

September 1999

## Extradition and the International Criminal Court: The Future of the Political Offense Doctrine

Christine E. Cervasio

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

---

### Recommended Citation

Christine E. Cervasio, *Extradition and the International Criminal Court: The Future of the Political Offense Doctrine*, 11 Pace Int'l L. Rev. 419 (1999)

DOI: <https://doi.org/10.58948/2331-3536.1241>

Available at: <https://digitalcommons.pace.edu/pilr/vol11/iss2/7>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# COMMENTS

## EXTRADITION AND THE INTERNATIONAL CRIMINAL COURT: THE FUTURE OF THE POLITICAL OFFENSE DOCTRINE

Christine E. Cervasio

### PART I:

#### Introduction

“The efficacy of any kind of system of international criminal law . . . requires that states accept an obligation either to try international offenders before their own courts or to surrender them for trial before a foreign (or international) court.”<sup>1</sup> This is the extradition dilemma that has stumped nations for years. Although every nation has varying rules on extradition, one exception that many nations agree upon is the political offense doctrine. Generally, the political offense doctrine in extradition law is the refusal of one country to extradite an accused or convicted individual if that person was to be tried on a crime of political character.<sup>2</sup> Not only is the exception a unilateral dec-

---

<sup>1</sup> M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* xi (1995).

<sup>2</sup> See *generally* DR. CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* IX (1980).

laration of national policy,<sup>3</sup> but it is also readily apparent in many bilateral<sup>4</sup> and multilateral treaties.<sup>5</sup>

The political offense doctrine serves as an exception to extradition when the crimes of the accused or convicted are incidental to, or somehow connected with, political order in a certain country.<sup>6</sup> This exception to extradition is raised by the state to which the accused has fled, and is generally included in extradition treaties.<sup>7</sup> This exception has been termed "a double edged sword" since it protects individuals from the possibility of an unfair trial or cruel punishment, while at the same time it grants immunity for individuals who have committed grave crimes.<sup>8</sup>

The introduction of the International Criminal Court (ICC) opens a new door to concerns of international crimes. A neutral judicial body will now prosecute crimes of grave nature such as "crimes against humanity" and "the crime of genocide."<sup>9</sup> Many of the policy reasons behind the theory of the political offense doctrine will cease to exist in this new body of law.<sup>10</sup> Is there a future for the political offense exception in the ICC?

This comment will explore the political offense exception and its future in the ICC. Part II will present a look into the

<sup>3</sup> Some of the nations that include the political offense exception in their extradition treaties are: Brazil (Aliens Act, October 13, 1969, art. 88(vii)); Great Britain (Extradition Act, August 9, 1870, art. 3(1)); Ireland (Extradition Act, July 19, 1965, art. 11(1)); Italy (CONST., December 27, 1947, arts. 10 (4) and 26 (2)); The Netherlands (Extradition Act, March 9, 1967, art. 11(1)); Portugal (Decree No. 437/75, August 16, 1975, art. 3(e)); Sweden (Extradition Act, December 6, 1957, art.6). See VAN DEN WIJNGAERT, *supra* note 2, at 1 n.1.

<sup>4</sup> Great Britain and Belgium (Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals, October 29, 1901, U.K.-Belg., art. 7); United States of America and India (Extradition Treaty between the Government of the United States of America and Government of the Republic of India, June 25, 1997, U.S.-Ind., art. 4). See SIR EDWARD CLARKE, A TREATISE UPON THE LAW OF EXTRADITION (Stevens and Haynes 1903).

<sup>5</sup> Arab League Extradition Agreement, September 14, 1952, art. 4; Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, June 27 1962, art. 3; European Convention on Extradition, December 13, 1957, art. 3. See VAN DEN WIJNGAERT, *supra* note 2, at 2 n.9.

<sup>6</sup> See BLACK'S LAW DICTIONARY 1158 (6<sup>th</sup> ed. 1990).

<sup>7</sup> See *e.g.*, *supra* notes 3-5.

<sup>8</sup> See VAN DEN WIJNGAERT, *supra* note 2, at IX.

<sup>9</sup> See Rome Statute of the International Criminal Court, art. 5, U.N. Doc. A/CONF.183/9\* (1999) [hereinafter Rome Statute].

<sup>10</sup> See *infra* Part II.

history of extradition and the evolution of the political offense doctrine. Part III will introduce the newly created ICC. Part IV will critically analyze the political offense doctrine within the framework of the Court. Finally, Part V will summarize why the future looks bleak for the political offense exception in the ICC.

## PART II:

### A. *Statutory History of Extradition and the Evolution of the Political Offense Doctrine*

Perhaps the most precise definition of extradition is “[t]he surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.”<sup>11</sup> The oldest extradition treaty was entered into by the Egyptian Pharaoh Ramses II and the Hittite Prince Hattusili.<sup>12</sup> The development of extradition as we know it did not begin until the eighteenth century, and then was itself considered an exception to the tradition of asylum.<sup>13</sup>

Historically, extraditable crimes were predominantly of a political nature.<sup>14</sup> Common criminals were not viewed as a danger to society, so sovereigns rarely sought them.<sup>15</sup> Persons who acted against the state, however, were frequently pursued and harshly punished.<sup>16</sup> Asylum, in these cases, was only granted if it was to benefit the state.<sup>17</sup> Asylum, therefore, was an exception to extradition.<sup>18</sup>

This practice changed with the evolution of time and the international order. Extradition became the norm, with the granting of asylum considerably limited.<sup>19</sup> Along with this change came the notion of the political offense exception. The eighteenth century, filled with revolutions and accompanied by

---

<sup>11</sup> BLACK'S LAW DICTIONARY, *supra* note 6, at 585.

<sup>12</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 4 n.17.

<sup>13</sup> See *id.* at 4.

<sup>14</sup> See *id.* at 5.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See VAN DEN WIJNGAERT, *supra* note 2.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at ix.

a frequent political uprising mentality, beset a new attitude towards political offenders and political crimes.<sup>20</sup> Many European democracies were the product of revolution and thus, strongly opposed the extradition of political offenders and refugees.<sup>21</sup>

The Belgium Extradition Act of 1833<sup>22</sup> marked the statutory beginning of the political offense doctrine.<sup>23</sup> The exception was worded very broadly.<sup>24</sup> Belgium put this clause in all its subsequent extradition treaties, the first in 1833,<sup>25</sup> and other countries have since followed this example.<sup>26</sup>

This exception was further developed in the twentieth century. The individual became the primary focus and concern of the inquiry.<sup>27</sup> Nations began applying the exception not only to persons who committed active crimes, but also to those persons who committed passive crimes.<sup>28</sup> Western nations previously applied the exception to only those persons who acted in favor of democracy, in order to protect those who fought for liberal democracy.<sup>29</sup> These nations, however, now began to apply the doctrine even to those who acted in opposition to democratic ideals.<sup>30</sup> The inception of human rights laws also prompted the trend of preference toward asylum and the broadening of the

---

<sup>20</sup> See *id.* at 9.

<sup>21</sup> See *id.* at 11.

<sup>22</sup> Belgium Extradition Act, October 1, 1833.

<sup>23</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 12.

<sup>24</sup> The translation of Article 6 of the Belgium Extradition Act provides that "it shall be expressly stipulated in these treaties that the foreigner shall not be prosecuted nor punished for any political offence [committed] before extradition, nor for any fact connected to such crime . . . ." *Id.* at 13.

<sup>25</sup> The Franco-Belgium treaty, 22 B.F.S.P. 223 (1833).

<sup>26</sup> This clause has been referred to as the 'Belgium clause,' or now as the 'at-tentat clause.' See VAN DEN WIJNGAERT, *supra* note 2, at 16. Today, this clause excludes attacks on the Head of State from the exception. See GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 116 (1991).

<sup>27</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 17-18.

<sup>28</sup> See *id.* An active crime is one where the individual acts in an overt, affirmative manner that directly causes the result. A passive crime is when the result is caused by a failure of an individual to act when a duty to act was present.

<sup>29</sup> See GILBERT, *supra* note 26, at 115. The political offense doctrine is not recognized nor practiced among socialist states. See VAN DEN WIJNGAERT, *supra* note 2, at 1 n.3.

<sup>30</sup> See *id.* at 19-20.

exception.<sup>31</sup> Thus, we see the background of our modern notion of the political offense exception.

### B. *The Political Offense Dilemma*

As previously stated, there are two sides to the political offense exception. The reasons for opposition, and again the exception, are strong. While in some cases there is a real and apparent need for asylum (whether for national political reasons or humanitarian reasons), in others, the criminal gets to use, and will take advantage of, the exception.

Turning to the first proposition, several rationales behind the political offense doctrine become evident in situations and cases that arise between state actors alone - without the interference of an international body. In some instances, it would be morally and politically necessary to grant the accused individual asylum.<sup>32</sup> Here, the first rationale of moral and political necessity is self-evident in that there exists two positive rights: the right of a state to grant asylum as well as a right of asylum for the individual.<sup>33</sup> The right of the state comes from "the normal exercise of the territorial sovereignty."<sup>34</sup> Many nations have included this right in their own constitutions.<sup>35</sup> The right to asylum for the individual may stem from municipal law.<sup>36</sup> In extradition law, the right to grant asylum, however, may "only be exercised with respect to persons not covered by the terms of

---

<sup>31</sup> See *id.* at 18-20.

<sup>32</sup> Asylum is "protection against another State, acting through its lawful, duly accredited, and duly authorized organs, or, in some cases, through agencies operating openly or covertly on behalf of the government, the ruling party, or the ruling clique." ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 1 (Almqvist & Wiksell International 1980). "Asylum accorded by a State to persons in its territory is generally referred to as 'territorial asylum.'" *Id.*

<sup>33</sup> See *id.* at 2.

<sup>34</sup> *Id.* (quoting *Asylum Case*, 1950 I.C.J. 266 at 274 (Columbia/Peru)).

<sup>35</sup> See HAGUE ACADEMY OF INTERNATIONAL LAW, *THE RIGHT OF ASYLUM* 64-71 (Hague Academy of International Law 1989). A sample of excerpts includes: Egypt: "the right to political asylum shall be guaranteed by the State to every foreigner persecuted for defending the people's interests, human rights, peace, or justice." Egypt CONST. art. 53 (1) (1980). "The extradition of political refugees shall be prohibited. *Id.*; Portugal: "Portuguese citizens shall not be extradited or deported from the national territory." Por. CONST. art. 33 (1) (1982). "No one shall be extradited for political reasons." *Id.*, art. 33 (2). "The status of political refugees shall be established by law." *Id.*, art. 33 (7).

<sup>36</sup> See GRAHL-MADSEN, *supra* note 32, at 2.

the treaty or specifically exempted from extradition."<sup>37</sup> This is precisely where the political offense doctrine falls.

Another rationale for the political offense doctrine is the concept of dual criminality.<sup>38</sup> This relates back to one of the fundamental principals of extradition law: if the crime for which the individual is to be tried is not a crime in a given state, the individual should not be sent to a state where he or she will be tried for the crime.<sup>39</sup> The United States in particular has applied this rationale to many cases dealing with the First Amendment.<sup>40</sup>

A third reason for the application of the doctrine is that there is no guarantee that the accused will receive a fair trial when sent back to the government of which he is a known opponent.<sup>41</sup> This illustrates the humanitarian argument in support of the doctrine. By extraditing the accused, the state could unintentionally be sending him to face a biased trial and to undergo severe and cruel punishment.<sup>42</sup> France recently adopted this humanitarian argument when it refused to extradite Mikhail Bondarj to Russia, where he was accused of breaking into apartments in Russia and subsequently forcing his victims to swallow strong drugs in order to weaken their resistance and avoid a struggle.<sup>43</sup> France refuses to extradite persons to countries in which the accused would be subject to the threat of capital punishment. Thus, France is using this exact humanitarian rationale to refuse extradition to Russia.<sup>44</sup>

Fourth, the political interest, or allegiance, of a state may dictate whether to extradite.<sup>45</sup> Espionage is a crime that falls

---

<sup>37</sup> *Id.* at 18.

<sup>38</sup> See Mary V. Mochary et al., *Extradition and the Political Offense Exception*, 81 AM. SOC'Y INT'L L. PROC. 467, 472 (1987).

<sup>39</sup> See *id.* Cf. *United States v. Gecas*, 120 F.3d 1419 (1997) (holding that even though the defendant faced a "real, substantial, reasonable, and appreciable fear of foreign conviction," *id.* at 1426, he could not invoke the Fifth Amendment privilege against self-incrimination). See *id.*

<sup>40</sup> See Mochary, *supra* note 38, at 472. The First Amendment of the United States' Constitution guarantees the right of free speech. See U.S. CONST. amend. I.

<sup>41</sup> See Mochary, *supra* note 38, at 472.

<sup>42</sup> See *id.*; see also Sarah L. Nagy, Comment, *Political Offense Exceptions to United States Extradition Policy: Aut Dedere Aut Judicare (Either Extradite or Prosecute)*, 1 IND. INT'L & COMP. L. REV. 109 (1991).

<sup>43</sup> See ITAR-TASS News Agency, Russian Federation, Thurs. July 2, 1998.

<sup>44</sup> See *id.*

<sup>45</sup> See Mochary, *supra* note 38, at 472.

within this category.<sup>46</sup> A nation would not want to punish an individual who has spied on its behalf. Simultaneously, however, that nation would not want to promote the breach of a nation's security.<sup>47</sup> The decision not to extradite in this case would be made for the state via reliance on the political offense doctrine, and therefore, in essence, would not require the state to take a position on the specific question of extradition for espionage.

A final rationale has its foundations in the concept of neutrality.<sup>48</sup> Whether to extradite or not could imply taking sides in a situation. An inquiry into the question of extradition may require passing judgment on the political acts within another country.<sup>49</sup> As a general rule, states seek to avoid this by relying on the political offense exception.<sup>50</sup>

On the other side of the coin, there are reasons opposing the political offense exception. The first reason offered is the theory of national sovereignty.<sup>51</sup> If a person commits a crime within a particular nation, that nation should presumably have the right to try him. There is no justification for other nations to step in and impose their values and/or judicial systems upon a criminal fugitive or the nation from where he came. It is, of course, the refugee nation that determines whether or not the crime is of political character. This allows the refugee state to impose its subjective view on the requesting state. By harboring the criminal and not allowing the controlling nation to bring him back and try him, the sheltering nation may be infringing upon the national sovereignty of the requesting state and as a result its right to subject the accused to its own laws and criminal proceedings.

A second argument on this point is that the political offense exception supports or encourages criminal activity as long as it

---

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 3.

<sup>49</sup> See *id.*

<sup>50</sup> This application of the concept of neutrality is similar to a rule followed in the United States' judicial system called the Act of State Doctrine. See *Underhill v. Hernandez*, 168 U.S. 250 (1897). This doctrine, stated generally and without the mention of specific exceptions, prohibits United States' national courts to pass judgment on the legality of acts of another government within its own territory. See *id.*

<sup>51</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 204.



has a political tie.<sup>52</sup> Offering refuge to those who commit crimes in times of political upheaval hardly advocates peaceful transformation of governments. It would be the equivalent of affirmatively allowing and supporting persons to commit crimes in order to further their own political interests. Any modern day criminal could easily take advantage of such an exception. The above section represents the rationales in support of and in opposition to the political offense doctrine. Also important are problems that are considered inherent in the doctrine.

### C. *Inherent Problems with the Political Offense Doctrine*

One problem with the political offense exception in the context of the international community is that the term "political offense" or "political character" is not precisely defined in any one country. Similarly, the "political offender" is also not defined with any great certainty. Generally, "[t]he *pseudo-political offender* is a person who has committed a political crime but who lacks the necessary ideological motivation."<sup>53</sup>

A political offense can be classified as a pure political offense or a relative political offense.<sup>54</sup> An act "directed solely against the political order"<sup>55</sup> is a pure political offense.<sup>56</sup> Relative political offenses can be broken into two sub-categories.<sup>57</sup> *Délit complexe* are those acts "directed at both the political order and private rights."<sup>58</sup> *Délit connexe* is "in itself not an act directed against the political order, but which is closely connected with another act which is so directed."<sup>59</sup>

---

<sup>52</sup> See *id.* at 202.

<sup>53</sup> *Id.* at 27. To explain, one who is motivated by personal reasons would not be considered a political offender. *Id.* The separation of the two motivations, personal and political, is important because "the preferred treatment, created for political offenders, in fact was meant for the *person* of the political offender, whereas the criteria for the granting of this treatment were in practice almost always based on the *act*." *Id.*

<sup>54</sup> See GILBERT, *supra* note 26, at 118.

<sup>55</sup> *Id.* (quoting IVAN SHEARER, EXTRADITION IN INTERNATIONAL LAW 185 (Manchester University Press 1971)).

<sup>56</sup> Acts of treason or espionage would be included in this category. See GEOFF GILBERT, *supra* note 26, at 118.

<sup>57</sup> See *id.* at 118.

<sup>58</sup> *Id.* at 181. An example would be when the act is that of a common criminal, such as murder, but the goals and motives of the act are political. See *id.* at 119.

<sup>59</sup> SHEARER, *supra* note 55 at 181-2. These acts are remote from any political goal and are thus difficult to recognize and accept. An illustration would be "the

In addition to the lack of a clear and objective definition of the exception among nations, the application of the exception varies widely from nation to nation. The application of the doctrine in Great Britain was first established in the case of *In re Castioni*.<sup>60</sup> In that case, the accused could not be surrendered to Switzerland because "the offence which the prisoner had committed was incidental to and formed a part of political disturbances, and therefore was an offence of a political character . . . ."<sup>61</sup> This requirement of proximity to the political objective of the accused has captured worldwide acceptance.<sup>62</sup> Thus, this test focuses more on the actual act of the individual rather than on his political motivations.<sup>63</sup>

In contrast, the approach to the political offense doctrine in the United States is not based on a generally accepted rule of law. It is applied and tested on a case by case, treaty by treaty

---

theft of guns in order to prepare for an armed rebellion and robbing a bank in order to provide funds for subversive political activities." GILBERT, *supra* note 26, at 199 (citing *Ferrandi v. Governor of Brixton Prison*, DC/205/81, (MWC), QBD, 22 June '81; *Re Kexel and Tillman's application for habeas corpus*, (CO/962/83, CO/963/83) LEXIS, 10 Apr. 1984, QBD).

<sup>60</sup> *In re Castioni*, 1 Eng. Rep. 149 (Q.B. 1890).

<sup>61</sup> *Id.* at 149. Article 3(1) of the Extradition Act of 1870 of Great Britain stated that

a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or . . . that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

Extradition Act of 1870, art. 3(1).

<sup>62</sup> See GILBERT, *supra* note 26, at 122. For example, the Dutch and Australian courts have followed this test. See, e.g., *Folkerts v. Public Prosecutor*, 74 I.L.R. 489 (1978) (Netherlands) ("Offences which were not in themselves of a political nature should nevertheless be regarded as political offences or as offences connected with such offences if, in the light of the circumstances in which they had been committed, they were of a predominantly political character." *Id.* at 499.). In *Prevato v. Governor Metropolitan Remand Centre*, 64 A.L.R. 37 (1986) (Australia), the Court explained that

[n]ot every offence committed in the course of opposition to government policy is a political offence. There must be, at least, an organized, prolonged campaign involving a number of people. The offence must be directed solely to that purpose; it must not involve the satisfaction of private ends. And the offence must be committed in the direct prosecution of that campaign; so an assault upon a political opponent in the course of the campaign may be a political offence but an assault upon a bank teller in the course of a robbery carried out to obtain funds for use in the campaign would not be.

*Id.*

<sup>63</sup> See GILBERT, *supra* note 26, at 122.

basis.<sup>64</sup> The first case in which the United States interpreted the political offense doctrine was *In re Ezeta*.<sup>65</sup> There, the court held that a crime is one of political character if it was committed "in the course of" or "in furtherance of" disturbing the political system.<sup>66</sup> Hence, the test was twofold. First, the accused must show the existence of a political disturbance. If that is satisfied, the accused must then show that the acts were attempts to affect the political system.<sup>67</sup> In recent years, however, courts have been more flexible and have focused on factors other than the pure existence of a political disturbance.<sup>68</sup>

The French approach to the political offense doctrine is perhaps more stringent than that of the United States. Founded in the landmark case of *Re Giovanni Gatti*,<sup>69</sup> France has followed the rule that the exception extends solely to those individuals whose acts affected *only* the state, and in no way affected individuals.<sup>70</sup> Thus, France takes a staunch pure political offense approach<sup>71</sup> to the doctrine.

<sup>64</sup> See *id.* at 124. Actually, in the United States, there has been "no instance where an extradition has occurred without a treaty." A.B.A. J. 28 (Apr. 1998) (quoting Magistrate Marcel C. Notzon). "[N]o branch of government has authority to surrender an accused to a foreign country except in pursuance of a statute or treaty." In *Re Extradition of Howard* (United States v. Howard), 996 F.2d 1320, 1329 (1<sup>st</sup> Cir. 1993). "In the absence of a treaty there is no duty to extradite." *Quinn v. Robinson*, 783 F.2d 776 at 782 (9<sup>th</sup> Cir. 1986) (quoting *Factor v. Laubheimer*, 290 U.S. 276, 287 (1933)).

<sup>65</sup> *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894).

<sup>66</sup> See *id.* at 998. "Any offense committed in the course of or furthering of civil war, insurrection or political commotion." *Id.* (quoting John Stuart Mill, *Hansard's Debates*, vol. 184, p. 2115).

<sup>67</sup> See *id.*; see also GILBERT, *supra* note 26, at 125. The test used by the United States has been characterized as one of the strictest, since the determinative factor is the proof of political disturbance. See *id.* In *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980), the accused alleged that Italy's request for extradition for financial crimes was merely a pretext to try him for a political scandal. See *id.* at 173-175. The court held, however, that since there was no proof of the existence of a political disturbance, the offence was not deemed political and thus ordered his extradition. See *id.*

<sup>68</sup> See *Mahmoud El-Abed Ahmad v. Wigen*, 910 F.2d 1063 (2<sup>nd</sup> Cir. 1990). There, the court used such factors as the status of the accused (civilian or military), the nature of the crime (an atrocity, one in violation of international law, war crime), any allegiance the accused may have to an organization, and the place where the act was committed. See generally *id.* See also GILBERT, *supra* note 26, at 126.

<sup>69</sup> 145 Ann.Dig. 145 (1947). See generally GILBERT, *supra* note 26.

<sup>70</sup> See *id.*

<sup>71</sup> See *supra* Part II.C, para. 2.

It is evident from only these three examples that there is much debate and confusion in the application of the political offense doctrine by international actors. This only becomes more complicated with the application of more than eighty individual national policies, as is the case with the ICC. Coupled with modern technology and communication, and the evolving ideals and norms of states, the need to reform the political offense doctrine is obvious.<sup>72</sup>

#### D. *The Political Offense Exception in Modern Times*

The political offense doctrine is seen as both a principle of international law and as a mere state practice. For example, at one point, Irish courts refused to extradite individuals involved in the violence in Northern Ireland in the 1970's based on the holding the violence was politically motivated.<sup>73</sup> Moreover, the Irish Constitution obligates the courts to recognize general principles of accepted international law.<sup>74</sup> Because the courts found that denying the extradition of politically motivated criminals was one of these generally recognized principles, the courts have staunchly upheld their decisions.<sup>75</sup> On the other hand, a Sudanese court held in *Steiner*<sup>76</sup> that although the ex-

---

<sup>72</sup> While there is a general consensus of a need to reform the doctrine, there exist many different views on how to proceed. Some advocate a restriction on the discretion given to court in determining political offenses, see, Pamela Loughman, *Carron v. McMahon: The Widening Scope of the Political Offense Exception to Extradition*, Comment, 18 BROOK. J. INT'L L. 635 (1992), which for some includes the need to shift the decision on the executive or legislative branches; see Mochary, *supra* note 38, at 475 (Remarks by Torsten Stein). Some press the need to restrict the actual doctrine itself. GILBERT, *supra* note 26. Further, some support abolition of the entire doctrine. VAN DEN WJNGAERT, *supra* note 2, at 205.

<sup>73</sup> See GILBERT, *supra* note 26, at 117.

<sup>74</sup> See IR. CONST. art. 29(3). "Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other states." See *id.*

<sup>75</sup> It must be noted however, that in more recent decisions, the Republic of Ireland has extradited terrorists to Northern Ireland. The courts held that "[t]he excusing per se of murder, and of offenses involving violence and the infliction of human suffering, done by, or at the behest of self-ordained arbiters, is the very antithesis of the ordinances of Christianity and civilization and of the basic requirements of political activity." Mochary, *supra* note 38, at 469 (quoting *McGlinchy*). Another case similarly held that the murders "were so brutal, cowardly and callous that it would be a distortion of language if they were to be accorded the status of political offenses or offenses connected with political offenses." *Id.* (quoting *Shannon*).

<sup>76</sup> In the Trial of F.E. Steiner, 74 I.L.R. 478 (1971) (Sudan).

ception is the "practice of the comity of nations,"<sup>77</sup> it is not a strict rule of international law that criminals who fall within the category of political offenders should never be extradited.<sup>78</sup> Thus, there is no uniform way of interpreting or applying the doctrine.<sup>79</sup>

The world is constantly getting smaller with the aid of technology. People across the world can communicate by phone, videophone, facsimile or even by computer. As a result of all this new technology, new crimes have emerged.<sup>80</sup> Information can be passed, dispersed and discussed across thousands of miles in a matter of seconds. Furthermore, travel is increasingly easy and inexpensive. Trains, planes and boats now afford people the possibility of getting from one hemisphere to the other in a matter of hours. The great modernization of technology, however, also makes it extremely easy for criminals to flee and find refuge.

As previously mentioned, technology has caused the emergence of new crimes. Terrorism<sup>81</sup> has become a household word in many nations. New deadly bombs and airplane hijackings are two ways in which technology has added to the criminal world.<sup>82</sup> These crimes can either be politically motivated or

---

<sup>77</sup> *Id.* at 480.

<sup>78</sup> See generally Steiner, 74 I.L.R. 478.

<sup>79</sup> See *id.* at 478, noting that there is no uniform definition of political offense.

<sup>80</sup> This author feels that with the birth of the widespread use of airplanes for travel, hijacking became common in the 1980s. More recently, along with the inception of the Internet, computer crimes now frequent the international community.

<sup>81</sup> Currently, the application of the political offense doctrine is very difficult and complicated to ascertain with regards to terrorism, since most acts of terrorism can be politically motivated, yet nations hardly want to grant asylum to terrorists. See VAN DEN WIJNGAERT, *supra* note 2, at 23-25. It should be noted that the definition of the word "terrorism," like definitions of "political offense" is very vague. In the United States "terrorism" is defined as

an activity that involves a violent act or an act dangerous to human life that is a violation of the criminals laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and appears to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping.

18 U.S.C.A. § 3077 (1985). See also BLACK'S LAW DICTIONARY, *supra* note 6, at 1473.

<sup>82</sup> See VAN DEN WIJNGAERT, *supra* note 2, at 22-23.

simply claimed to be of such nature. In fact, prior to 1974, seventy percent of airplane hijackings ended with political asylum being granted to the criminal.<sup>83</sup> It appears that where a terrorist can claim a political connection to his crime, he may then flee to a state that will grant him asylum.<sup>84</sup> In modern times, criminals may know the exception exists and that they have easy access to nations that grant asylum for such acts. Granting asylum in such situations seems to advocate the policy of refusing to punish a known criminal simply because he crossed international boundaries.

Another aspect of modern life is the growing awareness of human rights law and humanitarian law.<sup>85</sup> Currently, the United Nations is examining the need to set minimum humanitarian standards and arrange for greater protection of human rights, specifically in situations of internal conflict.<sup>86</sup> This notion no longer remains internal, for with international tribunals now being established to deal with grave crimes against humanity,<sup>87</sup> human rights standards and protections now attract international recognition.

Many humanitarian and human rights groups support the creation of the ICC.<sup>88</sup> In fact, human rights were a major force

---

<sup>83</sup> See *id.* at 23 n.124 (citing N. JOYNER, *Aerial Hijacking as an International Crime* 186-96 (1974)).

<sup>84</sup> See *id.* at 23. In September 1997, Great Britain's statutory instrument 1997 No. 1763 entitled *The Extradition (Hijacking) Order 1997* came into force. This is to be complementary to existing treaties and does not mention the political offence exception.

<sup>85</sup> Human rights law and humanitarian law have both similarities and differences:

Human rights advocates fear that the realism built into humanitarian law (for example, through such notions as military necessity) will compromise the idealism of human rights law. On the other hand, those used to basing their advocacy on international humanitarian law fear that the politicization associated with human rights work will compromise the neutral and purely humanitarian nature of their work.

David Petrusek, *Moving Forward on the Development of Minimum Humanitarian Standards*, 92 AM. J. INT'L L. 557 at 560 (1998). See *The Extradition (Hijacking) Order*, S.I. 1997, No. 1763.

<sup>86</sup> See generally David Petrusek, *supra* note 85.

<sup>87</sup> For example, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the recent adoption of the International Criminal Court.

<sup>88</sup> Such as Amnesty International, the International Center for Human Rights and Democratic Development (ICHRDD) and the United Nations International Children Education Fund (UNICEF). See *The Coalition for the Interna-*

behind the development of the ICC.<sup>89</sup> The ICC's supporters hope to ensure fair trials and just punishment.<sup>90</sup> Human rights law and humanitarian law recently have shifted focus from the rights and duties of states to the rights and duties of individuals.<sup>91</sup> Thus, these laws were inherently incorporated into the ICC.<sup>92</sup> Such focus on individual human rights tends to strengthen the argument in support of the political offense doctrine. This leads us to perhaps the most recent addition to modern international law – the new permanent ICC.

### PART III:

#### The Central Issue – The Birth of The International Criminal Court

The international community as a whole has finally decided that crimes of an international character such as terrorism, genocide, and war crimes must be prosecuted. The idea of an international criminal court has been idling since the 1919 Paris Treaty after World War I.<sup>93</sup> Thoughts of Nuremberg,<sup>94</sup> the ad hoc judicial tribunal that prosecuted Nazis for their war crimes, helped prompt the feeling of necessity of an international tribunal. More recent developments such as the creation of the in-

---

tional Criminal Court (June 15 – July 17) (visited Oct. 15, 1999) <<http://www.igc.org/icc/rome/index.html>>.

<sup>89</sup> The American Bar Association has "advocated the creation of the court since 1978 as a way to punish individuals responsible for gross violations of international law, particularly war crimes and related crimes against humanity, and violations of international human rights." Rhonda McMillion, *On Behalf of the World: ABA Urges Congressional Action on Key International Law Issues*, A.B.A. J. 99 (Mar. 1997).

<sup>90</sup> See The Coalition for the International Criminal Court, *supra* note 88.

<sup>91</sup> See generally Bartram S. Brown, Comment, *Nationality and Internationality in International Humanitarian Law*, 34 STAN J. INT'L L. 347 (1998).

<sup>92</sup> David Scheffer, Head of the United States Delegation to negotiate the creation of the ICC stated that "[o]ne could almost say that in this office it's not a human rights watch per se, it's an atrocities watch." Steven Keeva, *Global Justice Edges Closer: Creation of International Criminal Court Under Negotiation*, A.B.A. J. 22 (Nov. 1997).

<sup>93</sup> See *id.*

<sup>94</sup> The Nuremberg Trial was the International Military Tribunal created for the prosecution of war criminals. See GEORGE GINSBURGS AND V.N. KUDRIAVTSEV, *THE NUREMBERG TRIAL AND INTERNATIONAL LAW*, 4-8 (Kluwer Academic Publishers, ed. 1990). On August 8, 1945, the major powers, France, Great Britain, U.S.S.R. and the United States, signed the agreement to institute the tribunal to try Hitler's government, the cause of the inhumane suffering. See *id.*

ternational criminal tribunals for Rwanda and the former Yugoslavia have brought the idea closer to a reality.<sup>95</sup> The Nuremberg tribunal bears several important facets to the current issue. First, it brought together the judicial ideals, laws and politics of varying countries into one body of law.<sup>96</sup> This is exactly what is intended to happen with the ICC. A consensus must be reached, not just between four countries, but between more than eighty countries and their individualized and unique political, social and legal ideals and norms.<sup>97</sup>

Second, the political offense doctrine was nowhere to be seen in the Nuremberg tribunal. Since the Nazis were working under the control of Hitler's governmental regime, the claim of political character could have been made. It often seems virtually impossible to separate the idea of war crimes from politics, since war is, in its essence, political. Additionally, it is difficult to fathom the idea of "international" without implied reference to politics. At the time of the Nuremberg tribunal, the countries involved had well-established rules of law incorporating the political offense doctrine.<sup>98</sup> So perhaps there is no place in an international tribunal for the political offense doctrine.<sup>99</sup> The Nuremberg tribunal set precedent in its all-encompassing view of humanity, and in the consolidation and cooperation of vastly different nations working toward a common goal: peace.<sup>100</sup>

Many years after Nuremberg, nations have continued to entertain the idea of a permanent international tribunal.<sup>101</sup>

---

<sup>95</sup> See Keeva, *supra* note 92, at 22.

<sup>96</sup> While France was a nation based on continental law, Great Britain and the United States were based on Anglo-Saxon law. See GINSBURGS and KUDRIAVTSEV, *supra* note 94, at 5. In the United States and Great Britain, the presiding judge is somewhat passive. See *id.* The Soviet system advocated an active role of the judge; another example of a substantial difference in the judicial systems is the role of the defendant; in the United States, the defendant can be a witness, however, in the U.S.S.R., this is not allowed; these were but a few of the difficulties the participating nations had to overcome. There were, of course, many other differences ranging from rules of evidence, to burden of proof, to procedural rules. See GINSBURGS and KUDRIAVTSEV, *supra* note 94, at 5.

<sup>97</sup> See *infra* note 103 for a list of countries that have thus far ratified the Rome Statute.

<sup>98</sup> See *supra* notes 3-5.

<sup>99</sup> See *infra*, Part IV.

<sup>100</sup> See generally GINSBURGS and KUDRIAVTSEV, *supra* note 94.

<sup>101</sup> A representative of Canada has stated

[t]he establishment of the Ad Hoc Tribunals for the Former Yugoslavia and Rwanda provide proof, if that were needed, that the international



From June 15, 1998, until July 17, 1998, at the headquarters of the Food and Agriculture Organization, more than 130 countries took part in the drafting of the ICC.<sup>102</sup> These meetings culminated when the draft of the Rome Statute of the International Criminal Court (Rome Statute) was finished and signed by 29 countries<sup>103</sup> on July 17-18, 1998.<sup>104</sup> According to article 126 of the Rome Statute, the Statute will enter into force "on the first day of the month after the 60<sup>th</sup> day following the date of the deposit of the 60<sup>th</sup> instrument of ratification, acceptance, approval or accession . . ."<sup>105</sup> As of July 1999, four countries had ratified the statute: Italy, San Marino, Senegal, and Trinidad and Tobago.<sup>106</sup>

The overall purpose of the ICC is to promote world peace and, through a permanent body, apply a consistent approach to

---

community can accept and has accepted the idea of the need for a functioning international criminal court. It is now up to governments to act. It is unfortunate that this initiative was propelled by the horrific events in those war-torn countries, but because those events call out for a principled response on the part of the world community, this opportunity must be seized before the United Nations fall back into the complacency that followed the conclusion of the Nuremberg Tribunal.

Robert R. Fowler, *Statement by H.E. Robert R. Fowler Ambassador and Permanent Representative of Canada to the United Nations to the Sixth Committee of the 51<sup>st</sup> General Assembly Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Oct. 29, 1996) (visited Oct. 15, 1999) <<http://wagingpeace.org/>>.

<sup>102</sup> See The Coalition for the International Criminal Court, *supra* note 88.

<sup>103</sup> The 29 countries that signed the treaty on these dates in Rome were: Albania, Andorra, Bolivia, Cameroon, Congo, France, Georgia, Ghana, Greece, Italy, Liberia, Liechtenstein, Madagascar, Mali, Malta, Mauritius, Monaco, Namibia, The Netherlands, Niger, Panama, Samoa, San Marino, Senegal, South Africa, Spain, Switzerland, Zambia and Zimbabwe. See The Coalition for the International Criminal Court, *supra* note 88. Since then, fifty-five countries have signed: Angola, Antigua and Barbuda, Argentina, Australia, Austria, Belgium, Burkina Faso, Burundi, Bulgaria, Canada, Chile, Colombia, Costa Rica, Côte D'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Eritrea, Finland, Gabon, Gambia, Germany, Haiti, Honduras, Hungary, Iceland, Ireland, Jordan, Kenya, Kyrgyzstan, Latvia, Lesotho, Lithuania, Luxembourg, Malawi, New Zealand, Norway, Paraguay, Poland, Portugal, Romania, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Sweden, Tajikistan, Trinidad and Tobago, Uganda, the former Yugoslav Republic of Macedonia, United Kingdom and Venezuela. See *id.* This makes for a total of 84 countries currently signed onto and accepting the Rome Statute.

<sup>104</sup> See *id.*

<sup>105</sup> Rome Statute, *supra* note 9, art.126(1).

<sup>106</sup> See *id.* The Statute will remain at the United Nations in New York, USA for signature until December 31, 2000. See *id.*

international crimes that deserve prosecution.<sup>107</sup> The ICC is meant to be a completely apolitical, neutral judicial body and will have "international legal personality."<sup>108</sup> It will sit at The Hague in the Netherlands, and may sit elsewhere if needed.<sup>109</sup> When a state becomes a party to the treaty it accepts jurisdiction of the Court.<sup>110</sup> It is a court to which countries can turn when their own national courts either are unable or unwilling to hear a case, and thus is to be a complementary system to national criminal courts.<sup>111</sup> These goals are reflected in the recurring theme of cooperation, for throughout the statute, the ICC repeatedly calls upon the cooperation of states.<sup>112</sup>

Thus, after years of idealistic chatter, the ICC was finally born. "Make no mistake about it, this is international lawmak-

---

<sup>107</sup> See generally The Nuclear Age Peace Foundation (Aug. 8, 1988) (visited Oct. 15, 1999) <<http://wagingpeace.org>>.

<sup>108</sup> Rome Statute, *supra* note 9, art. 4.

<sup>109</sup> See Rome Statute, *supra* note 9, art. 3.

<sup>110</sup> See *id.* art. 12. One of the provisions to the Rome Statute proposed by the United States was that of a jurisdictional "opt-in/opt-out" clause in which individual states could decide which crimes the Court could prosecute. See The International Centre for Human Rights and Democratic Development, *Towards an Effective International Criminal Court* (visited Sept. 25, 1998) <[gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/rome/ichrdd.txt](http://gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/rome/ichrdd.txt)>. Another U.S. proposal was an approvals process that would allow prosecution or investigation of a crime only if the victim's State, the suspect's State, the State with custody of the person, the State in which the crime occurred and the State requesting the surrender consented. See *id.* These, however, were ultimately rejected by a majority of the states. See *id.* The United States has not, as of yet, signed the Rome Statute.

<sup>111</sup> See Rome Statute, *supra* note 9, art. 1. Many nations support and accept the idea of a complimentary system. "Brazil also supports the view of the International Law Commission that the court should be seen as complementary to national criminal justice systems, in cases where trial procedures are unavailable or deemed to be ineffective." *Statement of Brazil to the United Nations to the Sixth Committee of the 51<sup>st</sup> General Assembly Report of the Preparatory Committee on the Establishment of an International Criminal Court* (last modified Aug. 3, 1998) (visited Oct. 15, 1999) <<http://wagingpeace.org>>. A representative from Austria stated that "[w]e likewise stressed the concept of inherent jurisdiction based solely on the ratification of the Statute and supported the principle of complementarity." Professor Dr. Gerhard Hafner, *Permanent Mission of Austria to the United Nations: Establishment of an International Criminal Court Statement by Professor Dr. Gerhard Hafner* (Oct. 28, 1996) (visited Oct. 15, 1999) <<http://wagingpeace.org>>. See also *infra* note 119 regarding national sovereignty.

<sup>112</sup> Article 86 is entitled "General Obligation to Cooperate;" Article 87 is entitled "Requests for Cooperation: general provisions." See Rome Statute, *supra* note 9, arts. 86, 87. The obligation to cooperate can be seen throughout the other provisions such as with the absconding of persons against whom the prosecutor has a warrant. See *id.* art. 19(8)(c).

ing of historic proportions. Not since the establishment of the UN itself have so many countries voluntarily yielded ground on such a fundamental aspect of state sovereignty."<sup>113</sup>

The jurisdiction of the ICC is "limited to the most serious crimes of concern to the international community as a whole."<sup>114</sup> The Court will have jurisdiction with respect to crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.<sup>115</sup> Regarding jurisdiction, there are only a few reasons a case may be deemed inadmissible:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.<sup>116</sup>

The accused, the state that has jurisdiction of the case, or the state from which consent to jurisdiction is required can bring challenges to the admissibility of a case.<sup>117</sup>

---

<sup>113</sup> William R. Pace, *The Day Peace Won*, (visited Oct. 15, 1999) <gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/monitor/nine/pace.txt> (quoting TIMES OF INDIA, editorial, August 1, 1998).

<sup>114</sup> Rome Statute, *supra* note 9, art. 5.1.

<sup>115</sup> *See id.* Rome Statute, in great detail, defines each of these crimes. Genocide is defined as "any of the following acts [e.g., killing or causing great bodily or mental harm to members of the group] committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group . . ." *Id.* at art. 6. Crimes against humanity means "any of the following acts [e.g., murder, torture, deportation, rape] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . ." *Id.* at art. 7. War crimes includes "[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts [willful killing, torture, extensive destruction and appropriation of property, taking of hostages] against persons or property protected under the provisions of the relevant Geneva Convention . . ." *Id.* at art. 8. This also includes other violations such as directing attacks against religious or historic buildings and destroying or seizing property. Rome Statute, *supra* note 9, art. 8.

<sup>116</sup> *Id.* art. 17.

<sup>117</sup> *See id.* art. 19.

In choosing the applicable law, the ICC will consider the Rome Statute and its procedural rules, applicable treaties, established principles of international law, and also the national laws of the States that would normally exercise jurisdiction.<sup>118</sup> Thus, the ICC will factor in as many viewpoints as possible so as to retain its neutrality and fairness, and the practice would not result in an infringement upon the national sovereignty of the parties involved.<sup>119</sup>

#### PART IV:

#### Critical Analysis – The Political Offense Exception within the Context of the ICC

Before exploring the political offense exception, one recent case should be placed in the context of the ICC. First, the Court, by statute, has eradicated the claim of diplomatic immunity. Article 27, entitled “Irrelevance of official capacity,” provides that:

This statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or

---

<sup>118</sup> See *id.* art. 21(1). In applying the national laws of the States, those laws cannot be inconsistent with those the ICC, international law, or international principles. See *id.*

<sup>119</sup> Speakers from many countries have addressed and dismissed the fear that the ICC will impinge upon the national sovereignty of nations. A representative from Italy stated that

[t]he fundamental role of law in the creation of the new world order must be upheld. National sovereignty has nothing to fear from the consolidation of international law. We believe that the cause of peace can only profit from the establishment of an International Criminal Court on violations of international humanitarian law and crimes against humanity. Italy is committed to this goal and is ready to host in 1998 a diplomatic conference to sanction the birth of such a Court.

Ambassador Francesco Paolo Fulci, *Statement by the Permanent Representative of Italy, Ambassador Francesco Paolo Fulci to the Preparatory Committee on the Establishment of an International Criminal Court* (Feb. 11, 1997) (visited Oct. 15, 1999) <<http://wagingpeace.org>>. Further, China commended the complimentary principle when a representative stated that “[t]he International Criminal Court should not supplant national courts or become a supranational court or act as an appeal court to the national courts . . . We are pleased that the complementarity principle has been incorporated in the preamble . . .” Ambassador Chen Shiqiu, *Statement by H.E. Ambassador Chen Shiqiu Representative to China to the Sixth Committee on the Establishment of an International Criminal Court* (Oct. 30, 1996) (visited Oct. 15, 1999) <<http://wagingpeace.org>>.

parliament . . . shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.<sup>120</sup>

Recently, the Spanish Government asked the English Government to extradite the former Chilean dictator, General Augusto Pinochet.<sup>121</sup> The charges against the former dictator involved torture and killings by the Argentine and Chilean military rulers, and specifically, the killing or disappearance of 94 people of various nationalities in the 1970's and 1980's.<sup>122</sup> However, Chilean officials contended that General Pinochet had diplomatic immunity as a "Senator for Life."<sup>123</sup>

It is clear from the language in the Rome Statute that the ICC would not have tolerance for such a claim.<sup>124</sup> Although there are no specific articles in the statute that discuss the political offense doctrine, certainly the ICC's strong opposition to the claim of diplomatic immunity will carry over to any claims that the individual be exempt from prosecution based upon the political character of the crime. All crimes will be treated equally, regardless of the political motivation of the accused. Previously, it has been suggested that an international criminal court may be a possible solution to the political offense dilemma.<sup>125</sup>

The jurisdiction and purpose of the Court implicitly precludes the political offense doctrine from operating. The crimes over which it has jurisdiction could often be classified as political in nature or character. War crimes, crimes against humanity, genocide and crimes of aggression could be incorporated into the doctrine. If the doctrine were to have a place in the

---

<sup>120</sup> Rome Statute, *supra* note 9, art. 27. In addition, military commanders and other superiors are also not exempt from criminal liability. *See id.* art. 28.

<sup>121</sup> *See* Marlese Simons, *Spain Says It's Neutral on Pinochet; Signs Are Otherwise*, N.Y. TIMES, Oct. 21, 1998, § A, at 14. Due to the complexity of this particular subject, this Comment will not discuss this issue in detail.

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See* Rome Statute, *supra* note 9, art. 27.

<sup>125</sup> *See* GILBERT, *supra* note 26, at 156.

ICC, the doctrine would not only undermine a fundamental purpose of the Court, but could actually eradicate the jurisdiction of the ICC. In addition, a politically neutral body certainly cannot peer into the inner-workings of a country and pass judgment on its politics, and therefore cannot entertain the political offense doctrine.

This idea was endorsed by Austria, which conveyed the thought that there was no place in the ICC for the exception. In a statement given to the chairman of the committee prior to the Rome conference, a representative from Austria stated:

In the view of my delegation, this particular grounds [sic] for denial [political nature of a crime] are inadequate for the purposes of the ICC. Already a quick look at the crimes falling under the jurisdiction of the ICC and the circumstances under which these crimes are likely to be committed reveals the inadequacy of the [ ] political nature since almost all these crimes could in the view of the one or the other qualify as being politically motivated . . . Under [these] heterogeneous circumstances it will be difficult to define the political nature of an act – unless all acts being relevant to the international system will be qualified as political ones . . . [T]his ground is always policy oriented and depends on the definition by the individual State. But to leave the definition of the political nature [ ] to the individual states will substantially impair the efficiency of the ICC and make the duty to cooperate a mere recommendation. This outcome is unacceptable to my delegation.<sup>126</sup>

There have, of course, been questions about the ICC's ability to achieve true neutrality. The ICC might be too remote to be impartial in the judgment of terrorist crimes, yet not so remote as to not be politically affected.<sup>127</sup> For example, "[h]ow could it decide the fate of a member of the PLO (Palestine Liberation Organization) if both Israel and Libya, for example, had representatives on the bench?"<sup>128</sup> The following discussion will allay these fears by emphasizing that the ICC will be a truly impartial international tribunal.

---

<sup>126</sup> Hafner, *supra* note 111. It must be noted, however, that following this passage the representative stated that he would like a "restriction of the exception to the duty to cooperate to the utmost minimum in the interest of the efficiency of the ICC." *Id.*

<sup>127</sup> See GILBERT, *supra* note 26, at 156.

<sup>128</sup> *Id.*

Before discussing the policy reasons and rationales behind the political offense doctrine within the context of the ICC, it is important to note that the Rome Statute does not explicitly exterminate the doctrine. The few specific provisions regarding extradition are found deep in the body of the statute.<sup>129</sup> The Court is authorized to request the arrest and surrender of an individual to any state.<sup>130</sup> That state is then obliged, with respect to its national laws, to comply with the request.<sup>131</sup> Where there are competing requests for an individual with respect to the same conduct, and the state competing with the Court is a party to the statute, the Court shall be given priority.<sup>132</sup> If the competing state is not a party to the statute, the refugee state shall, if it is not under an international obligation to extradite the individual to the competing state, give priority to the Court.<sup>133</sup> If the refugee state is under an international obligation to extradite the individual, it may itself decide whether to extradite to the competing state or submit the individual to the Court.<sup>134</sup> Thus, the Court gives the requested state wide latitude and discretion in making its extradition decision.<sup>135</sup>

Dealing with these articles in turn, first, in article 89, entitled "Surrender of persons to the Court," the Court allows the requested state to comply with the request of the Court in accordance with its national law.<sup>136</sup> Presumably, under this provision, if the political offense exception to extradition is

---

<sup>129</sup> See Rome Statute, *supra* note 9, arts. 89-91.

<sup>130</sup> See *id.* art. 89.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* art. 90(1), (2).

<sup>133</sup> See *id.* art. 90(4).

<sup>134</sup> See Rome Statute, *supra* note 9, art. 90(6). The refugee State should take the following factors into account when making the decision: "(a) The respective dates of the requests; (b) The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and (c) The possibility of subsequent surrender between the Court and the requesting State." *Id.*

<sup>135</sup> These however, articles leave much to each state's interpretation of the function of the political offense doctrine. One of the unsettled debates in the area of international law, too complicated to be afforded ample discussion here, is whether the political offense doctrine is actually international law of civilized nations, or whether it is merely the national law of individual states. See *supra* Part I.

<sup>136</sup> "States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender." Rome Statute, *supra* note 9, art. 89(1).

embedded in a state's national law,<sup>137</sup> the obligation to extradite or surrender the individual does not exist. This however, entails an extremely narrow reading of the statute. To read the article by itself, and incorporate the allowance of the political offense exception would be contrary to the goals and purposes of the ICC.

Also, in article 90, entitled "Competing [R]equests," the Court allows the requested state to take into account international obligations<sup>138</sup> in its decision whether to extradite.<sup>139</sup> While the Court may request a state to surrender a person, it is the individual state that has the authority to decide whether to extradite.<sup>140</sup> Again, this provision must be read in the context of the entire Rome Statute and the goals and purposes of the ICC. First, if the Court is going to abolish the diplomatic immunity exception, an extremely political exception, then it would be absurd to say that the Court will allow the political offense doctrine. Second, it is the goal of the ICC to remain neutral and fair. It would hardly be "fair" to let some individuals escape jurisdiction simply because there were sufficient political ties that fall within the doctrine. Third, the ICC was specifically established to handle crimes of a political nature, such as war crimes and genocide.<sup>141</sup> Lastly, as shown below, it would be inane to attach the political offense doctrine where none of the underlying reasons for it are evident.

The political offense doctrine has certain rationales and purposes that exist when there is an inter-state controversy regarding the decision to extradite.<sup>142</sup> These rationales, however, will cease to exist in the ICC. First, with regard to dual crimi-

---

<sup>137</sup> See *supra* Part II.D., para.1.

<sup>138</sup> See Rome Statute, *supra* note 9, art. 90.

<sup>139</sup> "If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court . . . ." *Id.* art. 90(4).

<sup>140</sup> One of the proposals to the Statute contained bracketed text for the terms offered as suggestions for a title to Articles 87 and 88 to be used in conjunction with Article 90. See U.N. Doc. A/CONF.183/2/Add.1 at 133-139. Among the choices were the words "surrender," "transfer," and "extradition." See *id.* It can be inferred that the word "surrender" was ultimately chosen since it lacked the political implications contained in the word "extradition." *Id.*

<sup>141</sup> See *supra* Part IV, para.4.

<sup>142</sup> See *supra* Part II.B.



nality, the Court only has jurisdiction to hear the most serious of crimes.<sup>143</sup> Thus, it is more than likely that any crime for which the ICC could try an individual, will be a crime in the fugitive state. For example, by signing the Statute, each country is agreeing that genocide is illegal. There will be no struggle therefore, between nations regarding the extradition of a person out of a country where the act is legal, into a country where that person is subject to criminal liability.

Second, there will no longer be a fear of an unfair trial. The signatories to the Statute are extremely diverse. Under this body, the Court will be comprised of judges and prosecutors from different nations and must always remain neutral. The Court "could try the fugitive only for the common element of the crime and punishment would not be based on the political prejudices inherent in any single state's judiciary."<sup>144</sup> The Court will appoint a neutral prosecutor,<sup>145</sup> and the judges will represent several nations with different ideals.<sup>146</sup> With sufficient publicity and the international community supervising the trial, there is little chance of unfairness as there would be under a national court, which could remain out of the international public eye.

Furthermore, there will be less justification for fears of cruel or severe punishment. The rules of procedure and evidence, which supplement the Rome Statute, delineate the punishment of criminals accordingly, and will be extremely limited in terms of the punishments that can be ordered.<sup>147</sup> There will be no capital punishment in the ICC. The convicted individual

---

<sup>143</sup> The Court will have the jurisdiction to hear cases regarding the crime of genocide, crimes against humanity, war crimes and the crime of aggression. See Rome Statute, *supra* note 9, art. 5(1). See also, *supra* Part III.

<sup>144</sup> GILBERT, *supra* note 26, at 156.

<sup>145</sup> See Rome Statute, *supra* note 9, art. 42 (The Office of the Prosecutor). Accordingly, the Prosecutor will be a separate and independent organ of the Court. See *id.* art. 42(1). The Deputy Prosecutors will all represent different nationalities. See *id.* art. 42(2). The Prosecutor will be elected by secret ballot by an absolute majority. See *id.* art. 42(4).

<sup>146</sup> See *id.* art. 36, which requires judges to have experience and competence in criminal law and procedure, the relevant areas of international law and fluency in one of the working languages. Further, there shall be equitable geographical representation and fair representation of female and male judges. See Rome Statute, *supra* note 9, art. 36. Throughout the statute, the theme of impartiality is stressed.

<sup>147</sup> See *id.*, art.108(1), which states:

will serve his or her sentence in a state designated by the court.<sup>148</sup> The court, in its sentencing, will take several factors into account, such as accepted international treaty standards, the views of the convicted, the nationality of the convicted, the circumstances of the crime and the necessities of enforcement.<sup>149</sup> The convicted individual may also apply for a transfer during the service of the sentence.<sup>150</sup> The Court clearly and strictly supervises the enforcement of the sentence with great emphasis on the need to comply with international treaty standards regarding the treatment of prisoners.<sup>151</sup> In fact, the ICC, without the political offense doctrine, will actually promote the humanitarian concerns of the international community.<sup>152</sup>

Third, the need to grant asylum for the purpose of retaining neutrality<sup>153</sup> will also disappear. The asylum state would not be taking sides or passing any judgment upon the political acts of another nation in relinquishing suspected criminals to the ICC. In order for the ICC to have jurisdiction over the individual, the crime must be extremely grave and serious.<sup>154</sup> Also, the ICC's desire to prosecute a case will imply that there is an international consensus that the individual should be punished. Thus, the asylum state would have the backing of the international community in choosing to abide by an international norm rather than unilaterally opposing the requesting nation. Addi-

---

A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.

See also *id.* arts. 103-111. These articles deal with enforcement, limitation on the prosecution or punishment, reviewability of court for reduction of sentence and escape.

<sup>148</sup> A list of states that are willing to accept sentenced prisoners will be given to the court. See *id.* art. 103(1).

<sup>149</sup> See *id.* art. 103(3).

<sup>150</sup> See Rome Statute, *supra* note 9, art. 104(2).

<sup>151</sup> See *id.*, art. 106.

<sup>152</sup> See *supra* Part II.D. A report by the Commission on Human Rights to the United Nations recommended "following closely developments regarding the identification of crimes against humanity and customary rules of international humanitarian law . . ." Petrasek, *supra* note 85, at 562 (quoting Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87 & Add.1.).

<sup>153</sup> See *supra* Part II.B.

<sup>154</sup> See *supra* Part III.

tionally, states that are members of the ICC not only have an obligation to cooperate,<sup>155</sup> they are compelled to cooperate, which may lead to the surrender of the individual, thus placing no blame on the asylum state.<sup>156</sup> Moreover, by handing the individual over to the ICC, the asylum state is essentially agreeing with the Court only on the fact that the individual deserves to be investigated. It is the prosecutor who makes the final decision whether to bring the case to trial. The obligation to cooperate also dismisses the argument of political interest and allegiance.<sup>157</sup>

As none of the policies in favor of the political offense doctrine will work in the ICC, it is important to address the reasons opposing the political offense doctrine. The concerns of those in opposition to the doctrine will also be unfounded.<sup>158</sup> First, there will be no infringement upon national sovereignty.<sup>159</sup> This was a concern of many countries.<sup>160</sup> Again however, the ICC is to be complementary to national criminal courts, and in fact gives great deference to the laws of the individual nations involved. Thus, the argument that national sovereignty will be diminished is unfounded. Second, the fear of the opponents of the doctrine, of encouraging criminal activity that is tied to political ideals, will be laid aside. By establishing a permanent international criminal court that will have jurisdiction over crimes that were once viewed as unreachable, it is hoped that the ICC will work as a deterrent to criminal activity.<sup>161</sup> Because citizens of those nations signing the statute will be treated equally, whether politically motivated or personally motivated, there will be no such encouragement.

---

<sup>155</sup> See *supra* Part III. n.113.

<sup>156</sup> If the Court decides the case is inadmissible, the requested State "may, at its discretion, proceed to deal with the request for extradition from the requesting State." Rome Statute, *supra* note 9, art. 90(5).

<sup>157</sup> See *supra* Part II.B.

<sup>158</sup> See *supra* Part III.

<sup>159</sup> See *id.*

<sup>160</sup> See *id.*

<sup>161</sup> David Scheffer, Head of the United States Delegation to negotiate the creation of the ICC, stated that "[w]e firmly believe in the establishment of such a court . . . not only to ensure that when crimes of a certain magnitude occur the individuals responsible will be brought to justice, but we also support it as a major deterrent." Keava, *supra* note 92, at 22.

It can therefore be seen that the ICC reserves no place for the political offense doctrine. Although rationales exist in support of the political offense doctrine when individual states are the primary actors involved, these rationales cease to exist when the focus forum is a permanent international court. This can be seen by a common-sense approach of looking to the purposes and goals of the ICC, the articles within the statute, policy reasons supporting and opposing the doctrine, and endorsements of individual nations. Without any need for the doctrine, it will then cease to exist in the ICC.

#### PART V:

#### Conclusion

The International Criminal Court is finally within the world's reach. Not long ago, the thought of more than eighty nations coming to a consensus was a mere ideal in the distant future. The ICC encompasses social, economical, and political ideology of many nations, legal systems, religions and nongovernmental organizations into one international body. We certainly are a long way from the once bipolar world.

Amnesty International, in a report to its members after the Rome Conference, established that

[t]he true significance of the adoption of the Statute may well lie, not in the actual institution itself in its early years, which will face enormous obstacles, but in the revolution in legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves or, if they fail to fulfill this duty, by the international community in accordance with the rule of law.<sup>162</sup>

There will be many problems to work out in the upcoming years, but the establishment of the ICC can be seen and recognized as a positive step towards international peace. It is hoped that the major superpowers that have yet to sign the treaty, such as Russia and the United States will soon join the treaty and bring to the court their own ideas and expectations.

---

<sup>162</sup> Pace, *supra* note 113 (quoting Amnesty International).

This comment does not advocate one view of the political offense doctrine over another, nor does it propose any reform of the doctrine. The purpose of this comment is to cast light on the political offense doctrine within the context of the ICC and proclaim that, for the foregoing reasons, the doctrine will have no place, politically, socially or ideologically, in the ICC. The ICC, a neutral, international judicial body, will not support any of the political or social rationale that sustain the exception in a state-to-state forum.

The ICC, absent the political offense doctrine, will actually cater to both proponents and opponents of the doctrine when used interstate. For those in support of the doctrine, the ICC will grant a fair trial with minimal worry of cruel punishment. Furthermore, states will be able to maintain the appearance of neutrality to their counterparts via cooperation with the Court. For those who oppose the exception, the ICC will favor their ideas while suppressing their fears of the doctrine. The ICC will deter criminal activity rather than encourage it. The ICC, therefore, is one place where the abolition of the political offense doctrine may approach the possibility of making both sides content.

There is strong debate about the political offense doctrine in the application of interstate relations, when individual states are the primary actors in a problem. There are policy reasons and ideology in favor of and in opposition to the doctrine. No one nation or view is right or wrong. This debate, however, as illustrated above, ceases to exist when the focus forum is a neutral, international judicial body. The ICC, or any permanent international court, is simply not equipped to entertain the political offense doctrine.