at § 3-1; Sarkar, *The Proper Law of Crime in International Law* [hereinafter Sarkar], in INT'L CRIM. LAW 50 (G. Mueller and E. Wise eds. 1965) [hereinafter Mueller & Wise].

53. *Id.*; United States criminal laws that follow nationals abroad apparently are limited to treason, espionage, tax fraud, and formerly, draft evasion. *See generally* George, *Extraterritorial Application of Penal Legislation*, 64 MICH. L. REV. 609 (1966).

54. *See supra* note 43.

55. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES § 30(2); Harvard Research Draft Convention on Jurisdiction with Respect to Crime, in Mueller & Wise, *supra* note 52, at 41.

56. *See supra* notes 52 and 55.

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within the state.[57] Only a few states appear to have proscriptions that are made applicable to alien conduct abroad merely because the alien has come into their territory or seeks citizenship.[58]

This does not mean that a non-national accused whose alleged conduct does not fit the categories just discussed will always be permitted to remain in the requested state. Deportation may be possible, and it seems especially apt when there is reason to believe the accused is likely to engage in similar conduct in the future within the requested state. However, deportation may be impossible for any of several reasons.

First, deportation requires that some other state be willing to receive the individual, and where the individual is accused of a common crime, it is quite possible that the only one willing to receive him would be the one that requested his extradition. Second, the fact that a state is willing to receive the individual is not always sufficient; international law forbids returning an individual to a state where he faces persecution,[59] and deportation to a state that would try him despite its lack of a prior proscription would violate international human rights obligations.[60]

C. Assessment

The foregoing permits useful observations concerning principles reflected in the use of double-criminality as a condition for criminal law cooperation. The first is simply that double-criminality is a necessary implication of the basic principles found within each state criminal law system. It should also be noted that those basic princi-

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57. *Id.*

58. SWEDISH PENAL LAW § 3 (G. Mueller ed. 1972).

59. Convention Relating to the Status of Refugees, Art. 33(1), July 28, 1951, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1954; and Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, *entered into force* Oct. 4, 1967, which extends the Convention to cover events after 1951. However, Art. 33(2) mitigates the duty not to expel:

> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Convention Relating to the Status of Refugees, Art. 33(2), July 28, 1951, 189 U.N.T.S. 137, *entered into force* Apr. 22, 1984.

60. *See, e.g.*, Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration], which asserts in Art. 11(2): "[N]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law at the time it was committed."

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ples, prior proscription and a presumption of innocence, are universally acknowledged and are therefore suitable for interpreting any doubtful rule of international law.[61] Also, the double-criminality requirement is so widely acknowledged that it constitutes a custom, and it is so widely regarded as a legal necessity that it can be said to qualify as a customary international law rule.[62]

The next is that double-criminality establishes that a requesting state has no right to cooperation unless the conduct alleged is contrary to a proscription of the requested state. A correlative is that the requested state has no duty to extend cooperation unless that condition is satisfied.

Also, the requested state may have a duty under human rights law to withhold cooperation where the defect in double-criminality is that the conduct was not proscribed in the requesting state, and if the conduct was not proscribed in the requested state, its interests will be contrary to cooperation.

Moreover, no state takes criminal law action adverse to an individual unless its own social protection needs are clear, and a state will even refrain from social-protection action when the need for it is clear if the particular action would violate a basic principle of criminal law or a rule of international law.[63]

The conditions under which a particular state will see a clear social protection need based on prior conduct abroad by a person now within its territory are suggested by state practices in applying one's own proscriptions to such conduct. The generalization seems warranted that states appear to make their proscriptions applicable to conduct abroad whenever it is foreseeable that violation of such a proscription will threaten their own societies. However, most states have no criminal law mechanism for social protection for most conduct elsewhere involving only aliens, despite the fact that such conduct would have constituted a crime if done locally.

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61. Statute of the International Court of Justice, June 26, 1945, *entered into force* for the United States, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993, Art. 38(1)(c).

62. EXTRADITION, *supra* note 6, at § 4-1 (citing I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 132-49 (1971) and S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 69-84 (1968), as well as United States cases).

63. The prior proscription requirement, *supra* note 60, is an example of a basic principle that prevents social protection when a state's recognition of the need for protection produces a proscription only after harm has occurred. A drastic example of an international law rule with similar impact is the diplomatic immunity rule, which prevents punishment of foreign diplomats even for serious common crimes. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, *entered into force* for the United States, Dec. 13, 1972, 23 U.S.T. 3227, T.I.A.S. No. 7502, Art. 29.

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The last point permits a final observation, one that may be somewhat counter-intuitive. Most state criminal law systems do not seem to recognize a clear social protection need when proscribed conduct occurs beyond their territory and involves only aliens.

With these gleanings in mind, it is now possible to consider the matter of defenses to crimes. As mentioned above, it is generally said that defenses are irrelevant to double-criminality analysis. However, there is cause to be wary of truisms in this field, and the strength of the policies that reign in double-criminality analysis of proscriptions make it seem curious that defensibility should have been ignored altogether.

IV. WRONGFULNESS AND DEFENSIBILITY

A. Sovereigns and Political Offenses

In order to see the defensibility factor in multi-jurisdictional perspective, it is helpful to focus first on the essence of defensibility for offenses like mixed political offenses, but to do so without assuming the relevance of any one specific system. General arguments that might be formulated by a lay person can be identified and related to legal standards.

1. Sovereign's law, sovereign's courts

One such argument would be that the harm done was less than the harm the actor sought to avoid. Thus, Thoreau might argue in the modified example that a jailer's broken jaw is a minor harm compared to thousands of deaths and wounds in a senseless war, and that Thoreau's actions made the occurrence of the much greater harm somewhat less likely. All criminal law systems recognize a defense along these lines under such labels as necessity, lesser of evils, or defense of others.[64]

If argued to a lay audience, the persuasiveness of such an argument would depend largely on how members of the audience felt about the Mexican War, with those favoring U.S. policy being less likely to be persuaded. If argued instead to a U.S. court, as in a bench trial or on a motion for acquittal, the wisdom or desirability of U.S. policy would be legally irrelevant, and unless that policy were unlawful, the defense would be rejected out of hand. The reason is

64. *See* G. FLETCHER, RETHINKING CRIMINAL LAW 818-29 (1978).

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that in weighing evils, the sovereign that has created a legal system has its finger firmly planted on the scale, refusing to consider as harmful anything required or permitted according to that sovereign's laws.

What is important to recognize is that the same argument, based on the same facts, but in a court of a non-U.S. legal system, would seem to require a genuine weighing of the harm caused and the harm avoided, and a *genuine* weighing could produce a different result. This is persuasive evidence that at least some mixed political offenses can have a sovereign-oriented quality that violates the requirement of double-criminality.

A somewhat different argument resembling a legal plea of self-defense could also fit the above hypothetical, but another, more current example may be more effective. A television news producer taking action to prevent seizure of news film intended for broadcast might make an argument resembling a legal plea of defense of property, and if the producer himself were about to be abducted his action might fit self-defense. However, if those trying to seize the film from the producer were polite acting under lawful authority, these defenses would be unavailing in a court of that legal system.

2. A second sovereign, double-criminality

This causes double-criminality problems in three ways. First, in another state where such a fugitive might be found, there is the problem alluded to above of assessing the adequacy of a defense involving resistance to lawful authority where the lawful authority is that of another state. Even where both legal systems would authorize their own agents to take the same enforcement efforts under the circumstances in question, this is not a frivolous issue.

Universal criminal law principles indicate that sovereigns are well aware that law enforcement efforts interfere with individual autonomy. That sovereigns routinely sacrifice such autonomy to serve the interests their own laws serve indicates how readily each sovereign favors its own interests over conflicting interests in individual autonomy. However, sacrificing such interests for the sake of another sovereign is different. This is particularly true where a political offense is involved, for in such a setting the other sovereign is defending its self-interest in maintaining its power, rather than performing its usual role of defending the separate interests of the society it represents.

Second, the issue is sharper where the legal system of the state where such an offender has filed would not authorize its own agents

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to take such action under identical circumstances, for then one state is asked to sacrifice individual autonomy to a greater extent for the protection of another sovereign's power than it would to protect its own. Differences of this kind are not unusual, and the situation described above constitutes a useful example.

Such a seizure occurred in the United Kingdom recently, although apparently no one resisted police actions. The actions included scrutinizing numerous British Broadcasting Corporation videotapes in order to find the offending item, one that apparently threatened to embarrass the government, but that would have revealed no information posing a serious threat to national security.[65] The seizure of the film—dealing with a spy satellite program about which Parliament was kept uniformed—created great controversy, but there seems to be agreement that the seizure was lawful under the Official Secrets Act.[66]

In contrast, a similar effort by an incumbent U.S. administration to prevent dissemination of The Pentagon Papers,[67] which also threatened embarrassment but did not jeopardize national security, was frustrated by court action declaring such "prior restraint" illegal.[68] As a result, a journalist, who believed that use of embarrassing facts against a government was an important enough political or civil right that he would be willing to resist any efforts by law enforcement agents to prevent such dissemination, might face a very different fate depending on where he was working. In the U.K., his determination might be put to the test by agents acting with lawful authority, but in the U.S. this would be virtually unthinkable; that is, the same disposition would cause him to become a criminal in the U.K., but not in the U.S.

A third complication is also possible. Even if both states were in agreement that such interferences with news dissemination were illegal, there would remain the possibility that government agents might still attempt such an interference. This could lead to resistance that would raise the question of defensibility of opposition to government agents where they exceed their authority. The common law rule inherited by the United States from Great Britain was that resistance by reasonable force to prevent an unlawful arrest was defensible,[69]

65. NEWSWEEK, Feb. 16, 1987, at 43.

66. Official Secrets Act (1911), 1 & 2 Geo. 5c. 28, 8 HALISBURY'S STATUTES OF ENGLAND 250 (3d ed. 1969), § 2, "wrongful communication, etc., of information."

67. New York Times Co. v. U.S., 403 U.S. 713 (1971).

68. The doctrine is discussed in the separate opinions in 403 U.S. at 715.

69. Chivigny, *The Right to Resist Unlawful Arrest*, 78 YALE L.J. 1128, 1129-30 (1969).

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but most states in the U.S. have since abandoned that rule, reasoning that the dangers attending resistance outweigh the dangers attending submission to unlawful arrest.[70] That reasoning, however, was based on the circumstances those states' courts observed, including the smooth operation of a legal system that featured, among other safeguards, the possibility of a prompt release via a writ of habeas corpus as a remedy for unlawful arrest.[71]

At the hands of different judges or in varied settings, such reasoning could lead to different results. In fact, some states in the U.S. adhere to the old common law rule despite nationwide availability of *habeas corpus* and uniform federal constitutional protection overseen by the United States Supreme Court. A different setting worth considering is one part of the United Kingdom—Northern Ireland—where preventive detention is authorized, based on expected future conduct of detainees. No prompt review of the legality of such extraordinary arrests is available, and review in courts is delayed for a considerable time.[72] A judge using the modern U.S. approach conceivably could agree that these detention policies are justified under the emergency conditions in Northern Ireland, yet decide that self-help to prevent an unwarranted arrest also would be justified due to the unusually great harm resulting from such arrests in view of the lack of prompt remedies.

B. Defensibility and Common Crimes

The foregoing indicates that, when certain defenses likely to be raised by persons accused of political offenses are considered, double-criminality does appear to pose a problem in that one sovereign may be asked to sacrifice individual autonomy for the sake of protecting another's power to a greater degree than it would sacrifice such autonomy to protect itself.

These apparent problems are not easily reconciled with the truism that defenses are never considered under double-criminality analysis. However, the possibility should be considered that this truism is an over-generalization—like the one that treated pure political offenses as though they satisfied the test for double-criminality.

70. *Id.* at 1132-38, and Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 281 (1946).

71. P. ROBINSON, 2 CRIMINAL LAW DEFENSES § 131(e)(5) (1984); W. LAFAVE & A. SCOTT, CRIMINAL.LAW 396 (1972).

72. These measures include the Prevention of Terrorism (Temporary Provisions) Act 1984, and the Northern Ireland (Emergency Provisions) Act of 1978, *reprinted in* LEGISLATIVE RESPONSES TO TERRORISM (Y. Alexander and A. Nones eds. 1986).

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To begin with, it is useful to consider why states should insist on double-criminality as to proscriptions, yet ignore possible variations in defenses. The reason is not obvious because proscriptions and defenses normally function in tandem to establish wrongfulness of conduct within a given legal system.

1. One rule, varied settings

One possible reason is that some facial differences in defenses may constitute adaptations to local conditions, which are distinguishable from differences in principle. An excellent example is justifiability of resistance to unlawful arrest. In a legal system that is disorganized—regardless of why—unlawful arrests may be a problem, and legal remedies for them may be inadequate. Such circumstances may lead to a popular view that such resistance is appropriate, which may in turn put police officers on notice that ensuring the lawfulness of their actions is desirable for the sake of their own safety. In such a setting, courts may regard resistance to unlawful arrest as justifiable, and a member of the community that is ruled by this legal system might be conditioned by popular opinion to resist an unlawful arrest, or may even know of, and rely on, the locally recognized legal defense.

However, the same individuals—judges, members of the community, police officers and potential arrestees—might quickly adjust their behavior if the operation of the legal system became more reliable. Such a change would be a reaction to changed circumstances rather than a change of principle, for a principle that reflected a balance between dangers of resistance and dangers of submission would operate differently under the two sets of conditions.

Placed in an extradition context, such a difference would mean ordinarily only that, were a fugitive returned to the situs of his resistance, his defense would be judged according to the situs of his resistance, his defense would be judged according to situs conditions and by persons familiar with those conditions. It usually would not mean that a different principle would be applied in evaluating the defense.[73]

Other legal standards for defenses may also be sensitive to local conditions. They include reasonableness of mistakes of fact, reasonableness of belief of danger to support self-defense or defense of others, provocation sufficient to convert murder to manslaughter,

73. The common principle at work would seem to be the lesser-of-evils defense, *supra* note 61.

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conditions that support necessity or duress defenses generally, and the role of intoxication in reducing offenses. Reasonableness is particularly likely to be interpreted in terms of local behavior patterns. The existence or non-existence of defenses based on provocation or intoxication would also seem reflective of local social conditions. Moreover, most states permit lay participation in the initial determination of whether such defenses apply and most of those states accord a degree of deference to such an initial determination, giving a further opportunity for application to be influenced by familiarity with factual circumstances at the situs of the offense.

Accordingly, many seeming differences in defense standards or in their application may be traceable to local social conditions. By ignoring such phenomena in deciding whether double-criminality is satisfied, states may be described as reacting to a single meta-rule that proscribed conduct should be punished unless justified by social conditions at the situs of the offense.

2. Possible differences in principles

In fact, differences in standards for defenses do not seem significant among Western nations. Also, where the difference in defenses is such that the defense at the place of conduct is more lenient than in the requested state, this should not interfere with extradition in keeping with the maxim *in dubio pro reo*. Moreover, the principle that there is no crime unless a law so provides would seem to support the view that an act defensible under applicable law is not a crime.

In the reverse situation, where the situs defense is less generous than the requested state's, a partial explanation for permitting extradition would be deference to the greater knowledge of situs decision-makers concerning social and circumstantial factors. This may be reconciled with the principle *in dubio pro reo* on the basis that, although there are arguably two applicable defense standards, the requested state is far less likely to be able to take proper account of local conditions. A further explanation would be that, once the occurence of proscribed conduct is adequately proved,[74] the probable dangerousness of the accused to the society of the requested state is sufficiently established to warrant social protection action by that state. This point will be explored further below in connection with political offenses.

74. The proof required varies, with common-law systems requiring probable cause while civil-law systems may accept conclusory charging instruments. EXTRADITION, *supra* note 6, at § 2-2.

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C. Treatment of Political Offenses

The next step in assessing relevance of defenses is to consider whether the above reasons are equally applicable where political offenses are in issue.

The most obvious difference between types of offenses is the self-involvement of requesting states in evaluation of defenses to political offenses. For ordinary offenses, the requesting state appears, in relation to defenses, to serve as a conduit for expression of situs social values with regard to situs circumstances. In contrast, where political offenses are involved, the state appears to pursue interests of its own, contrary to those of at least one of its inhabitants. In such cases it distorts the balance in a lesser-of-evils defense and utterly deprives an accused of any right to resist lawful actions of state agents. Because it can forbid many things and authorize its agents to prevent all conduct it proscribes, a state can command its residents to do what they consider offensive or forbid them to do what they consider necessary and then render anyone who resists its will legally defenseless. That is, it will characterize all resistance as battery or some other crime and will simply deem such resistance indefensible because the resistance was directed at law enforcement activities.

Such self-interest is relevant because a requesting state acts as judge of whether the proscription to be enforced was proper, and every state regards its own legislation as proper—including the United States, except when such legislation violates Constitutional strictures, which are actually rather permissive.[75]

This is so despite the fact that all modern legal systems consider it to be the essence of unlawfulness for anyone to be permitted to serve as judge in his own case.[76] Within a given state system this is ordinarily applied to contracts that seem to give one party a unilateral right of interpretation,[77] but it also manifests itself in requirements

75. For example, one state may punish consensual sexual acts between adult males as a felony, and another may enact anti-discrimination measures for the protection of homosexuals as long as enforcement of those measures does not interfere with federal government activities. *See* Baker v. Wade, 774 F.2d 1285 (5th Cir.) (upholding a Missouri state criminal statute), *cert. denied*, 106 S. Ct. 3337, *reh'g denied*, 107 S. Ct. 23 (1986); U.S. v. Philadelphia, 798 F.2d 81 (3d Cir. 1986) (barring a human rights agency from interfering with military recruitment at schools on the basis of military discrimination against homosexuals).

76. For observations concerning state interest as a compromise among private interests, and on state legal systems in conjunction with the state's monopoly on deciding what uses of force are legitimate, see H. KELSEN, GENERAL THEORY OF LAW AND STATE 439, 21 (1945).

77. An example of its private-law role is provided in COMPARATIVE LAW 520 (R. Schlesinger ed. 1980), using a corporate law case from the German Federal Republic and discussing comparable U.S. legal rules.

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that judges recuse themselves in cases in which they have an interest and in other settings.[78]

Self-judgment in political cases is unavoidable within a single legal system, for such issues must be decided and there is no alternative authority within a closed system. However, in a multistate setting, it is not necessary for one state to defer to the views of another in such matters.

Moreover, it is obvious that such extradition would be inappropriate where the requested state has a less restrictive defense standand than the requesting state, for such an extradition would involve the requested state in suppressing individual autonomy to a greater extent to protect another state than it would to protect itself.

Even where the relative restrictiveness of the defense standards is reversed, extradition is still inappropriate where the offense charged is political. That is because commission of an offense for a political motive does not establish the dangerousness of the offender to another state, since a variation in political conditions could mean that the motivation would not call for similar conduct in the second state. If instead political conditions in the two states were substantially similar, a judgment by the requested state concerning defensibility would involve an element of self-judgment.

On the other hand, any attempt to assess similarities or differences in political conditions would lead to difficulties of two kinds. First, it would be potentially unreliable, and therefore inappropriate as a basis for suppressive action in a criminal law setting. Second, it could constitute an interference in the internal affairs of the other state whose political conditions were being assessed.

D. Assessment

The foregoing exploration of the reasons why defenses might generally be irrelevant for double-criminality analysis, yet significant where political offenses are involved, seems persuasive. In view of traditional practices, it would seem to establish a customary international law norm that a requesting state has no right to cooperation from a requested state where the offense in question is political, because political offenses entail self-judgment as to defensibility, and avoidance of self-judgment is a general principle suitable for clarification of any doubtful rule of international law.[79]

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78. In the United States, MODEL CODE OF JUDICIAL CONDUCT, Canon 3 (1972), requires recusal when a judge has an interest in a matter.

79. *See supra* note 61.

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It also reflects the fact that the double-criminality requirement has a substantial and not merely formal role, one related to the balance a requested state strikes between personal autonomy and competing interests important to that state.

Finally, it indicates that attempts by a requested state to appease a requesting state or to protect itself from any possible social dangerousness by extraditing political offenders would be difficult to reconcile with universal criminal law principles within its own system, and with principles of international law.

V. THE POLITICAL OFFENSE DOCTRINE RECONSIDERED

A. Historical Rationales, Contemporary Interests

The observations derived above can be used in assessing the current role of the traditional political offense doctrine in terms of interests served and interests sacrificed. The historical policy arguments in favor of the broad immunization under the traditional doctrine provide a suitable framework.

1. Relativity

The rationale that focuses on the relativity of wrongfulness of the conduct in question merely highlights the fact that different legal systems may have differing interests with respect to particular kinds of conduct, and that these differences are more apparent in relation to political offenses than in relation to non-political offenses. However, this does not explain why a requested state, having *de facto* control over a fugitive, would not simply apply its own standards and punish conduct it considers wrong. The first elements of an explanation emerge from consideration of the next rationale.

2. Parochiality

The argument that political offenses do not threaten world public order highlights three interests. The first is that of the state where the offense occurred in protecting its own social order. This interest is clearly implicated by offenses against its laws regardless of their political aspect, and political offenses may even implicate that interest more strongly than ordinary offenses.

The second interest indicated is that of the receiving state in protecting its own social order. However, this interest may or may not

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be implicated by foreign offenses generally, and the fact that an offense is political does not resolve this issue. A Marxist revolutionary may be as dangerous to one capitalist state as another, yet pose no threat to a Communist state. This may indicate why a state's legal system would lack an internal interest in punishing some such conduct, but it does not explain why all political offenses would be immunized.

The third interest is that of the international legal system. At this point it should be noted that interests in individual conduct are difficult to attribute directly to the international legal system independent of the interests of states. That is, if a given form of conduct is criminal in no state, it cannot be shown to be proscribed by international law. Conversely, all conduct that is said to constitute a crime under international law is criminalized under the laws of virtually all states. Moreover, because international criminal law cooperation is ordinarily conditioned on "double criminality," many forms of arguably evil conduct raise no international law issues unless more than one state criminalizes such conduct.

However, the international law system does have a direct interest in the prevention of disputes between states, and this interest may be implicated where one state provides asylum to enemies of the government of another. This would seem to provide an external impetus in favor of punishment, but there are other external factors to be considered.

3. Neutrality

The neutrality rationale reveals external interests that can be served by immunization. The first is the interest of the global community in minimizing disputes between states. Any automatic reaction to requests for extradition of political offenses tends to serve this interest because it avoids a specific judgment by the requested state concerning the merits of a particular confrontation within a requesting state. Determinations on a case-by-case basis would require such judgments, which could be regarded by a requesting state as an unwarranted interference in its internal affairs.[80] However, automatic extradition for all offenses, regardless of their political character, would also constitute an automatic response that would avoid both interfering judgments and frustration of the interests of the requesting state.

80. WIJNGAERT, *supra* note 15, at 3.

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Another aspect of neutrality offers the first indication of why automatic immunization is preferable to automatic extradition. As Van den Wijngaert notes, the neutrality principle also tends to vindicate the idea that people are entitled to overthrow their governments,[81] an idea that was very popular in the quarters where the political offense doctrine first emerged. The continued importance of this idea may be questioned on the basis that, although international human rights instruments embody a right of all peoples to self-determination, states generally do not regard self-determination as amounting to a right of revolution.[82] However, it is also true that there is no international law principle that gives any one government a right to endure in the face of domestic opposition. In fact, international law imposes duties on states that require governments to respect enumerated individual rights,[83] but it imposes no duties on individuals to respect rights of their governments.[84]

Moreover, the significance of an assertion of the existence or non-existence of a right requires careful evaluation. To begin with, the non-existence of a right to do something does not necessarily mean that there is a prohibition against doing it. In Honfeldian terms, a no-right is quite consistent with a privilege.[85] This is important when coupled with reference to a particular legal system, because the lack of a right of revolution under international law would mean only that the international legal system would offer no assistance to those who attempt a revolution; it would not necessarily mean that international law would offer assistance to those who would oppose a revolution.

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81. *Id.*

82. Even the mere idea that all peoples are entitled to internal democracy, attributed to Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 732 (1971), is characterized as "a radical interpretation of the principle of self-determination" in INTERNATIONAL LAW, CASES & MATERIALS 212 (L. Henkin, R. Pugh, O. Schacter and H. Smit eds. 1980).

83. A host of documents could be cited, but the following are sufficient for present purposes: Universal Declaration, *supra* note 60; Human Rights Convention, *supra* note 31; International Covenant on Civil and Political Rights, *entered into force* Mar. 23, 1976, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEG. MATERIALS 368 (1967).

84. E. Castren, CIVIL WAR 18-20, *excerpted in* INTERNATIONAL LAW AND WORLD ORDER (B. Weston, B. Falk and A. D'Amato eds. 1980) [hereinafter INTERNATIONAL LAW] 281-82, puts it thus: "[a]s regards international law, and particularly its written rules, there are at present no general conventions or even treaties between particular states condemning civil war . . . [a]gain, customary international law has been unanimously interpreted as not prohibiting, but permitting civil wars."

85. Hoffeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); *see also* Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

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Actually, the position of international law with respect to revolutions is rather complex. In addition to the human rights principles just discussed, principles concerning neutrality during civil wars are also applicable. According to those principles, once a revolution has reached a state of belligerancy—power parity with the opposing government[86]—any state favoring the government in violation of neutrality principles is said to have committed an act of war upon the revolution.[87] And even when a revolution has only attained the status of insurgency—staying power[88]—another state may choose to apply neutrality principles to its conduct toward the opposing parties without thereby committing an act of war upon the government side.[89]

The insurgency principle closely resembles the old Anglo-Saxon political offense doctrine, which focused on the existence of a general uprising. It is possible that the Anglo-Saxon doctrine should be interpreted as an extension of neutrality to situations in which the insurgency standard may not be satisfied. If so, the Continental doctrines, which do not require a general uprising, would seem to extend neutrality principles even further. Taken together, these observations support a reasonably persuasive argument that international law does provide some assistance to revolutions by permitting other states to adopt neutral stances regarding them without incurring the adverse consequences involved in committing an act of war.

Moreover, legal interests in human rights may be found not only in the international legal system, but also in the legal systems of states, and this is true as to the right of revolution. Generally such an interest of a state legal system is not addressed in any particular statutory or constitutional provision, although at least one exception may be found in the U.S. Constitution's conferral of a right of the people to bear arms.[90] Rather, the interests of most state systems are revealed by the combination of criminal laws proscribing nearly all conduct necessary to waging a revolution, and the absence of any legally-recognized defenses for engaging in such conduct in order to overthrow lawful authority.

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86. *See, e.g.*, Falk, *Janus Tormented: The International Law of Internal War*, in INTERNATIONAL ASPECT OF CIVIL STRIFE 185, 197-206 (J. Rosenau ed. 1964), *reprinted in* INTERNATIONAL LAW, *supra* note 84, noting the imprecision of the definition of belligerancy.

87. *Id.*

88. Insurgency is contrasted with mere rebellion chiefly as being more sustained and substantial. *Id.*

89. *Id.*

90. U.S. CONST. amend. III.

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Ordinarily, this expresses an interest of each legal system in preventing revolutions, but it is important to note that each such interest is focused on preventing revolutions against that system's own lawful authority. Accordingly, whether to apply a given system's proscriptions to revolutionary conduct occurring outside of that system may involve difficult questions concerning the degree to which one legal system has an interest in protecting another. As discussed above, limitations on jurisdiction of criminal courts as well as the political offense doctrine have made it unnecessary to answer such questions in a criminal law context.

Accordingly, the operative laws of one state seem to shed little direct light on whether it has an interest in furthering revolutions elsewhere. However, the mere existence of a given legal system may constitute some evidence on the point, for many current legal systems are themselves the product of revolutions, so that they reflect an interest of that state's law-makers in the success of revolutions under at least some range of circumstances. Further evidence may be found in exhortatory documents associated with legal systems, such as the U.S. Declaration of Independence or the Declaration of the Rights of Man.[91] Moreover, outside of the context of criminal law, there is ample evidence that states may support either beseiged governments or revolutionaries, depending on a variety of circumstances.

In sum, the existence of an interest of some kind in furthering at least some revolutions cannot be discounted. It may have an international basis as well as a basis in the legal tradition of a given requested state. It would reflect notions concerning legitimacy of governments and adequacy of provocation to revolt. At the same time, it should be noted, the existence of a contrary interest cannot be discounted, one in suppressing other revolutions. It would be based on general concerns for prevention of unwarranted violence.

4. Non-persecution

An interest strongly favoring immunization is found in what Van den Wijngaert calls the human rights rationale. Non-extradition of political offenders serves the interest of protecting individuals from

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91. The Declaration, as embodied in the Constitution of 1793, is more than exhortatory in tone. Art. 33 provides, "When the government violates the right of a people, insurrection is . . . the most sacred of rights and indispensible of duties," *quoted in* Charmont, *Recent Phases of French Legal Philosophy* in MODERN FRENCH LEGAL PHILOSOPHY 138 (A. Charmont, L. Duguit and R. Demogue eds. 1968). *See generally* WIJNGAERT, *supra* note 15, at 8-14.

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persecution, and the reality of that interest is manifest in the generally accepted norms of international law governing refugees,[92] as well as in international criminal law practice and in the legal systems of many states.[93]

Pursuit of this interest by inquiring into the likelihood that a foreign government will persecute an individual is not easily reconciled with the neutrality interest in avoiding judgments that interfere in internal affairs of another state. However, the fact that the standard used is an international one, rather than one created by another state, may reduce some of the tension between states that would otherwise occur. Also, use of such a standard in an immigration or refugee setting seems to focus on the eligibility of the individual for a particular status, rather than on the merits of the government the individual fears.

In contrast, when such a standard is used in a criminal law context, where the requesting state has asserted that its social protection interests require punishment of the individual, a refusal on the basis of risk of prosecution seems to be directed at the worthiness of the requesting state.

As a result, avoidance of such determinations seems highly desirable in a criminal law context, and automatic immunization is the only way to serve the human rights interest in preventing persecution while also using an automatic rule.

The counterpoint raised by Van den Wijngaert, that danger of persecution explains non-extradition but does not explain failure of the asylum state to punish the conduct, presumes that there is an interest that requires such punishment. As discussed above, it is far from clear that such an interest generally will exist, and the interests just described offer possible reasons for refraining from prosecution even if an interest in prosecution is perceived.

B. Interest Alignment

At this point, it is useful to review the interests identified and to make an assessment of the role the traditional political offense doc-

92. *See supra* note 59 and accompanying text.

93. The European Convention, *supra* note 10, contains an anti-persecution provision in its Art. 5, eliminating the duty to extradite under such circumstances. National laws preventing extradition in such circumstances. National laws preventing extradition in such circumstances are discussed in EXTRADITION, *supra* note 6. MURPHY, *supra* note 12, at 127, observes that U.S. extradition law does not clearly preclude such extraditions and urges redress of this defect.

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trine plays in relation to them. Their statuses are portrayed in the top line of Figure 1. They are:

1. The requesting state's social protection interest, which it apparently regards as implicated by the offense at hand. This interest is simply sacrificed under traditional doctrine, apparently because of competing interests important to the requested state.

2. The requested state's social protection interest. The traditional doctrine does not directly address this interest, but it should be noted that, despite unavailability of extradition, there may be other ways for the requested state to serve this interest if it deems this necessary.[94]

3. The requested state's interest in individual autonomy—in avoiding adverse action against individuals except when required by its own social protection interest. This interest is quite safe.

4. The international law interest in minimizing disputes between states. This interest is reasonably safe because the refusal of extradition is automatic, based on standards that do not reflect in an *ad hominem* fashion on the circumstances of the requesting state. However, there may still be some frustration on the part of a requesting state, so maximum service of this interest might involve preventing all refusals that are not necessary in order to serve competing interests.

5. The international human rights interest in preventing the return of fugitives to places where they are likely to face persecution. The traditional doctrine accomplished this, and international refugee conventions also serve this interest.[95]

6. A difficult to describe but apparent interest in avoiding involvement by a second state in suppression of some revolutionary activities. The source of such an interest may be the requested state, or a somewhat controversial international human rights legal norm, or simply an interest of humanity generally. The interest would apply only to activities directed against particular provocations or directed at achieving particular goals.[96] On the state level, for example, a Marxist state might find capitalistic excesses to constitute adequate provocation to justify a revolution; a democracy might regard establishment of a more representative government as a goal that would justify a revolution. On an international level, replacing a regime

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94. EXTRADITION, *supra* note 6, ch. iv (disguised extradition through immigration practices) and ch. v (abduction and unlawful seizure).

95. *See supra* note 59.

96. A model framework is provided in Bassiouni, *supra* note 1.

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that violates human rights with one that would respect human rights might justify a revolution.

This interest is well-served by the traditional political offense doctrine.

7. Presumably, the above interest has a mate, suppression of revolutionary activities having contrary features on the grounds that what the revolutionary activity seeks to destroy should not be destroyed, or what it seeks to establish should not be established. However, the traditional political offense doctrine makes it virtually impossible to serve this interest through criminal cooperation in suppressing acts done for the sake of revolutions that lack merit.

8. In addition to the above pair of goal-oriented interests, there is a means-oriented interest, suppression of particularly reprehensible means that can be justified by no end. This is the same interest that is reflected in international law proscriptions relating to war crimes, and in various state criminal law rules ranging from proscriptions against possession of certain weapons to rejections of lesser-of-evils defenses where the harm caused was greater than was necessary.

Under traditional political offense doctrine, this interest is ignored by the Anglo-American and French approaches, but is served to some degree by the Swiss.

This interest is identifiable as distinct from the goal-oriented interests and within a given legal context it may function independently, as seems to be the case with war crimes under international law. However, the possibility exists that contexts only remotely analogous to conventional warfare may invite a blending of means and goal-oriented interests within a particular legal framework. That is, there may be a tendency to regard some means as unjustifiable when applied to serve some goals, but not when applied to serve others. This seems to occur within state criminal systems when law enforcement agents are permitted to use weapons that are denied to all others.

9. An interest reflected in all legal systems is to avoid self-judgment whenever possible. It is obviously relevant where a revolutionary is judged according to the laws of the government he or she opposes, for the system the accused regards as the justifying provocation. The traditional doctrine serves this interest well by preventing any revolutionary from being judged by an enemy sovereign. Moreover, it tends to prevent the revolutionary from being judged by any authority at all.

The number and nature of the interests involved suggests strongly that it will seldom be possible to satisfy all of them. However, it is appropriate to consider whether some of the interests that do not

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seem to be well-protected by traditional practice are being left at risk unnecessarily.

2. Tradition undone

An interesting initial step is to consider the effect on the above interests if one were to simply abandon the political offense concept, at least as to mixed offenses, and to simply extradite. The benefits, portrayed on line 2 of Figure 1 of the appendix, would be dramatically improved in terms of the social protection interests of both the requesting and requested states and the interest in suppressing unmeritorious revolutionary activity. This would be a possible improvement in dispute avoidance as well. There would be a facial problem with respect to persecution that could be cured largely with adherence to refugee law norms. The trade-off would be that the requested state's individual autonomy interest would be placed at risk, and that the interests in non-interference with meritorious revolutions and avoidance of self-judgment would be sacrificed altogether. A few observations are possible.

First, the net effect on the paired interests relating to revolutionary activity is a slight deterioration in going from the political offense doctrine to its contrary. Second, the net effect on the interests in non-persecution and dispute avoidance is, if anything, slightly positive. This suggests that these four interests are probably not important in explaining why one approach is favored over the other.

Focusing attention at the left end of the figure, it is apparent that there has been a dramatic improvement in the social protection interest of the requesting state and a significant improvement in the social protection interest of the requested state. Against these two improvements there is some deterioration as to the requested state's interest in individual autonomy and, at the right end of the figure, a drastic worsening as to self-judgment.

The result is clear. In preferring the political offense doctrine, a requested state appears willing to sacrifice the social protection interest of the requesting state and possibly impair its own social protection interest rather than jeopardize its own interest in individual autonomy and allow the requesting state to judge its own enemy.

3. The case-by-case alternative

Before attempting an assessment, it is useful to examine the status of interests under a third approach, case-by-case decisions on extradition requests. The results are depicted on line 3 of Figure 1 of the

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appendix. Line 3a reflects their status when extradition results; 3b reflects denial of extradition. Line 3c reflects the overall capacity of such an approach to serve the relevant interests.

Significant improvements appear in the first, second and fifth columns. The requesting state's interest in social protection is no longer totally sacrificed, as it may be served if extradition occurs (Column 1). The social protection interest of the requested state is now fully served (Column 2), and the interest in suppressing non-meritorious political violence seems less at risk than before (Column 7).

However, the interest in avoiding disputes between states has gone from safe to at risk (Column 4), and there is now a possible element of self-judgment (Column 9), in that the requested state's decision may be based on concerns it shares with the requesting state.

By rejecting this obvious alternative to automatic reactions, states have indicated a greater concern for the pair of interests that would suffer under it than for the trio that would benefit.

4. Weights of interests

The preference for the traditional political offense doctrine over the two most obvious alternatives provides evidence of the relative importance of the interests identified as relevant. Because the rejected alternatives would benefit the social protection interests of both states, these interests seem relatively unimportant. The same is true of the interest in suppressing non-meritorious political violence. On the other hand, the interests in avoiding self-judgment and avoiding disputes between states seem relatively important because they would have suffered under the alternative approaches.

This relative weight of interests may be contrary to intuitive expectations, but it is well-supported by the previous examination of basic criminal cooperation practices. Double-criminality mandates that a requesting state's interest in social protection always be subordinate to the interest of the requested state in individual autonomy. Also, offenses committed abroad for political purposes are unlikely to convince a requested state that its interest in individual autonomy is outweighed by its social protection interest. This makes assignment of low importance to social protection interests credible.

On the other hand, the universal aversion to self-judgment and the strong principles of international law regarding neutrality and noninterference make it believable that the interests relating to them are accorded relatively great weight.

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5. The European Convention

a. Estimating its appeal

The foregoing rather modest conclusions concerning relative weights of interests make it possible to predict the viability of proposed approaches to shrinking the scope of the political offense exception to extradition. The European Convention on terrorism is a useful example.

The status of relevant interests is reflected in Line 4 of Figure 1. Three improvements are noticeable, but they affect the interests mentioned above as having little weight. The two deteriorations affect important interests—self-judgment (Column 9) and dispute avoidance (Column 5). Moreover, two further interests would also suffer, the requested state's interest in individual autonomy (Column 3) and the interest in avoiding suppression of meritorious political violence (Column 6).

Such an analysis amply explains the failure of the European Convention. On balance, its adoption would have done harm to important interests while improving service to unimportant ones.

b. Improving the European Convention

Before considering particular measures that might improve upon the European terrorism convention, it is appropriate to consider one aspect of the background of that convention that has not been mentioned. It is the European Human Rights Convention,[97] which was in effect among the proposed parties to the terrorism convention.

One might have thought—as the U.K. and the U.S. seem to—that such a strong human rights convention[98] would eliminate much of the strain in dealing with political offenses. The basis for such a view is that once proper behavior of governments is assured, political violence against governments becomes indefensible.[99] The failure of the terrorism convention to eliminate political offense status for a broad

97. Human Rights Convention, *supra* note 31.

98. Compared to other human rights conventions, it addresses a broader range of more clearly articulated rights and assures enforcement through a commission and international court on a continuous—as opposed to *ad hoc* basis.

99. A rather drastic proposal to cope with terrorism on such a basis is offered in Milte, *Prevention of Terrorism Through the Development of Supra-National Criminology*, 10 J. INT'L L & ECON. 519 (1975). He suggests creating an international armed force that would topple evil governments, so that all further violence against governments could be assessed more clearly.

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range of violent acts indicates that nearly all European states do not regard the human rights convention as having such an effect.

The majority position finds analytical support in the discussion above concerning patterns of criminal law cooperation, which indicated that double-criminality was crucial. Double-criminality focuses on the social protection interest of the requested state; unless that interest clearly outweighs the requested state's interest in individual autonomy, there will be no cooperation. This means that any variations among legal systems can produce problems under double-criminality analysis, for political violence in another legal system raises social protection concerns in another only to the extent that similarities between the two systems can be established. In fact, states decline to assess such similarities, relying instead on the political offense doctrine.

That such differences among systems can exist and be important despite the existence of a human rights convention can be seen through the *Ireland v. United Kingdom* case.[100] There, the European Court of Human Rights upheld emergency measures in Northern Ireland, including preventive detention, on the basis that the decision of whether the circumstances warranted such matters was within the discretion of the U.K.[101]

The existence of such discretion creates the possibility of three kinds of double-criminality issues. The first is between states that, faced with similar circumstances, have enacted similar emergency measures. In such a setting, the requested state would seem to have no basis for regarding the emergency measures of the requesting state as justifying political violence there. However, if instead the requested state were beset with similar circumstances, yet had chosen not to adopt similar emergency measures, this would seem to amount to adoption of a position that such measures are unwarranted, which would seem to affect its view of whether political violence against such measures might be defensible. The third possibility is a requested state faced with no emergency. It would seem that such a state would have great difficulty in deciding whether a given emergency measure was warranted in its view.

Accordingly, it would seem that only the elimination of state discretion to have significantly different rules of law in relation to im-

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100. Eur. Ct. of Hum. Rts., Judgment of Jan. 18, 1978, Series A, No. 25.

101. The term used by the court is "margin of appreciation." *Id.* At least one writer has concluded that the Human Rights Convention provides scarcely any protection against governmental over—reactions to terrorism. Warbrick, *The European Court of Human Rights and Terrorism*, 32 INT'L & COMP. L.J. 143 (1982).

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portant individual rights would prevent double-criminality problems. There is no reason to believe that this is required by international law or that it is desired by Western European states. Indeed, such uniformity is not even found within a strong federal system such as that of the United States.[102]

Accordingly, it would seem that no viable proposal for strengthening the European Human Rights Convention would make the terrorism convention workable.

C. A New Decisional Framework

1. The enduring value of tradition

The basic concepts embodied in the traditional political offense doctrine have not outlived their usefulness. No state is required to assist in punishing conduct that may be defensible under its own criminal law standards. Assessing foreign circumstances in relation to political offenses is difficult, and all doubts should inure to the benefit of an accused.

So long as the only decision-makers available are the requesting and requested states, the difficulty of evaluating foreign circumstances seems an impossible obstacle. However, the introduction of another decision-maker and assignment of appropriate standards to each decision-maker may have a dramatic impact. Line 5 of Figure 1 of the appendix tracks the impact of such an approach on the relevant interests.

2. Requested state interests

Only two of the interests charted are peculiar to the requested state and available for that state to serve. These are its interests in social protection and individual autonomy.

Where foreign circumstances must be considered, determining the implications of these interests is problematic. However, for some conduct circumstances may be irrelevant, and this makes a decision by the requested state possible.

a. War crimes analogies

The clearest case of indefensibility, and of implication of the social protection interest, is conduct the requested state would punish even

102. *See supra* note 75 as to contrary laws concerning homosexuality and notes 69-71 as to different rules concerning resistance to unlawful arrest.

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if done by its own agents acting on its own behalf in time of war or national emergency. If such conduct is punishable under such circumstances, it follows that it is punishable in that state's view under all circumstances, especially when that state was not the intended beneficiary of the conduct.

This is applicable to crimes that are closely analogous to war crimes. For example, hostage-taking is a war crime, and the hostage-taking convention[103] was successful in eliminating political offense status for kidnappings coupled with extortionate demands. The successes of the convention concerning offenses against diplomatic personnel[104] and the conventions against aerial hijacking[105] may be explainable on the same basis.

Indeed, eliminating political offense status for war crimes has been proposed,[106] and finds solid support in the analysis developed above. However, implementing this suggestion would entail extremely difficult problems in analogizing rebellious conduct to conduct by regular combattants in an international armed conflict.

Some of these problems arise from the status of the offender as a part-time combattant. The most generous international standard would condition such a person's entitlement to prisioner-of-war (P.O.W.) status on his openly bearing arms from the moment of deployment on a military mission.[107] P.O.W. status prevents the capturing forties from punishing such a person. Thus rebels are not legally required to bear arms openly at all times, but as a practical matter, they cannot always control whether or when a military engagement may occur. Accordingly, it seems a close question whether a rebel loses P.O.W. status if, surprised by a police roadblock, he produces a rifle from hiding and starts a firefight.

A second kind of problem is also exemplified in the above scenario. It is that the definition of "war crime" must be narrower than merely conduct that is punishable despite its occuring in the context of an armed conflict. Otherwise, the term would include conduct as

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103. *Supra* note 9.

104. *Supra* note 8.

105. *Supra* note 7.

106. Those finding the war crimes criterion relevant include WIJNGAERT, *supra* note 15, at 132; Paust, *The Human Right to Participate in Armed Revolution*, 32 EMORY L.J. 545 (1983); Rubin, *Terrorism and the Law of War*, 12 DEN. J. INT'L L. & POL'Y 211 (1983).

107. Protocol No. 1 (1977) to the Geneva Conventions, Art. 44(3), *reprinted in* H. Levie, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT—INTERNATIONAL LAW STUDIED—U.S. NAVY WAR COLLEGE v. 60 (1979). The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.S. 846, 47 Stat. 2021, Art. 4(A)(2) is less generous, apparently requiring uniforms.

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to which states openly use a double-standard because of its similarity to espionage. Thus, in the above scenario, even if it were determined that the rebel had no claim to P.O.W. status, the opposing government could be expected to punish him, but that same government would not punish its own soldiers who failed to bear arms openly upon deployment for military action, nor would it seem to be under any international law obligation to do so.[108]

Still, where the police-victims are taken completely by surprise—as where the purpose of the roadblock was merely to detect drunk drivers—the attack would be somewhat analogous to an attack on civilians, which is one of the types of "war crime" that states do have an international obligation to suppress.[109]

The third kind of problem that is likely to arise results from differences in strategy, and tactics. The concept of war crimes evolved in connection with more-or-less conventional wars, and its application to the special setting of political violence or revolution can raise difficult issues.

One example would be the blowing up of a neighborhood surrounding a factory. Typically in an international armed conflict this would be accomplished by aerial bombardment, and the fact that civilians were killed and civilian property destroyed would not make it a war crime unless the additional harm was not justified by military necessity and was wanton.[110] The argument that the number of bombs dropped was calculated to assure destruction of the factory, even if a few were duds or landed off-target, would generally be regarded as an adequate defense.

In a revolution, however, similar destruction would be more likely to result from the planting of explosives. As a result, the use of more explosives than required to destroy the factory itself could be questioned, and a claim that the reason for using extra charges was to create confusion that would delay fire-fighting efforts would have to be evaluated.

The final problem is that the war crimes doctrine is not always clear, even in conventional war settings. For example, unrestricted submarine warfare was treated as a war crime at Nuremberg on the grounds that it harmed the shipwrecked in that the vessel that sank

108. *Id.*, Art. 129, requires penalization of conduct constituting a grave breach of the Convention, but behavior that would merely deprive one of prisoner-of-war status is not a grave breach.

109. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, Art. 147.

110. *Id.*

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their ship was not available to rescue them.[111] However, widespread use of contact mines—which occurred on both sides in Europe—was not treated as a war crime.[112]

Accordingly, analogies to war crimes sometimes will enable a requested state to determine whether foreign conduct is of the kind it regards as indefensible regardless of circumstances, but for some conduct the resort to analogy will involve precisely the kind of attempt to assess foreign circumstances that creates the problems indicated as intolerable above.

Nevertheless, where the analogy is obvious, the implication for the requested state's social protection interest is also obvious; the requested state has no reason to deny cooperation in suppressing such conduct.

b. Defensibility *per se*

It is similarly clear that a requested state's interest in individual autonomy militates against cooperation for one category of conduct, that which it regards as defensible regardless of circumstances. This category consists of conduct the requested state would regard as defensible even if committed against its own agents acting on its own behalf.

A straightforward example would be resistance to lawful arrest where excessive force is used by the arresting officer and the underlying offense does not satisfy double-criminality. Another might be resistance to unlawful arrest, which was discussed above.

Most conduct that would otherwise fir this category, such as acts one state calls treason that the other does not, are already immunized by the double-criminality requirement or the pure political offense doctrine.

c. Clear and unclear cases

For conduct that it treats as defensible *per se* the requested state's interest in individual autonomy mandates that there be no adverse action. In contrast, for conduct clearly analogous to war crimes, adverse action is indicated, but there remains the question of what form such action should take.

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111. 1 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS, *Indictment* 29-40 (1947).

112. *Id. See also* Reed, *Damn the Torpedoes!: International Standards Regarding the Use of Automatic Submarine Mines*, 8 FORDHAM INT'L L.J. 286 (1975).

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If the requested state elects to prosecute in its own courts, this may create some practical problems concerning access to evidence, but all seems unobjectionable in principle. On the other hand, deportation seems inappropriate because the conduct has been found to raise a social protection concern in both states, and cooperation in suppression is the usual result in such a situation. Moreover, deportation may be impracticable due to the lack of any state who would be willing to receive the offender other than the state requesting extradition.

Extradition may be appropriate, but the further issue of whether persecution is likely in the requesting state would require consideration, and this may be awkward for the requested state in that it may involve an obtrusive comment on the internal affairs of the requesting state. Accordingly, it may be desirable to have a persecution determination made by another decision-maker.

The desirability of another decision-maker is even greater as to conduct that is neither defensible *per se* nor closely analogous to a war crime. In such situations, the requested state is disabled from determining its own social protection needs by the concerns underlying the political offense doctrine. As a result, allowing the defender to remain at large in the requested state could be dangerous, but extraditing such an individual could involve the requested state in suppression that is not warranted by its own social protection interest. Deportation may seem to be a compromise, but it is not obvious that this is appropriate where the conduct is somewhat analogous to a war crime, and in any event there is no guarantee that any third state will be willing to receive the offender.

Accordingly, if a suitable tribunal were available, it would seem desirable to refer to it decisions concerning persecution in a requesting state and decisions regarding offenses that fall between the two extremes of defensibility. The allocation of decisional competence between requested state and tribunal is illustrated in Figure 2.

3. International/pervasive interests

a. Preventing persecution

One of the tasks that could be performed more effectively by an international tribunal would be determinations concerning possible persecution of an offender in a requesting state. Simply by having an existence attributable to more than one state, such a tribunal would be in a better position to serve crucial interests in this connection.

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First, it would inherently offer a greater chance of objectivity by virtue of its broader base. While a decision on risk of persecution might be subject to foreign policy or other influences within a single state, such decisions could be insulated from such influences in an international tribunal, particularly if it is structured with this purpose in mind.

Second, unless judges were public officials of states, there would be no significant element of self-judgment in their decisions whether particular evidence established a risk of persecution. That is, they would not have a direct interest in shielding another state merely on the basis that evidence concerning that state was similar to evidence concerning their own.

Third, whatever indignation a finding of a risk of persecution might provoke in a requesting state, that indignation would be diffused because the finding was not made by any one state. Moreover, indignation directed at the tribunal might be blunted if the requesting state were one of those responsible for the tribunal's existence.

Accordingly, use of an international tribunal would be likely to produce more objective decisions regarding persecution, insulating them from self-interests of states. At the same time, the likelihood that such decisions could provoke disputes between states is greatly reduced.

b. Wrongfulness beyond states

Much the same would be true of decisions by an international tribunal concerning disposition of persons whose conduct falls between the two extremes of defensibility. Even using a vague standard, its decision would be relatively objective, divorced from self-interest of any particular state, and unlikely to provoke a dispute between states.

The elements of an appropriate standard are the three interests depicted in Figure 1 at Columns 6, 7 and 8. Preventing unwarranted violence is probably the most basic of all, reflecting a sentiment with universal appeal. However, the criterion to be applied may depend on which legal system is consulted.

The other two interests—suppressing unmeritorious political violence and avoiding suppression of meritorious political violence—focus on worthiness of goals and state standards on such matters are obviously divergent. However, a global standard may be applied where the effect of the goal sought on human rights is clear: Goals that improve respect for human rights are to be favored, and those harmful to human rights are not.

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Thus, an international tribunal seeking to serve such interests could be mandated to do so with or without emphasis on the views of various states or with relative disregard for any views that are not universally shared. Or, it could be given a simple substantive mandate to balance these interests, and the composition of the tribunal could be designed to influence the relative emphasis on various views. For example, a panel composed of one representative each from the requested and requesting state, plus one person chosen by them, would give some attention to the views of each of the involved states, as well as consensus or compromise positions.

Decisions based on these concepts, even under a vaguely-articulated balancing test, would be capable of providing greater service to the relevant interests than has been possible under prior frameworks. They would not automatically protect or punish political violence, but would discriminate among cases. This would not only tend to serve the three interests described above, but it could also lead to satisfaction of the social protection interests of the requesting state.

c. Ultimate dispositions

If the tribunal determines that the interest in avoiding suppression of meritorious political violence outweighs the other two interests described above, the accused should be freed from any criminal law restraints. If the decision is to the contrary, extradition to the requesting state should follow, unless there is a risk of persecution there.

However, there remain two potential problems concerning the actual disposition of accused persons. The first involves a situation in which a decision is made to free the accused of criminal restraints, but no state will permit the accused within its territory. This could result in deportation to the requesting state. Such a result might seem harsh, but it may also serve as a check against undue leniency on the part of the tribunal.

The more difficult problem is the case in which extradition is deemed appropriate for the offense, but the risk of persecution prevents extradition. In such an event it may be appropriate to extradite the accused to any state that is willing to prosecute. If no such state were available, the accused could be released to any state that would permit the accused to remain within its territory. However, there may be no state that is truly willing, so that the original requested

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state may be forced to accept the accused under refugee law asylum principles.[113]

Such a disposition seems unduly lax because asylum was intended only to prevent persecution, not to immunize crimes. However, the immunity lasts only while the government in the requesting state continues to pose a danger of persecution, and the unrestrained presence of the accused in the requested state may be characterized as a natural consequence of the limited jurisdictional reach of that state's criminal law system.[114]

Still, it is not necessary to accept such an outcome as inevitable. An international tribunal could be empowered by the states creating it with the competence to try offenses under such circumstances. Such power could be regarded as deriving from the various jurisdictional bases those states use or could, consistent with international law, use in their own criminal law systems.[115]

Such trials, if they result in acquittal, would solve the problem of having an accused at large. Where the result is a finding of guilt, the record of the trial might illuminate the circumstances of the offense in a way that would cause some state to be truly willing to offer asylum. Finally, if no state is truly willing to offer asylum to a guilty person, that person could be committed to a penal facility of the requested state or another willing state. At the end of the sentence, the requesting state or another state may be willing to permit that person to remain in its territory because of the rehabilitative effects of the sentence; also, the risk of persecution in the requesting state may have passed.

4. Effects on interests

The impact on relevant interests is dramatic. As Line 5 of Figure 1 shows, every interest is well-served except the social protection interest of the requesting state (Column 1), which may or may not be served. This is far more effective than any of the previous alternatives.

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113. *See supra* note 59 and accompanying text.

114. *See generally* Sarkar, *supra* note 52, on existing and proper jurisdictional scopes.

115. For proposed models of international enforcement mechanisms utilizing such a basis, see M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980); Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention*, 9 HOFSTRA L. REV. 523 (1981).

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CONCLUSION

The foregoing has demonstrated that the 19th Century political offense doctrine serves numerous interests that have enduring importance. The relevance of these interests was shown to be a product of basic patterns of criminal law cooperation. Whether concern for all of these interests was a conscious force in creating and shaping doctrine is unimportant; what matters is that contemporary reluctance to abandon the political offense doctrine indicates that sensitivity to these interests endures. As a result, any attempt to reform the political offense doctrine must take them into account.

Specifically, it has shown that the supposition that all states share an interest in suppressing all political violence flies in the face of a century and a half of Western legal tradition that serves traceable interests that are highly relevant today. While it may be intuitively apparent that all sovereigns *as sovereigns* have an interest in suppressing all political violence, the foregoing discussion demonstrates that this can be true only as to sovereigns that do not acknowledge that sovereignty belongs to those governed and that those who govern exercise sovereignty only in a representative capacity. No government that makes such an acknowledgement can possibly take the position that all sovereign are always right or that all violence against any sovereign is wrong.

Put another way, the above discussion has shown that the political offense doctrine, that irritating impediment to global cooperation against terrorism, is not merely a quaint relic of an irrelevant past. Instead, it is an inherent consequence of the thinking that supported first the American and then the French Revolutions—and which sustains the political order of the contemporary Western world. It is the simple insight that no government is "right" simply because it is a government, and that the merit or legitimacy of a government is to be decided by those whom it seeks to govern and by no one else.

To discard a requested state's interest in individual autonomy and the general interest of avoiding suppression of meritorious revolutionary activity would be to repudiate the revolutions that are the cornerstones of contemporary Western legal philosophy.

However, heaping praise on the political offense doctrine's role in protecting those interests does not in itself solve the current, pressing problem of international terrorism. Burying the traditional doctrine is what is needed.

That is, a 19th Century vehicle for protecting vitally important interests need not be retained if a more suitable modern alternative

can be devised. The problem is that many of the vehicles that have been proposed recently would bury the interests along with the old vehicle.

The European terrorism convention was blind to these interests, and actually offered an arrangement that would have sacrificed important interests for the sake of unimportant ones. The U.S.—U.K. supplemental extradition treaty is utterly insensitive to these interests, as shown on Line 6 of Figure 1.

If any reform proposal is to achieve widespread acceptance, it will probably have to accommodate these interests at least as well as is the case under the traditional political offense doctrine. If any proposal succeeds without offering such an accommodation of interests, it does not deserve to be called a reform.

The framework described above seems extremely promising. By confining requested state decisions to matters reflecting the clear interests of its criminal law system and then entrusting further decisions to an international tribunal, maximum service to the relevant interests can be achieved.

This means that further attempts to achieve a consensus concerning wrongfulness of politically-motivated violence is misdirected. Attempting to define terrorism is of little utility. Within a given state system it could be defined, but there is little point in doing so because all conduct that would meet the definition is already proscribed and indefensible.[116] However, in a multi-system setting, there are decided limits to consensus concerning wrongfulness of politically-motivated violence.

Instead, the kind of conduct states can agree to suppress is definable only by reference to a combination of tests, some linked to the states most directly concerned, and some more general. Thus, if terrorism is to be defined in a global sense as conduct to be suppressed, it can be defined only as a product of a process that accommodated both states' interests and global interests. A suitable framework for such a process has been sketched above.

Once this is accepted, it is apparent that the dialog concerning international suppression of terrorism should shift from semantics to process. Specific proposals concerning composition of an international tribunal, the standards to be used by it and by requested states, and like matters require attention.

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116. *See* MURPHY, *supra* note 12, at 2. This view is also reflected in the Omnibus Anti-Terrorism Act of 1986, *supra* note 13, which creates new extraterritorial crimes, but no new local crimes.

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If such a shift of attention occurs, prospects for a successful, measured, international response to terrorism will be greatly improved.

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FIGURE 1 INTEREST ALIGNMENT MATRIX

INTEREST SOURCES		REQUESTING STATE	REQUESTED STATE		INTERNATIONAL LAW		GENERAL			
Approach \ Interest		1 Social Protection	2 Social Protection	3 Individual Autonomy	4 Preventing persecution	5 Avoiding disputes between states	6 Non-suppression of meritorious pol. violence	7 Suppression of non-meritorious pol. viol.	8 Suppression of undue violence	9 Avoiding self-judgment
Traditional doctrine		sacrificed	at risk	safe	safe	safe	safe	at risk	at risk	at risk
Automatic extradition		safe	safe	at risk	at risk[1]	safe	sacrificed	safe	safe	sacrif.
Case-by-case decisions	Result: extrad.	safe	safe	safe	at risk[1]	safe	safe	safe	safe	sacrif.
	contra	sacrificed	safe	safe	safe	sacrif.	safe	safe	safe	sacrif.
	net	at risk	safe	safe	at risk[1]	at risk	safe	safe	safe	sacrif.
European Convention		rel. safe[2]	rel. safe[2]	at risk	safe	safe	at risk	safe	safe	at risk
New framework		at risk	rel. safe[3]	rel. safe[3]	safe	safe	safe	safe	safe	safe
U.S. - U.K. supp. treaty		safe	safe	sacrificed	at risk[1]	safe	sacrificed	safe	safe	at risk

SACRIFICED, SAFE, AND AT RISK refer to whether a decision is likely to serve an interest

NOTES:
1. These risks may be reduced by use of refugee law or the European Convention's separate provision, but reliability would be subject to self-judgment/self-interest.
2. Safety under the European Convention is relative because some acts of political violence would still be governed by the traditional approach.
3. Safety under the new approach is not absolute because unclear cases are delegated to a tribunal that may not weigh interests in precisely the same way as the requested state.

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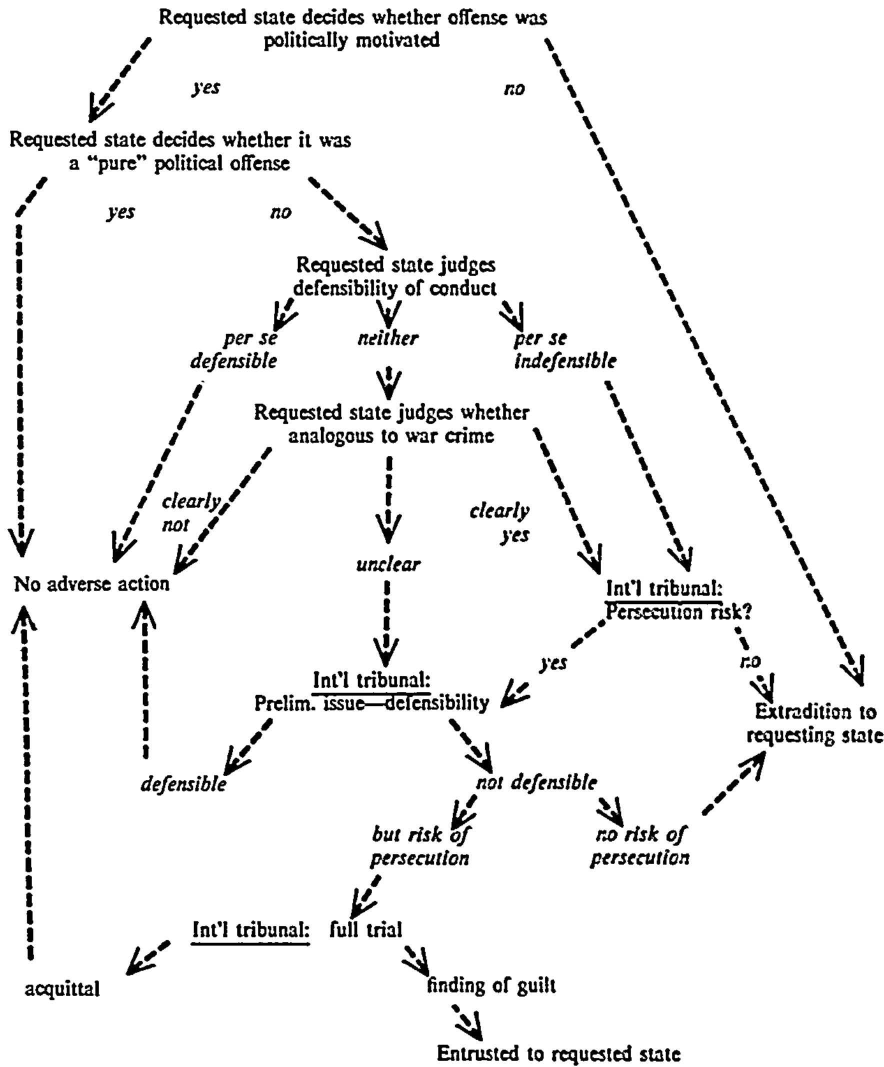
FIGURE 2

SCHEMATIC OF MODEL DECISIONAL FRAMEWORK



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