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# **Patriots and Terrorists: Reconciling Human Rights With World Order**

*by Nicholas N. Kittrie\**

## **I. INTRODUCTION**

Whenever an IRA bomb explodes in Northern Ireland, an Arab assassin's bullet takes the life of a school child in Israel, a Puerto Rican Liberation Front explosion rips apart a commercial airliner, a Spanish official is executed by local Basque separatists, or a Turkish diplomat in France is shot by Armenian blood revengers—the world community once again faces the dilemmas posed by political violence. There are those who condemn resorting to violence as a means for political protest or change, and assert that political motives should not excuse a person from criminal responsibility. In the eyes of those who condemn violence, countries which are willing to provide safe havens for political terrorists are accessories to terror. There are others who characterize politically motivated activists as a distinct category—entitled to special consideration by the world community. In the latter view, those engaged in political violence should be treated as legitimate combatants, much the same as warring nations treat each other's soldiers. Looming in the background of these conflicting positions is the international law of extradition.<sup>1</sup> It is this law which, more than a century ago, gave recognition to the special status of the political offender—exempting him from extradition for his political crimes. Therefore, the current debate about political violence, the moral and legal status of the political offender assumes a central role.

## **II. POLITICAL CRIMES: FROM SACRILEGE TO "SOCIAL COMPACT"**

Throughout ancient history and the Middle Ages and as long as the doctrine of the divine and absolute right of kings furnished the philosophical legitimacy for the governments of Europe, treason and other offenses against the sovereign and his political order were invariably viewed

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<sup>1</sup> For a general discussion of the international law of extradition see, I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971).

as the most despicable of all crimes. With the 18th century arrival of the Age of Reason, however, new perspectives were advanced regarding the relationship between the ruler and the citizenry under him. The traditional notion of the absolute ruler gave way to a new liberal philosophy professing the people to be the ultimate holders of sovereign power and viewing the ruler as being merely the recipient of such limited authority as was delegated to him. The theory of government based on the "social compact" of the people, which had the endorsement of such leading liberal philosophers as Jean Jacques Rousseau and John Locke, implied the constant need for the consent of the governed. Governments were conceived as the agents of the people, not their masters. Governmental powers were limited by "constitutions" which, as a manifestation of the social contract, defined the rights of government as well as the rights of the governed. From these changed political doctrines flowed the conclusion that the legitimacy of government was not absolute but only relative.<sup>2</sup>

It was this relativist image of government—a government deriving its continuing authority from the support of the people and further limited by higher requirements of lawfulness—that cast the political offender in a newly favored position. Presenting himself as one to right the wrongs committed by government, the political offender appeared to possess overriding claims. He, much like the government in power, was claiming to derive a mandate from the citizenry, however small his supporting community might be. He, much like those in authority, was asserting rights established by law. Indeed, while the incumbent regime might often rely upon the rights of vested power and ancient law, the political challengers would frequently assert "higher" rights derived from national constitutions or from some "natural" and immutable law. No longer was the political offender seen as an unrighteous and claimless and public enemy. He was viewed as a political opponent and competitor to the existing government, not as an enemy of the "real sovereign," the people. To such a competitor certain courtesies had to be extended. Moreover, the likelihood of a political turnover and a role reversal could not be ignored. "Don't do unto your political enemy what you don't want done unto you," was possibly the bottom line of the differential standards developed for political offenders during the second third of the 19th century.

The philosophical and jurisprudential foundations of the benign attitude towards the political offender were well illustrated in the writings of Vidal, a leading French legal scholar:

. . . Whereas formerly the political criminal was treated as a public enemy, he is today considered as a friend of the public good, as a man of

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<sup>2</sup> B. INGRAHAM, *POLITICAL CRIME IN EUROPE* 78-83 (1979).

progress, desirous of bettering the political institutions of his country, having laudable intentions, hastening the onward march of humanity, his only fault being that he wishes to go too fast, and that *he employs in attempting to realize the progress which he desires, means irregular, illegal and violent*. If from this point of view, the political criminal is reprehensible and ought to be punished in the interest of the established order, his criminality cannot be compared with that of the ordinary malefactor, with the murderer, the thief, etc. It is only *relative*, dependent on time, place, circumstances, the institutions of the land, and it is often inspired by noble sentiments, by disinterested motives, by devotion to persons and principles, by love of one's country. In conclusion, the criminality is often only *passing*; the author of a political crime who is rather a vanquished, a *conquered man*, than a criminal, may become, as a result of a revolution favorable to his ideas, the *conqueror* of the morrow, who is called regularly and lawfully to direct and guide the state and the public administration of his country. The penal reaction exercised against him is not at all, then, like that against malefactors, who violate the law in which case it is a work of *social defense* against an attack upon immanent conditions of human existence but is rather a work of the *defense of caste, of political parties*, against an attack upon an organization and upon a political regime historically transitory.<sup>3</sup> (author's emphasis)

The political turmoil and changes of 19th century Europe contributed heavily to the new perspective on political dissenters and rebels. No longer were political dissent and revolution viewed as morally reprehensible and outrightly condemned by prevailing political philosophies. As prominent a group as the Fathers of the American Revolution articulated in their Declaration of Independence the right of revolution whenever the government failed to accord the governed their due. Under political liberalism, rebellion was permissible if it represented the will of the popular majority and was undertaken for a just cause. Thomas Jefferson, a pragmatic political leader, even went so far as to suggest that rebellion should often be used in order to keep the democratic process and the people's rights vital and vibrant.<sup>4</sup>

### III. THE PRIVILEGE OF BEING POLITICAL

It was pursuant to the altered philosophies and realities that both the domestic laws of Europe and the international law of extradition set out to accord the political offender a more lenient treatment. "The French Revolution of 1789 and its aftermath," writes Cherif Bassiouni,

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<sup>3</sup> VIDAL, *COURS DE DROIT CRIMINAL ET DE SCIENCE PENTENTIAIRE*, 110-12 (5th ed. 1916), reprinted in Ferrari, *Political Crime*, 20 Colum. L. Rev. 312-13 (1920).

<sup>4</sup> "I like a little rebellion now and then . . . The tree of liberty must be refreshed from time to time with The blood of patriots and tyrants." 2 D. MALONE, *JEFFERSON AND HIS TIME* 158, 166 (1951).

“started the transformation of (political crime which) . . . was the extraditable offense *par excellence* to what has since become the nonextraditable offense *par excellence*.”<sup>5</sup> The first explicit international limitation upon the extradition of political offenders appeared in the 1834 treaty between France and Belgium.<sup>6</sup> One year earlier, the same principle was enunciated in the domestic law of Belgium, and was contained also in an exchange of notes between France and Switzerland.<sup>7</sup> In 1843, France and the United States ratified a treaty exempting from extradition persons accused of “any crime or offense of a purely political character.”<sup>8</sup> In subsequent years, the differentiation between conventional and political offenders became a worldwide extradition standard and also resulted in special considerations for political offenses in domestic law. Solzhenitsyn reported the treatment of political offenders under the regime of the Russian czar:

It was almost a crime to mix politicals with criminals! Criminals were teamed up and driven along the streets to the station so as to expose them to public disgrace. And politicals could go there in carriages. . . ; politicals were not fed from the common pot but were given a food allowance instead and had their meals brought from public eating houses. The Bolshevik Olmsky didn't want even the hospital rations because he found the food too coarse.<sup>9</sup>

The 20th century saw a decline in the previous tolerance toward the use of extra-legal measures for the attainment of political change. The political offender continued to retain the special privileges previously acquired in the international arena—but that was mainly due to the sense of national pride and political rivalries manifested in the relations between nations. On the continent, the search for political stability slowly and finally resulted in a total erosion of the political offender exception in domestic law. Middle-of-the-road governments, dependent upon fragile coalitions of divergent parties for survival, were no longer willing to pay the heavy price for dissenting political views.

The American political system, which was originally established through revolution, came of age and substituted a dedication to peaceful transformation for the older flirtation which change through revolutionary means. American political philosophy, reinforced by the active reformist role assumed by the judiciary under the newly discovered concept

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<sup>5</sup> C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 370-71 (1974).

<sup>6</sup> Extradition Treat, Nov. 22, 1834, France-Belgium, art. 5, 6 *Recueil des Traités* (France) 278, 84 Perry's T.S. 456.

<sup>7</sup> Law of October 1, 1833 (1980) *Les Codes Belges* II 429 (Belgium).

<sup>8</sup> Convention for the Surrender of Criminals U.S.-France, entered into force April 13, 1844, 8 Stat. 580, T.S. No. 89.

<sup>9</sup> A. SOLZHONITSYN, *THE GULAG ARCHIPELAGO* 499-500 (1973).

of judicial review, increasingly began to view revolution as obsolete and morally reprehensible. The American Constitution, with its panoply of checks and balances designed to curb governmental abuse, was being pointed to as an effective substitute for the resort to revolution in the less perfected political systems. So viewed, the constitutional system not only allows for the full expression of the majority will, but also guarantees that all just causes, and such causes only, will be pursued by the government. Given the state of harmony produced by what is described as the American constitutional miracle, no justification for revolution could be envisioned.<sup>10</sup> This outlook, in fact, replaces the old and discarded doctrine of divine and absolute sovereign legitimacy with a new absolute theory—the theory of constitutional perfection, holding that the self-correcting procedures under the constitution obviate the need, and therefore abolish the citizens' right, to resort to extra-legal measures of reform.

The new totalitarian regimes, which rose on the European Continent during the agonizing years between the two World Wars, similarly found little use for the tolerance of political offenders. First Soviet Communism, and later Italian Fascism and German Naziism set out to establish their own corrupt versions of the utopian absolutes. Unlike America, which felt it had discovered the procedures for attaining ultimate goodness, the Soviets and Nazis claimed to have established the ultimate and perfect social, economic and political order. Opposition to or reform of such ultimate order was neither needed nor tolerated. Dissenters were either ill or evil. Having failed to recognize the absolute perfection of the newly instituted Soviet or Nazi order, the offenders against it were to be stringently dealt with, much like the offenders against the divine and absolute sovereigns of old.<sup>11</sup>

In these new and confident societies which believe themselves to have discovered the ideal utopian sociopolitical order or the ideal procedures for attaining such order, the political offender has no redeeming social value. He appears from time to time merely as an apparition to challenge the perfection of those in power.

#### IV. THE PROTECTION OF NEW INTERNATIONAL RIGHTS

Just as the fortunes of the political offender seem to have reached their lowest point, new sources of support have suddenly manifested themselves. These have been derived from the rapid expansion of international law which began to recognize the new principles of self-determination and human rights. While the political offender of the 19th century

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<sup>10</sup> A. ULAM, *THE UNFINISHED REVOLUTION* 282 (1960).

<sup>11</sup> Kitzrie, *Reconciling The Irreconcilable: The Quest for International Agreement Over Political Crime and Terrorism* [1978] *Y.B. WORLD AFF.* 208, 214 (1978).

could base his claims to legitimacy upon domestic law or upon the ill-defined and not generally recognized "higher" principles of natural law, his 20th century counterpart has had the support of growing prestige and sometimes the commanding power of an expanding law of nations. The First World War ended with a commitment of the victorious nations to the right of self-determination for those who have been under the yoke of others. The establishment of self-government in the newly created nations of Poland, Latvia, Lithuania, Estonia and Czechoslovakia, was the first step in the implementation of this commitment. The creation of the League of Nations' mandates system, committed to preparing colonial people for eventual self-rule, gave additional impetus to the growth of nationalism among the colonial nations of Asia and Africa. The movement which commenced with President Wilson's Fourteen Points reached its peak in the post-Second World War era.<sup>12</sup> Some manifestations of the new commitment have been reflected in actual positive international law. One example of the attempt to implement the international promise of self-determination was the 1960 United Nations General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>13</sup> But the climate of public opinion in the world community has certainly supported the most expeditious route to self-determination.

When a political activist seeks to pursue this goal, and in the process finds himself labeled and prosecuted as a criminal under the domestic law of the repressing regime, it is international principles which he pleads in justification to the world community. The political offender thus ceases to be the exclusive business of the country which he denounces or of the rule against which he rebels. The political offender, if indeed in the pursuit of the new international standards, becomes the spokesman and agent of the community of nations.

The conclusion of the Second World War also witnessed a renewed international commitment to the world-wide protection and promotion of individual and communal human rights. In 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights.<sup>14</sup> In the following quarter of a century a host of other proclamations, declarations, conventions and covenants have been advanced by the United Nations, dealing with such topics as economic, social and cultural rights, civil and political rights, racial discrimination, slavery, collective bargaining by workers, rights of children and the right of asylum.<sup>15</sup>

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<sup>12</sup> See generally, R. SUREDA, *THE EVOLUTION OF THE RIGHT OF SELF-DETERMINATION* (1973).

<sup>13</sup> G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4686 (1960).

<sup>14</sup> G.A. Res. 217, U.N. Doc. A/1311 (1948).

<sup>15</sup> Human Rights: A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev. 1 (1978).

While these expressions have been neither uniformly accepted nor shared on an equal legal status, they have nevertheless left an indelible mark on world opinion. Even stronger undertakings for the advancement of human rights have come into being on a regional basis. The European Convention on Human Rights and its enforcement process are notable examples.<sup>16</sup>

It is evident that self-determination and other advancements of fundamental human rights and freedoms have become a major goal of the international community and its jurisprudence in the post-United Nations Charter era. How is this community and its law to respond to individuals and groups who insist on the actual and immediate implementation of these rights? A climate of escalated expectations has been created. Those deprived of self-determination such as the Latvians, Lithuanians and Estonians were coerced into merging into the Soviet Union at the end of World War II and have been demanding the right to rule themselves. Those without the right to freely depart and return to the countries of their residence—such as the Jews, the Sakharovs and the Rastopoviches of Russia—are calling out for this freedom. Those denied liberty or equality for reasons of race or religion—the blacks of South Africa, the Asians in Idi Amin's Uganda and the Chinese in Indonesia—demand relief. Those distinct communities which are denied the full opportunity to cultivate their culture or language—such as the Kurds of Iraq and the Arabs of Iran—expect the world's understanding and support. Those who wish effective regional self-rule—the Basques in Spain, the Welsh in the United Kingdom or the Bretons in France—are demanding what they believe to be their acknowledged right. When all or any of these rights are outrightly denied by law or practice, or when effective procedures for their attainment have been frustrated, what relief may be sought by those aggrieved? Will the offending regime's labeling as "criminals" those opposed to its own transgressions suffice in the eyes of world opinion and international law to make such designations stick? Must not the international community display its support for those acting on behalf of its proclaimed principles? Is it desirable to demand that those who exercise their internationally recognized rights be accorded, as "political offenders," differential treatment in domestic and international law? Or, should the principle be extended further to believe totally from the label of criminality those who responsibly exercise their rights under internationally established charters, declarations and covenants?

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<sup>16</sup> See generally, Robertson, *The United Nations Covenant on Civil and Political Rights and The European Convention On Human Rights*, [1969] BRIT. Y.B. INT'L L. 21; O'Hanlon, *The Brussels Colloquy on the European Convention on Human Rights*, 5 IRISH JUR. 252 (1970); Comto, *The Application of the European Convention on Human Rights in Municipal Law*, 4 J. INT'L COMMISSION OF JUR. 94 (1962).



The questions raised by acts of individual or group resistance to national laws and practices violative of international rights and standards are not theoretically posed. These are questions which have been brought increasingly often before judicial and administrative tribunals in cases of requested extradition, and in other instances as well. A Jew being taken to the Nazi gas ovens assassinates his guard and escapes abroad. Is he subject to a German extradition request on a charge of murder? An Arab youth in Hebron participates in a violent demonstration against the Israeli authorities, demanding the establishment of an independent Palestinian state. Several Israeli police officers are injured and the youth is apprehended and sentenced to 90 days in jail for assaulting an officer. When the youth later applies for immigration to the United States, will he be disqualified by the American authorities on the basis of his criminal record? A Russian Tartar, dissatisfied with the ethnic, cultural and religious discrimination against his people, decides to illegally cross the border from Soviet Georgia into Turkey. A member of a local Russian Kholhoz, dedicated to the Marxist cause, notices him and attempts to alert the Soviet border guards. A struggle ensues and the local Marxist is left injured by the escaping Tartar. Will extradition be granted for the dissenter's aggravated assault upon the loyal Russian Kholhoznik?

#### V. POLITICAL OFFENSES: FROM HEROISM TO INTERNATIONAL CRIMES

The international movement for self-determination and human rights has added a great measure of support for the 19th century doctrines advocating the differential treatment of political offenders. But at the same time, a totally distinct development in international law has been taking place, one which may produce the virtual demise of the political offender's favored status. This latter development has evolved from the maturing and steady growth of international criminal law.

In the post-Second World War era, several drastic restrictions were placed on the benefits of the political offense claim. World revulsion against Nazi and Fascist atrocities resulted in the Nuremberg tribunal's affirmation of both crimes against the peace and war crimes as international offense exceptions. The Nuremberg trial, and the subsequent reformulation of its principles by the United Nations General Assembly in 1947,<sup>17</sup> established for the first time that crimes against humanity were to be universally condemned. In the recent past, after a discussion of the South African practice of apartheid, the General Assembly designated it to be "a crime against humanity."<sup>18</sup>

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<sup>17</sup> G.A. Res. 177, U.N. Doc. A/519 (1947).

<sup>18</sup> G.A. Res. 2823, 27 U.N. GAOR, Supp. (No.30) 25, U.N. Doc. A/3730 (1972).

The Genocide Convention of 1948<sup>19</sup> similarly sought to protect national, ethnic, racial and religious groups by defining as an international crime the killing of members of a group, causing them serious bodily or mental harm, or deliberately inflicting upon them conditions of life calculated to bring physical destruction. In addition, the Genocide Convention specifically prohibited genocide and related crimes from qualifying as political offenses and urged all states to grant extradition of those charged with such crimes.

As more offenses were being recognized, not only as contrary to the well-being of one country but as threats against the welfare of all mankind, the "international crime" category continued to expand. The origins of international criminal law date back to the crime of piracy, long considered an offense against all civilized nations.<sup>20</sup> Other early international efforts concentrated upon white slavery and traffic in narcotics. But, in more recent years, there has been a growing international commitment to limit, through a process of international criminalization, conduct which otherwise could be viewed as political yet which, because of its threat to the basic institutions of the world community, could no longer be allowed the political offense benefits. The definition of counterfeiting as an international crime after the First World War was such a step.<sup>21</sup> Even more demonstrative of the world community's willingness to condemn political violence has been the recent conventions making aircraft hijacking<sup>22</sup> and the kidnapping of diplomats (internationally protected persons) international crimes.<sup>23</sup> Thus condemned by international law, a growing list of crimes can no longer be viewed as political offenses affording their perpetrators protection from extradition. Instead, the international crime designation increasingly makes it the positive duty of all civilized nations to apprehend those charged with such crimes and subject them to either extradition or prosecution.

Gradually, the political offense category has been declining. In partic-

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<sup>19</sup> The Convention of the Prevention and Punishment of The Crime of Genocide, G.A. Res. 260 A, U.N. Doc. A/810 (1948).

<sup>20</sup> See, Convention of the High Seas entered into force Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

<sup>21</sup> International Convention for the Suppression of Counterfeiting Currency, Signed April 20, 1929, 112 L.N.T.S. 372.

<sup>22</sup> See Convention for The Safety of Civil Aviation, done Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention for The Suppression of Unlawful Seizure of Aircraft, done Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention on Offenses and Certain Other Acts Committed On Board Aircraft, done Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

<sup>23</sup> Convention to Prevent and Punish Acts of Terrorism that are of International Significance, adopted Feb. 2, 1971, reprinted in 10 INT'L LEGAL MATERIALS, 255 (1971); Convention on The Prevention and Punishment of Crimes Against Internationally Protected Persons, G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30), U.N. Doc. A/9030 (1973).

ular, with regard to activities that endanger the institutions which are indispensable for the conduct of international relations and trade (i.e. diplomatic security and safety of aviation), the world's nations have been willing to forego their political differences in order to join in the abolition of the political offender benefits. The position of the political offender of old—an enemy to some and a hero to others—is constantly being eroded. Unless the trend is reversed, those portrayed as noble rebels in the previous century might become the blackest of all villains by the end of the current century.

#### VI. BETWEEN RIGHTS AND CRIMES: WHENCE THE POLITICAL OFFENDER?

The post-Second World War era which gave recognition to new international rights on one hand, and formulated new international crimes on the other hand, has had profound impact on the classification and status of political offenders. Contradictions, as well as concurrences, between international and domestic legal standards in the definition of political offenses are becoming much more critical to international cooperation. In the face of domestic denial of human rights to which the community of nations has given recognition, in many countries political offenders may be acting in conformity with recognized international rights even though in violation of domestic laws. At the same time, other activities which were once recognized as "political offenses," domestically as well as within the community of nations, might now be turning into international crimes.

The political offender's crime, as previously seen, might range from such "pure" and non-violent offenses as violations of laws restricting freedom of speech and travel, imposing censorship or apartheid, to a veritable "siege of terror," involving random and indiscriminate terroristic violence against an innocent and uninvolved population. What traditionally have been defined in extradition law and practice as "pure" political offenses—acts which challenge the State but affect no private rights of innocent parties—continue to benefit from a privileged status in the international extradition law. One who commits treason, sedition or espionage continues to be entitled to the political offender's protection from extradition. Beneficiaries also include those who violate state laws limiting freedom of speech or assembly, those who disregard censorship and other secrecy laws and those who break laws restricting religion or other exercises of human rights. For many of those in the "pure" offender category, current continuation of the protection against extradition will not completely reflect the full measure of their entitlement. Pressure is mounting, as evidenced by the United Nations condemnations of apartheid, racism and colonialism, to lift the label of criminality from domestic conduct which has involved nothing more than an assertion of internationally rec-

ognized human rights.<sup>24</sup> Part of what was once a political offense is thus on the way to becoming an enforceable international as well as domestic right.

On the other end of the political offense spectrum is a growing list of activities which have been losing their political exemption and have become universally condemned as international crimes. Included here are crimes against humanity, genocide, aircraft hijacking and the kidnapping of diplomats. Most conduct which has been so condemned internationally might be classed either as "complex" or "connected" political offenses. Genocide, crimes against humanity and offenses against diplomats might be categorized as complex offenses. Aircraft hijacking and other offenses against innocent victims would fall within the category of connected offenses. It is clear that none of the activities which have come to be designated as international crimes constitute "pure" political offenses. What the process of international criminalization reflects, by and large, is a universal reaffirmation of the classical commitment of international law to the protection of transportation and communication routes, and the safeguarding of diplomatic personnel. The international law process also represents, to a lesser degree, an effort to narrow the classes of potential victims of political violence and, thus, to protect the innocent.

There now remains an area in the center of the political offense spectrum which remains as yet unaffected by the growing recognition of human rights on the one hand and the increasing expansion of international crimes on the other. Typical of this range of conduct are what might generally be regarded as "complex" or "connected" political offenses. Some of these offenses might be committed domestically, some transnationally. Complex political offenses such as the assassination of a government official in the course of a political uprising, the bombing of military or police headquarters and violent resistance to an arresting officer come within the class. Also included in this category of behavior are such connected political offenses as bank robberies for the replenishing of a revolutionary treasury, the kidnapping of a business executive for extortion and the taking of hostages in order to have them exchanged for imprisoned political offenders. It is with regard to this wide range of conduct, in the middle spectrum between international rights and international crimes, that uncertainty and ambivalence currently prevail in the international community. Especially troublesome in this still uncharted terrain are manifestations of contemporary political violence which differ substantially from the traditional political offenses. Consider, for instance, the indiscriminate use of violence against victims only marginally associated with an opposing political regime or party, or the as-

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<sup>24</sup> Human Rights: A Compilation of International Instruments, 1 *supra*.

sault against such victims in neutral countries remote from the battlefield. Consider a machine gun assault by Irish nationalists against a bus carrying school children in Northern Ireland. Consider the massacre, by Japanese collaborators with the Palenstine Liberation Organization, of Christian pilgrims from Puerto Rico upon their arrival at Israel's Lod Airport. How should such types of conduct be treated by the international community?

The most comprehensive treaty for the prevention and punishment of political violence was proposed by the League of Nations in 1937. Following the assassination of King Alexander I of Yugoslavia, at Marseilles on October 9, 1934, the French Government urged the Council of the League of Nations to prepare an international agreement for the suppression of terrorism. A committee of experts prepared a draft convention which was later offered for signature.<sup>25</sup>

Viewing the League of Nations convention today, from the vantage point of subsequent historical developments, the shortcomings of that effort are readily apparent. The attempted assassination of Hitler by disgruntled German military leaders in 1944 and the successful execution of Mussolini by anti-Fascist partisans in 1945 would have readily qualified as internationally condemned terrorist acts under the proposed League convention. Many of the post-Second World War liberation movements in Asia and Africa would have been similarly defined as terroristic. Broadcasting to an oppressed people to encourage them to rise against an exploiting regime would have been condemned as an incitement to commit international crime. It is little wonder that the 1937 document, capable of such bizarre interpretations, received so little support when offered.

The League of Nations convention was clearly predicated on the maintenance of the pre-Second World War status quo. It displayed an unblinking willingness to label all future revolutionary or national liberation movements as terrorist. Such total commitment against all violent political contests cannot be expected to succeed. As long as the world consists of "haves" and "have nots," of those in power and those out of power, of countries which permit gradual and peaceful changes and those which prohibit them, a total disavowal of violence is visionary. Yet what can be done about the terrorists' excesses of recent years?

## VII. RECONCILING PROTECTION OF HUMAN RIGHTS WITH WORLD ORDER

Recognizing the expanding boundaries of international crime and the concurrent narrowing of the political offense exceptions, a viewer might well conclude that the 19th century liberalism and tolerance for extra-

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<sup>25</sup> Convention for The Prevention and Punishment of Terrorism, 7 INT'L LEGIS. 862-78 (M. Hudson ed. 1941).

legal dissent and activism is coming to an end. Aircraft hijacking and diplomatic abduction are now designated as international crimes. The 1977 European Convention on the Suppression of Terrorism similarly excludes kidnapping, hostage taking and firearm offenses from the definition of political offenses.<sup>26</sup> Other tactics of violence are likely to be internationally outlawed on a case-by-case basis. Now that the end of colonialism is in sight, even radical governments might be discovering that tolerance of non-governmental violence, even for sympathetic causes, is too risky an enterprise. Established regimes might be closing ranks in self-protection. One committed to the further pursuit of collective as well as individual political self-realization might therefore soon confront the central question: within the confines of international legality, what may groups or individuals deprived of self-determination or other internationally recognized rights do in the defense of their claims?

Others who observe current developments might focus on an altogether different concern. Witnessing the continuing resurgence of indiscriminate violence, and the existence, as well as emergence, of new safe haven countries—unwilling to participate effectively or sincerely in international controls—it might be concluded that no more than lip service is being paid to international cooperation. Taking notice of newly rising angry minorities (ethnic, religious, linguistic and cultural), and considering evidence of retribalization within the modern nation-states, dire predictions might be advanced of yet new waves of violence. The observer of these trends would articulate his concern differently: given past failures to define and proscribe terrorism, are there any prospects for the future regulation and meaningful control of the excesses of political violence?

A reform of the international extradition standards applicable to political offenders promises reasonably broad and important results for the limitation of excessive political violence. In the first place, such an approach avoids the arguments against a comprehensive anti-terrorism convention as a tool of the "haves." It is evident that any proposed convention against political violence and terrorism which disregards the claims and needs of the politically abused cannot hope for the necessary broad-ranged support. The political offense exception, on the other hand, has its clear origins in the protection of unorthodox dissent. Already built into the exception is a sympathetic viewpoint of the political dissenter and rebel. Using the exception as a point of departure is therefore desirable.

Moreover, a restructuring of this exception does not require a total and absolute bar against all extra-legal methods of dissent. Instead, the exception allows for the development of new and flexible standards for judging extraditability. The political offender exception is well suited to

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<sup>26</sup> European Convention on the Suppression of Terrorism, *entered into force* Oct. 25, 1978, art. 1, Gr. Brit. T.S. No. 93 (7390), Europ. T.S. NO. 90.

serve as a balancing test. The motivation of the actor, the proportion of violence utilized to the claimed wrong, and effects on innocent persons have all been previously considered in applications for political offender status. Implicit in any resort to a balancing test are principles already known to all countries in their domestic handling of claims of self-defense.

The decision to deal with the problem of excessive violence and terrorism by means of the extradition exception has already been adopted by the Council of Europe. In a 1974 resolution, the Committee of Ministers pointed out that extradition is a particularly effective means for controlling terrorism. The Council urged member-States in their response to extradition requests to consider the particular seriousness of terrorist acts which: (1) create a collective danger to life, liberty or safety; (2) affect innocent persons alien to the motives behind the struggle; or (3) employ cruel and vicious means. If extradition is refused in such serious instances, prosecution by competent domestic authorities is required.

The narrowing of the political offense exception deals with only one side of the problem, namely the excesses of political activism. The European Resolution falls short in not addressing itself more directly to the rights of those engaged in legitimate assertions of self-determination and human rights. In order to maintain a proper balance between human rights and world order, it is imperative that the world community in rejecting the proposition that all forms of violence are justified if supported by political goals, avoid the trap of supporting the other extreme, that violent opposition to an established regime is never permissible by international standards. Consequently, the principles of self-defense and the requirement of proportionality need to be re-examined, refined and injected more vigorously into this area.<sup>27</sup>

Those claiming the status of political offenders should be required to circumscribe and limit their violent conduct. Acts of self-defense would have to be addressed, as directly as possible, against those exercising the state power, and should avoid all deliberate or careless harm to innocent parties. The force used for such acts of self-defense should be appropriate and proportionate to the harm imposed by the authorities, as well as to the amount of force utilized by the authorities. If groups resorting to violence for political ends (and their supporters in the community of nations) can be persuaded that their protection from extradition and international criminal prosecution, as well as their acquisition of some form of legitimacy and recognition (i.e., prisoner of war status and civilian clothing in captivity) set their price in terms of moderation and restraint, the

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<sup>27</sup> For discussion of such an approach see, Bassiouni, *Ideologically Motivated Offense and The Political Offense Exception in Extradition—A Proposed Juridical Standard for The Unruly Problem*, 19 DEPAUL L. REV. 254-57 (1969).

sparing of innocent people might be at hand.

To some international idealists and reformers such an endorsement of individual or group self-help might appear questionable. But "acts of resistance," even though utilizing extra-legal means, will be indispensable as long as the international community lacks the means for the effective, world-wide enforcement of fundamental human rights.



