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## NOTES

### The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities †

On January 7, 1977, Abu Daoud entered France as a member of an official delegation sent to Paris by the Palestinian Liberation Organization (PLO). A day or so later, French police detained and then arrested him upon the request of the West German and Israeli Governments. Officials of both governments announced forthcoming requests for his extradition as a suspected organizer of the 1972 Munich Olympics massacre. This chain of events set the stage for the most recent case illustrating the political and legal obstacles which militate against the extradition and eventual prosecution and punishment of alleged transnational terrorists.<sup>1</sup>

#### I. EXTRADITION AND TRANSNATIONAL TERRORISM

Extradition has been defined as "the act by which one nation delivers up an individual, accused or convicted of an offense outside of its own territory, to another nation which demands him, and which is competent to try and punish him."<sup>2</sup> In contemporary international practice, the decision as to whether an alleged offender will be extradited to the requesting State is within the complete discretion of the requested State. Absent bilateral or multilateral treaty obligations, there is no legal duty to extradite. Where treaty provisions govern, the requested State usually will grant an extradition request only for crimes enumerated in the treaty. Moreover, most treaties provide an exception for acts

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1. For an extensive definition of the term "transnational terrorism," see Lillich & Paxman, *State Responsibility For Injuries To Aliens Occasioned By Terrorist Activities*, 26 AM. U. L. REV., 217, 217 n.1 (1977).

2. 1 J. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3 (1891). See also A. BILLOT, TRAITÉ DE L'EXTRADITION 1 (1874); BLACK'S LAW DICTIONARY 698 (4th rev. ed. 1968). See generally F. PIGGOTT, EXTRADITION 5-16 (1910).

deemed to be "political offenses." In any event, extradition is ultimately a political decision to be made by the government of the requested State.<sup>3</sup>

In the context of transnational terrorism, the process of extradition takes on special significance precisely because of the "political offense" exception and the almost unlimited discretion of governments in matters of extradition. Most terrorists will seek asylum in countries which are sympathetic to the political beliefs which allegedly motivated their crimes. Such countries are likely to refuse requests for the extradition of terrorists: either they are not parties to extradition agreements and hence are not under a legal duty to extradite; or they will invoke the "political offense" exception of existing treaties.<sup>4</sup>

For example, on December 18, 1973, Arab terrorists attacked a Pan American jet airliner at the Rome airport. Thirty-two persons were killed during the attack. In order to escape, the terrorists hijacked a Lufthansa plane and flew to Athens, where they demanded the release of two Palestinians imprisoned there.<sup>5</sup> They then flew to Kuwait.<sup>6</sup> Italy, Morocco, West Germany, and the United States made requests for the extradition of the terrorists. Kuwait had no extradition treaty with any of these States. Moreover, the Kuwaiti Government deemed the acts of the terrorists to be of a "political" character. Ultimately, the terrorists were handed over to the "Arab Liberation Movement" for having committed "crimes against the movement."<sup>7</sup>

Given the alleged purposes and motives of their acts, terrorists apprehended in less politically sympathetic countries also may invoke the "political offense" exception. Recently, however, the courts in several countries have held that terrorist crimes are without the purview of the "political offense" exception.<sup>8</sup> They have done so by adopting a restrictive and narrow construction of political crimes. In *Re State of Wisconsin and Armstrong*,<sup>9</sup> the United States requested the extradition of Armstrong from Canada on charges relating to the bombing of four buildings at the University of Wisconsin in 1972. In contesting the request for his

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3. See Lillich & Paxman, *supra* note 1, at 300.

4. *Id.* at 303.

5. N.Y. Times, Dec. 18, 1973, at 1, col. 8.

6. *Id.*, Dec. 20, 1973, at 1, col. 1.

7. *Id.*, Dec. 23, 1973, at 3, col. 1. For an analysis of this incident, see Lillich & Paxman, *supra* note 1, at 277, 302.

8. See Lillich & Paxman, *supra* note 1, at 300-03.

9. 28 D.L.R.3d 513 (York, Ontario County Ct. 1972).

extradition, Armstrong alleged that his acts were of a "political character," since they were directed against U.S. involvement in the Vietnam War. The extradition magistrate, however, ruled that the "political offense" exception was inapplicable since no classified research had been done on the campus and the accused was not part of an organized political protest movement. The magistrate also noted that the acts of the accused were directed at the property of the university, not at the U.S. Government. The court of appeals affirmed the decision, characterizing Armstrong as "not a political fugitive but simply a fugitive from justice . . . ." <sup>10</sup>

*Cheng v. Governor of Pentonville Prison* <sup>11</sup> involved a Formosan who fled to Sweden after having been convicted of the attempted murder of Chiang Kai-shek's son in New York City. The Swedish Government, after some hesitation, acceded to the United States' request for his extradition, but, while Cheng was being flown back to the United States, he became ill and was taken to London for medical treatment. The United States then had to request his extradition from Great Britain. In the proceedings before the British court, Cheng contended that the request should be denied because his acts fell within the "political offense" provision of the extradition treaty between the United States and Great Britain. The House of Lords, however, concluded that the exception applied only to acts of political opposition to the State requesting extradition. Since Cheng's act was not directed against the United States Government, the request for Cheng's extradition was granted.

The most recent application of the "political offense" exception to incidents of transnational terrorism is the case of Rolf Pohle, decided by the Supreme Court of Greece in October 1976.<sup>12</sup> Pohle, a member of the Baader-Meinhof terrorist gang, was sentenced by a West German court in 1974 to six years' imprisonment. He was freed the following year in exchange for a West Berlin politician who had been kidnapped by other members of the gang. After his arrest in Athens in 1976, the West German Government sought his extradition from Greece on the ground that his prison term in West Germany had not been satisfied. The court of appeals in Athens refused the request, holding that "his acts were those of a genuine revolutionary, and that they were not a criminal but a

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10. 32 D.L.R.3d 265 (Fed. Ct. App. 1973). See Note, *Asylum or Accessory: The Non-Surrender of Political Offenders by Canada*, 31 U. TORONTO FACULTY L. REV. 93 (1973).

11. [1973] A.C. 931 (H.L.).

12. See Judgment of Oct. 1, 1976, Wash. Post, Oct. 4, 1976, § A, at 24, col. 1 (S. Ct. Greece).

political offense.”<sup>13</sup> The Supreme Court of Greece reversed the decision “by adopting a very narrow definition of a political crime, taking it to cover only actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives.”<sup>14</sup>

These decisions reveal that many States regard terrorist acts as common crimes outside the purview of the “political offense” exception, no matter what political motivations are claimed. The governments and courts of many other States, however, adhere to a more flexible construction.<sup>15</sup> In France, for example, the *Chambre d'accusation* of the *Cour d'appel* of Paris refused to extradite two fugitives who were wanted in the United States on aircraft hijacking charges. In the proceeding, the United States argued that “[t]hese fugitives had not been engaged in any political activity in the United States and were not subject to any persecution. A halfhearted effort to direct the plane to Hanoi does not make this crime political. Rather, the extortion of \$500,000 contradicts any assertion of ‘political character.’”<sup>16</sup> The French court, however, held that the acts of the hijackers constituted “political offenses” under article VI of the treaty of extradition between the United States and France.<sup>17</sup>

## II. THE FACTS OF THE CASE

On January 5, 1977, the PLO requested visas from the French consulate in Beirut for the members of an official delegation to Paris.<sup>18</sup> The delegation was to attend the funeral services of Mah-

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13. *Id.*

14. *The Times* (London), Oct. 2, 1976, at 4, col. 1. See also *THE ECONOMIST*, Oct. 9, 1976, at 65, col. 2.

15. See Lillich & Paxman, *supra* note 1, at 303.

16. E. McDowell, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975*, at 168 (1975). The court may have tacitly incorporated in its decision the French Government's criticism of U.S. policy in Vietnam.

17. *Id.* at 168-69. See Extradition Convention, Jan. 6, 1909, United States-France, 37 Stat. 1526, T.S. No. 561, *amended*, Feb. 12, 1970, 22 U.S.T. 407, T.I.A.S. No. 7075.

18. Most of the facts in the case have been obtained from the Agence France-Presse interview with Raymond Barre, Prime Minister of France, in Paris (Jan. 13, 1977) (transcript obtained from the Information Service of the French Embassy, Washington, D.C.) [hereinafter cited as Barre Interview] and the Communiqué of the French Ministry of Justice Concerning the Release of Abu Daoud (Jan. 11, 1977) (obtained from the Information Service of the French Embassy, Washington, D.C.) [hereinafter cited as Communiqué]. The Barre Interview was reported at *N.Y. Times*, Jan. 14, 1977, § A, at 1, col. 4.

Other information was obtained from news reports. See *THE ECONOMIST*, Jan. 15, 1977, at 43; *TIME*, Jan. 24, 1977, at 29; *The Guardian* (London), Jan. 13, 1977, at 3, col. 1;

moud Saleh, a former PLO representative who had been assassinated in the French capital on January 3, 1977. One of the delegates listed was Youssif Hanna Raji; subsequent events have revealed that he was in fact Abu Daoud (Mohammed Daoud Mohammed Auda), allegedly an organizer of the 1972 Munich Olympics massacre.<sup>19</sup> The French consulate granted the visa requests, apparently on the same day.<sup>20</sup>

On January 7, 1977, Abu Daoud entered France with the PLO delegation. Although he made no attempt to alter his physical appearance and used a false Iraqi passport, Daoud encountered no difficulties. He registered at the Résidence Saint-Honoré, where security arrangements had been made by the French Ministry of Foreign Affairs. That afternoon, the French Director for Middle East Affairs invited the members of the delegation, including Daoud, to the Quai d'Orsay for a meeting. Later that day, the French police, acting upon information from the West German police, brought in "Raji" to verify his identity. In the evening, when officials of the West German Ministry of the Interior sent their French counterparts a telegram announcing a forthcoming request for extradition, the French police detained Daoud for questioning.<sup>21</sup>

On the morning of January 8, the West German judicial authorities, acting through Interpol, confirmed in writing to French officials that a warrant for the arrest of Abu Daoud had been signed by a judge of the Munich cantonal court. They requested that Daoud be held in custody pending a request for his extradition. That afternoon, pursuant to article 9 of the French-German Extra-

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Le Monde, Jan. 10, 1977, at 6, col. 1, Jan. 11, 1977, at 1, col. 3, Jan. 12, 1977, § A, at 6, col. 1, Jan. 13, 1977, § A, at 2, col. 2; N.Y. Times, Jan. 12, 1977, § A, at 6, col. 1; The Times (London), Jan. 11, 1977, at 6, col. 4, Jan. 12, 1977, at 1, col. 1, Mar. 19, 1977, at 5, col. 2.

For a very brief summary of the facts, see Roubache, *A Propos De Droit*, [1977] 51-53 GAZETTE DU PALAIS [GAZ. PALAIS]. For a short critique of the case, see Rubin, *Abu Daoud Case: Flouting World Law*, Christian Science Monitor, Jan. 27, 1977, at 31, col. 1. See generally Note, *The Abu Daoud Affair*, 2 J. INT'L L. & ECON. 539 (1977); Recent Developments, *International Terrorism: Extradition*, 18 HARV. INT'L L.J. 467 (1977).

19. For a discussion of Abu Daoud's terrorist activities and his possible status as a Jordanian double agent, see TIME, Jan. 24, 1977, at 30.

20. Prime Minister Barre states that "[t]he usual verification procedures carried out by the Consulate did not enable it to determine the identity of the person presented under the name of Youssif Hanna Raji." Barre Interview, *supra* note 18, at 1.

21. The arrest of Abu Daoud was reported to have been the work of several Western intelligence agencies which sought revenge for the earlier murders of their agents. See, e.g., N.Y. Times, Jan. 12, 1977, § A, at 6, col. 3.

dition Convention,<sup>22</sup> the French authorities placed Daoud under provisional arrest.

On the afternoon of January 10, Israeli officials, also acting through Interpol, told French authorities that a warrant for the arrest of Abu Daoud had been issued by the Israeli judicial authorities. Like the West Germans, the Israelis sought Abu Daoud on charges relating to the 1972 Munich Olympics massacre.<sup>23</sup> The Israeli officials requested that Abu Daoud be arrested provisionally with a view to extradition pursuant to article 10 of the French-Israeli Convention.<sup>24</sup>

On the morning of January 11, the *Chambre d'accusation* of the *Cour d'appel* of Paris convened in camera to rule upon the legality of the continued provisional detention of Abu Daoud. Abu Daoud's lawyers contended that the West German arrest warrant was invalid on three grounds: (1) it did not contain the alias (Youssif Hanna Raji) under which Daoud had been arrested; (2) it had not been dated; and (3) it had not been confirmed by the West German authorities through diplomatic channels as required by the extradition convention. With regard to the Israeli request, the defense argued that the French-Israeli Extradition Convention in effect at the time of the July 1972 Munich massacre<sup>25</sup> did not apply to crimes committed in third countries by non-Israeli nationals and that the new pact concluded in July 1975,<sup>26</sup> which did confer jurisdiction in such cases, could not be applied retroactively. Newspaper accounts reported that the public prosecutor agreed with the defense arguments.<sup>27</sup>

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22. Convention on Extradition, Nov. 29, 1951, France-West Germany, [1959] *Journal Officiel de la République Française* [J.O.] 11524. The translations of the treaty are taken from Excerpts from the Extradition Convention Signed Between France and the Federal Republic of Germany, November 29, 1951 (obtained from the Information Service of the French Embassy, Washington, D.C.).

23. Newspaper accounts reported, however, that the Israeli Government would request extradition for Abu Daoud's complicity in other acts as well, *i.e.*, 14 acts of terrorism carried out in Israel from February 1972 to January 1973. *THE ECONOMIST*, Jan. 15, 1977, at 46.

24. Convention on Extradition, Nov. 12, 1958, France-Israel, [1971] J.O. 11268, 805 U.N.T.S. 251.

25. *Id.*

26. This special terrorist pact consisted of the parallel enactment of similar domestic laws. France enacted the Statute of July 11, 1975, [1975] J.O. 7219, [1975] *Dalloz-Sirey, Législation* [D.S.L.] 259. This enactment became article 689-1 of the French Code de procédure pénale [C. PR. PEN.]. For the Israeli law, see Penal Law Amendment of March 21, 1972, 26 *LAWS OF THE STATE OF ISRAEL* 53, § 4.

27. *N.Y. Times*, Jan. 12, 1977, § A, at 6, col. 1; *The Times* (London), Jan. 12, 1977, at 1, col. 3.

After a brief deliberation, the court adopted the major defense arguments.<sup>28</sup> The court held that, since the West German warrant had not been confirmed through diplomatic channels as required by the applicable convention, there were no legal grounds to justify Abu Daoud's continued provisional detention pending the anticipated request for extradition. The court then held that no action could be taken on the Israeli request to hold Abu Daoud in custody, citing article 3(5) of the French extradition law,<sup>29</sup> and the absence of any act within the scope of the French-Israeli extradition agreement in effect in 1972. Since no other charges had been made, the court concluded that Abu Daoud should be set free. Neither Abu Daoud nor his lawyers made a statement in court regarding his innocence of the alleged terrorist charges. The fact that Abu Daoud had entered France on a false passport was not brought up during the proceeding.

The suspected terrorist left France the same afternoon on a flight to Algiers.

### III. AN ANALYSIS OF THE DECISION OF THE FRENCH COURT

The arrest of Abu Daoud placed the French Government in an extremely delicate diplomatic position.<sup>30</sup> While French officials had taken a strong public stand against transnational terrorism, they also had cultivated relations with the Arab countries.<sup>31</sup> Prior to the arrest, President Valéry Giscard d'Estaing had announced plans for an official visit to Saudi Arabia to discuss an oil supply

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28. For the official report of the court's decision, see [1977] 51-53 GAZ. PALAIS. See also *Le Monde*, Jan. 13, 1977, at 2, col. 1 (reporting the French Ministry of Justice's official summary of the court's decision).

29. The French government may surrender to foreign governments, at their request, any individual, not a French national or a French subject, found on the territory of the French Republic or of its colonial possessions, who is the object of proceedings begun in the name of the requesting State or of a sentence handed down by its courts.

Nonetheless, extradition shall only be granted if the offense that has occasioned the request was committed:

Either on the territory of the requesting State by a national of that State or by an alien;

Or outside the territory of that State by one of its nationals;

Or outside its territory by a non-national of the requesting State if the offense is among those for which French law authorizes prosecution in France even though they were committed by a foreign national on foreign territory.

Law of March 10, 1972, art. 3(5), [1927] J.O. 2874, [1927] 1 GAZ. PALAIS 1018.

30. See *The Times* (London), Jan. 11, 1977, at 6, col. 4.

31. See *THE ECONOMIST*, Jan. 15, 1977, at 43, col. 1; *Le Monde*, Jan. 13, 1977, at 14, col. 3; *The Times* (London), Jan. 11, 1977, at 6, col. 5.



agreement;<sup>32</sup> the government was closing a \$150 million defense deal with Egypt<sup>33</sup> and secretly negotiating with Libya to obtain the release of a French anthropologist who had been held as a hostage by Chad rebels for over two years.<sup>34</sup> The detention and possible extradition of Abu Daoud posed a serious threat to a French economy almost totally dependent upon Arab oil. Moreover, some form of terrorist blackmail could be anticipated, threatening the security of France.<sup>35</sup>

In the aftermath of the release of Abu Daoud, many Western governments and newspapers criticized the decision of the French court as having been politically motivated. The court, they contended, had yielded to the pressure of the French Government which, in turn, had succumbed to possible Arab oil threats and terrorist blackmail.<sup>36</sup> The court's resort to legal technicalities and its narrow and extremely technical construction of the applicable conventions appear to merit such criticism. Although the French court never reached the substantive question of whether the acts imputed to Abu Daoud were of a political character, the procedural holding seems to indicate the presence of political influences. The consideration of extrajudicial criteria not only hinders the eventual punishment of transnational terrorists, but also lessens the

32. *The Times* (London), Jan. 11, 1977, at 6, col. 5.

33. Barre Interview, *supra* note 18, at 2.

34. This incident involved the kidnapping of Mrs. Françoise Claustre, a 38-year-old French archaeologist and anthropologist, by a small band of Toutou rebels in May 1974. The French Government had been unable to obtain her release despite promises to pay an enormous ransom and to deliver arms to the rebels. Prominent officials, newspapers, and public opinion generally were pressuring the government to resolve the matter. See *N.Y. Times*, Sept. 14, 1975, at 20, col. 1, Sept. 26, 1975, at 6, col. 2, Oct. 3, 1975, at 35, col. 2, Jan. 11, 1976, at 7, col. 1. In order to secure Mrs. Claustre's release, the French Government had undertaken secret negotiations with President Kadhafi of Libya whose influence in Chad is linked to his interest in military expansion in Africa. On January 31, 1977, the leader of the rebels personally escorted Mrs. Claustre and her husband to Libya and released them to President Kadhafi. The French Government's continued detention of Abu Daoud pending extradition requests obviously would have jeopardized the negotiations with President Kadhafi. See *Le Monde*, Feb. 1, 1977, at 1, col. 3, Feb. 2, 1977, at 2, col. 1, Feb. 3, 1977, at 1, col. 2.

35. See *N.Y. Times*, Jan. 12, 1977, § A, at 20, col. 1; *Le Monde*, Jan. 13, 1977, § A, at 1, col. 2.

36. See, e.g., *Le Monde*, Jan. 12, 1977, at 3, col. 1 (adverse reaction of French newspapers); *The Guardian* (London), Jan. 13, 1977, at 3, col. 1 (criticism by Israeli government); *N.Y. Times*, Jan. 12, 1977, § A, at 20, col. 1 (critical editorial), Jan. 13, 1977, at 3, col. 1 (criticism by President Carter and Department of State); *The Times* (London), Jan. 12, 1977, at 1, col. 1 (reporting technical nature of decision reached, Arab pressure, Israeli and German reaction).

viability of the courts as an independent institution of government and their capacity to dispense justice impartially.

An assessment of the decision, however, must take into account West Germany's conduct. According to newspaper accounts, the West German Government shared many of the French apprehensions.<sup>37</sup> German legal experts were skeptical about pursuing an extradition request on the basis of the available evidence. The government also was anxious about its recently improved relations with the Arab countries as well as the possibility of terrorist blackmail.<sup>38</sup> The French court could not have released Abu Daoud on procedural grounds if the West German Government had followed the proper procedures under the convention.

As for the Israeli Government, newspaper accounts report that it was not initially interested in obtaining Abu Daoud since it believed him to be a Jordanian double agent and, consequently, an unimportant figure in the Palestinian espionage network.<sup>39</sup>

#### A. *Procedural Provisions Applicable to the Requests for Abu Daoud's Extradition*

Under French law, extradition is an act of mutual international assistance in the repression of crimes and the punishment of criminal offenders.<sup>40</sup> A request for extradition is a diplomatic act, involving the legal duties of the national government as they arise under public international law.<sup>41</sup> The final decision on extradition rests with the executive branch.<sup>42</sup> Although the executive is under a legal obligation to consult with the judiciary, the judicial functions are narrowly defined and subordinate to those of the executive.<sup>43</sup>

37. See *Le Monde*, Jan. 12, 1977, § C, at 2, col. 3; *The Times* (London), Jan. 15, 1977, at 3, col. 3.

38. See *The Guardian* (London), Jan. 13, 1977, at 3, col. 1; *Le Monde*, Jan. 11, 1977, at 6, col. 2; *TIME*, Jan. 24, 1977, at 29, col. 1; *The Times* (London), Jan. 11, 1977, at 13, col. 1.

39. See *TIME*, Jan. 24, 1977, at 30. But see Rapoport, *Between Minimum Courage and Maximum Cowardice: A Legal Analysis of the Release of Abu Daoud*, 3 *BROOKLYN J. INT'L L.* 195 (1977).

40. See Aymond, *Extradition*, [II-Droit Penal] *ENCYCLOPEDIE DALLOZ* ch. 1, § 1, ¶ 6 (1968) [hereinafter cited as *AYMOND-DALLOZ*].

41. See *id.* ch. 1, § 1, ¶ 4 & § 2, ¶ 34.

42. Law of March 10, 1927, arts. 2, 18, [1927] *J.O.* 2874, 2880, [1927] 1 *GAZ. PALAIS* 1019-20. For an analysis of the substance of the law, see Travers, *La loi française d'extradition du 10 mars 1927*, 54 *JOURNAL DU DROIT INTERNATIONAL* 595 (1927).

43. Law of March 10, 1927, arts. 14-17, [1927] *J.O.* 2877-79, [1927] 1 *GAZ. PALAIS* 1020. See also *AYMOND-DALLOZ*, *supra* note 40, at ch. 1, § 2, ¶¶ 36, 38, 40.

In the absence of an applicable treaty provision,<sup>44</sup> the Law of March 10, 1927 is controlling in matters of extradition. In all cases, the *Chambre d'accusation* of the *Cour d'appel* decides whether the extradition request is procedurally correct and a denial of the request is binding upon the executive.<sup>45</sup> Otherwise, the executive is free to grant or to deny the request on the basis of its own determination.<sup>46</sup>

The arrest of Abu Daoud and the anticipated extradition demands from the West German and Israeli Governments involved bilateral extradition conventions as well as the French extradition statute. The West German Government made its request for extradition pursuant to article 9 of the French-German Extradition Convention:<sup>47</sup>

At the direct request of the judiciary of the requesting State, the individual sought shall be arrested provisionally when there is reason to fear that he might avoid extradition or make it more difficult to ascertain the truth.

. . . .  
This request must be confirmed at the same time through diplomatic channels.

The requesting State shall be informed of the provisional arrest or of the reasons why it could not be made.

Article 10 provides that "the provisional detention may be ended if the surrendering government is not presented, in the 20 days following the arrest, with one of the documents mentioned in paragraph 2 of article 8 . . . ." The documents of article 8(2) are "a decision or order of executory conviction, or an arrest warrant or any other writ having the same force issued by the judiciary."

The Israeli request was made pursuant to article 10 of the French-Israeli Extradition Convention:<sup>48</sup>

In an emergency, at the request of the judiciary or the police of the requesting State, a provisional arrest shall

44. Law of March 10, 1927, art. 1, [1927] J.O. 2874, [1927] 1 GAZ. PALAIS 1018. See also AYMOND-DALLOZ, *supra* note 40, at ch. 1, § 2, ¶¶ 37, 38.

45. Law of March 27, 1927, arts. 16-17, [1927] J.O. 2879, [1927] 1 GAZ. PALAIS 1020. See also AYMOND-DALLOZ, *supra* note 40, at ch. 1, § 2, ¶ 38.

46. Law of March 10, 1927, art. 18, [1927] J.O. 2880, [1927] 1 GAZ. PALAIS 1020. See also AYMOND-DALLOZ, *supra* note 40, at ch. 1, § 2, ¶ 38.

47. Convention on Extradition, *supra* note 22. See also 48 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [R.C.D.I.P.] 757 (1959).

48. Convention on Extradition, *supra* note 24.

be made of the individual sought while transmission of the documents mentioned in paragraph 2 of the preceding article is awaited . . . . The request shall mention that a written arrest warrant or a conviction exists and that the request is being made with a view to extradition . . . .<sup>49</sup>

Articles 9 and 11 of the Convention also were relevant to the Israeli request for extradition. Article 9 provides that:

The request for extradition shall be made through diplomatic channels . . . . The report of the act for which extradition is requested, the date and place it was committed, its classification and the legal provisions applicable to it, shall be indicated as accurately as possible. . . . Extradition in this case shall only take place if, in the opinion of the authorities of the surrendering State, sufficient proof exists to justify the committal for trial had the offense been committed on the territory of that State . . . .

The relevant language in article 11 reads:

This provisional arrest may be suspended at any time; it will end ipso jure 60 days following the arrest if the surrendering State is not in receipt of the extradition request accompanied by the documents listed in article 9.

The release shall not preclude arrest and extradition should the extradition request come through at a later date.

Finally, in view of the holding of the French court,<sup>50</sup> article 689-1 of the Code of Penal Procedure and article 4 of the Penal Code were central to the assessment of the Israeli Government's extradition request. Article 689-1 provides that "[a]ny foreigner who, outside the territory of the Republic, has committed or been an accomplice to a crime can be pursued and judged according to the requirements of French law, provided the victim of the crime was a French national."<sup>51</sup> Article 4 of the Penal Code limits the application of article 689-1, stating that "[n]o crime can be pun-

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49. The translations of the treaty are taken from Excerpts From the Extradition Convention Signed Between France and Israel, November 12, 1958 (obtained from the Information Service of the French Embassy, Washington, D.C.).

50. See text at notes 65-72 *infra*.

51. C. PR. PEN. art. 689-1 (Fr.).

ished by punishments which were not prescribed by law before they were committed."<sup>52</sup>

The traditional principles of French extradition law and the relevant treaty and code provisions cited above provided the legal framework in which the court assessed the validity of Abu Daoud's continued provisional detention.

### B. *The West German Request For Provisional Detention*

Preliminary communications to the French Government indicated that the West German Government would seek the extradition of Abu Daoud for his alleged participation in the 1972 Munich Olympics massacre.<sup>53</sup> Under article 3 of the French-German Extradition Convention,<sup>54</sup> that charge was an offense for which extradition could be requested, unless the act was considered a "political offense" or had been judged and punished previously.<sup>55</sup> Under the provisions of the Law of March 10, 1927,<sup>56</sup> however, the *Chambre d'accusation* considered only the narrow question of the legality of the continued provisional detention of Abu Daoud on the basis of the information supplied by the West German Government,<sup>57</sup> ruling that the preliminary procedural requirements for detention had not been satisfied.

The court appears to have emphasized unduly the language of article 9 requiring diplomatic confirmation of the request for provisional detention on the basis of an extremely narrow reading of the language of the provision.<sup>58</sup> West German officials have maintained that the court's interpretation of the above article did not

52. CODE PENALE art. 4 (Fr).

53. See Baïre Interview, *supra* note 18, at 1-2; Communiqué, *supra* note 18, at 1.

54. "[P]ersons . . . sought for crimes . . . punished by the laws of the contracting parties by at least a one year imprisonment . . . will be subject to extradition." Convention on Extradition, *supra* note 24, art. 3.

55. Article 4 provides:

Extradition will not be granted if the offense for which it is sought is considered by the requested party, given the circumstances in which it was committed, as a political offense or as an act committed to prepare such an offense, to execute it, or committed in view of impeding the commission of a political offense.

*Id.* art. 4 (author's translation). See also 48 R.C.D.I.P. 757, 757 (1959).

56. Law of March 10, 1927, art. 16, [1927] J.O. 2877, [1927] 1 GAZ. PALAIS 1020.

57. See Baïre Interview, *supra* note 18, at 3; Communiqué, *supra* note 18, at 1.

58. The U.S. Department of State commented that Abu Daoud was released on an "apparent legal technicality." The Times (London), Jan. 13, 1977, at 1, col. 4. One French editorialist commented that the court "[avait fait] preuve d'un grand souci de juridisme." Le Monde, Jan. 13, 1977, § D, at 2, col. 1.

accord with previous, less stringent practice.<sup>59</sup> They have contended that article 10 gave them 20 days in which to present diplomatic confirmation.<sup>60</sup> The head of the West German Ministry of Justice's international law section summarized the official West German reaction when he accused the French court of freeing a terrorist on a legal technicality.<sup>61</sup>

French officials have asserted that the West German Government's reluctance to forward diplomatic confirmation justified the court's reasoning. When the request of January 8 was not confirmed, French officials contacted the German embassy in Paris on January 10. According to Prime Minister Barre, that effort was futile:

On Monday [January 10] at 3:00 p.m. the Embassy of the Federal Republic of Germany informed the [French] Ministry of Foreign Affairs that it had no new information regarding the matter. This attitude was all the more surprising since the request by the German Minister of the Interior had, three days earlier, been urgent.<sup>62</sup>

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59. N.Y. Times, Jan. 14, 1977, at 19, col. 6, Jan. 12, 1977, § A, at 6, col. 5.

60. Le Monde, Jan. 12, 1977, § C, at 2, col. 3. This reading of the Convention is not totally justifiable. See text at notes 63-64 *infra*.

61. N.Y. Times, Jan. 14, 1977, at 19, col. 6.

62. Barre Interview, *supra* note 18, at 3. In a press conference on January 17, 1977, in which he strongly defended the French actions, the President of France, Valéry Giscard d'Estaing, gave a more detailed account of the contacts between the French Government and the West German Embassy in Paris:

[L]ast Monday the 10th, three days after the first contacts had been made with the French authorities on this matter, the principal assistant of the Foreign Minister [Mr. Ulrich] was ordered to meet with the West German *chargé d'affaires* to obtain additional details in regard to this matter. The Ambassador . . . was not in Paris. . . . At 3 o'clock on Monday [afternoon] Mr. Ulrich . . . met with the West German *chargé d'affaires* who informed him that [the West German Embassy had] neither information nor instructions in regard to this matter. Mr. Ulrich informed him that in view of the importance of the problem and in view of the fact it was now before the French courts, it was desirable that . . . [the German *chargé d'affaires*] enter into contact with the attaché in Bonn who could provide him with the latest information in regard to this matter and that he [Mr. Ulrich] would wait for his telephone call . . . he would be available day or night.

And Mr. Ulrich was never called . . . [The court therefore] had no official communication concerning the extradition request [from West Germany].

L'Affaire Abu Daoud Extraits De La Conférence de Presse De Monsieur Valéry Giscard d'Estaing (obtained from the Information Service of the French Embassy, Washington, D.C.) (author's translation). The French Ambassador to the United States, Mr. Jacques Kosciusko-Morizet, also attempted to explain and justify the French actions. Letter to the Editor, Washington Post, Jan. 23, 1977, at 8, col. 3.

For the French Government, this constituted a strong indication of German unwillingness to follow through on their request for extradition.

While these official pronouncements obviously are not disinterested, they indicate that neither government wanted to pursue Abu Daoud's extradition.<sup>63</sup> When viewed in the light of Prime Minister Barre's remarks, West German criticisms of the French court decision are much less persuasive. Although there is merit to the argument that the court was responding to the political interests of the French Government, the insistence upon the satisfaction of the article 9(3) requirement was justified, at least in part, by the West German unwillingness to forward diplomatic confirmation. A close reading of article 10 reveals that the 20-day grace period applies specifically to the extradition documents referred to in article 8 and not to the diplomatic confirmation requirement of article 9. Moreover, newspaper accounts report that West German authorities unofficially viewed Abu Daoud's release with some relief.<sup>64</sup>

### *C. The Israeli Request that Abu Daoud Be Held in Custody With a View to Extradition*

The French court's holding regarding the Israeli request turned upon the substantive validity of the anticipated Israeli request for extradition. Article 3(5) of the French extradition law states that "[e]xtradition can be granted based on an offense committed outside the territory of the requesting State by a non-national of that State only if the same type of offense could be prosecuted in France even though committed by a non-French national outside of France."<sup>65</sup>

Article 689-1 of the French Code of Penal Procedure, effective January 1, 1976, appears to satisfy this requirement: "Any foreigner who, outside the territory of the Republic, has rendered himself guilty of a crime, either as its author or as an accomplice, can be sought and judged according to the requirements of the French law, when the victim of this crime is of French nation-

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63. It was suggested that the West German federal structure may have delayed diplomatic contacts. N.Y. Times, Jan. 12, 1977, § A, at 6, col. 5. In the light of subsequent developments, this early thesis is unpersuasive.

64. See, e.g., Le Monde, Jan. 12, 1977, § C, at 2, col. 3; The Times (London), Jan. 15, 1977, at 3, col. 3. Apparently German legal experts questioned whether the evidence against Daoud was sufficient to obtain either extradition or an eventual conviction. Le Monde, Jan. 12, 1977, § C, at 2, col. 3; The Times (London), Jan. 15, 1977, at 3, col. 3.

65. Law of March 10, 1927, art. 3(5), [1927] J.O. 2874, [1927] 1 GAZ. PALAIS 1018.

ality.”<sup>66</sup> However, the French court reasoned that article 689-1 could not be applied retroactively because it is a criminal law. Since it had been adopted some three years after the Munich incident, the requirement of article 3 was not met, and Abu Daoud could not be detained.<sup>67</sup>

The court appears to have overstepped its jurisdiction by ruling upon the merits of the Israeli request for extradition. The *Chambre d'accusation* was convened to determine whether the provisional detention of the suspected terrorist was in conformity with the procedures laid out in the applicable convention; it was not sitting to rule upon an extradition request that had not been made. Israeli officials contend that their embassy in Paris was never informed that the in camera proceeding was to take place. As a consequence, Israel did not have an opportunity to present arguments through the public prosecutor concerning the validity of the forthcoming extradition request.<sup>68</sup> Press reports indicate that the Israelis planned to seek Abu Daoud's extradition on the basis of alleged terrorist acts committed on Israeli territory as well as in Munich. Such a claim would have satisfied the article 3 requirement.<sup>69</sup> As a result, the *Chambre d'accusation*, which had jurisdiction to review only the procedural regularity of the request for provisional detention, actually judged the merits of an extradition request which had not been made.

The court also appears to have ignored the applicable provisions of the French-Israeli Extradition Convention. The Israeli request for provisional detention fulfilled the requirements of the Convention.<sup>70</sup> The court, however, relied exclusively upon the provisions of the French extradition statute, ignoring the well-settled rule of French law that, in the event of a conflict between a domestic law and a treaty, the latter will control.<sup>71</sup>

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66. C. PR. PEN. art. 689-1 (Fr.).

67. See text at notes 28-29 *supra*. See also Roubache, *supra* note 18, at 3-4.

68. The Guardian (London), Jan. 13, 1977, at 3, col. 1.

69. Given the context in which the alleged crimes were committed, the political offense exception would likely have been raised as a defense in a hearing on the substantive issues raised by the extradition requests. This question is crucial to the eventual success or failure of the legal struggle against transnational terrorism. For general discussions of the issue, see M. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 370 (1974); L. OPPENHEIM, INTERNATIONAL LAW 393 (1905); Lillich & Paxman, *supra* note 1, at 303; *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 ASILS INT'L L.J. 1 (1977).

70. Those requirements are outlined in the text at notes 48-52 *supra*.

71. "The treaties or agreements that are duly ratified or approved have, from the moment of their publication, an authority superior to that of the laws, with the reserva-



The obvious dichotomy between the resort to legal technicalities and the failure to consider fundamental points of law strongly suggests that the court was searching for some sort of legal justification of a foregone political conclusion, rather than objectively applying legal rules and principles to the particular circumstances of the case. Under established law, the complex substantive legal question should have been dealt with in a separate proceeding in which the parties concerned could have presented their case.

The failure of the French public prosecutor to object to the presentation of arguments concerning the validity of an anticipated extradition request, and the court's incorporation of these arguments into its decision, suggests, even more forcefully than the ruling on the German request, that the court yielded to political pressure. While the extradition of Abu Daoud to West Germany would have been unpalatable, his extradition to Israel was politically inconceivable.<sup>72</sup> The French Government made no attempt to justify the court's holding in regard to the Israeli extradition request, except to reiterate the court's reasoning as though it were justified intrinsically.<sup>73</sup>

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Before making an assessment of the impact of the Abu Daoud case on the struggle against transnational terrorism, it should be noted that both the facts of the case and the foregoing analysis have left one question unresolved: given his notorious reputation, why was Abu Daoud sent to Paris in the first place? A number of possible explanations come to mind. First, the PLO may have wanted Abu Daoud to be arrested in Paris in order to sabotage the French role in securing an eventual settlement in the Middle East or to test French support for its cause. Second, the French Government, knowing Abu Daoud's identity, allowed him to enter France as a friendly gesture to the PLO in an effort to advance its position in the Middle East. The government's plans then were thwarted by the French domestic intelligence agency (DST) which, when alerted by the intelligence agencies of other countries, arrested Abu Daoud either on orders from the Ministry of the Interior or independently to avenge the death of two of its agents who had

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tion for each agreement or treaty that it be applied by the other party." CONSTITUTION art. 55 (Fr.) (author's translation).

72. See *The Times* (London), Jan. 11, 1977, at 13, col. 1.

73. See Barre interview, *supra* note 18, at 4; Communiqué, *supra* note 18, at 2.

been shot in Paris the previous year while attempting to apprehend other transnational terrorists.<sup>74</sup>

The second scenario casts the objectives of French foreign policy and the means used to implement them in a cynical, if not illegal, light. The French Government is seen as attempting to gain influence in the Middle East through complicity with terrorists. It also raises serious questions about the role of secret police forces in democratic States. The French domestic intelligence agency is seen as subverting the policy determinations of a democratically-elected government. Such activity transforms the struggle against transnational terrorism into another form of terrorism which, although originating in legitimate institutions, would be just as disruptive of the harmony of the international community. Moreover, it would block effectively any emerging consensus between States on the question of terrorism, since individual States could not guarantee subsequent implementation of national policies on terrorism.

It appears probable, however, especially in the light of statements made by a former French intelligence director,<sup>75</sup> that the DST took no independent action. The apparent inconsistency between Abu Daoud's unimpeded entry into France and his subsequent arrest by French police can be explained by confusion arising at the highest levels of policymaking in the French Government, specifically between the Ministry of Foreign Affairs and the Ministry of the Interior.<sup>76</sup> Such confusion would explain the nature of the decision that was made: since Abu Daoud's entry into France involved official complicity with an alleged transnational terrorist, knowledge of that policy and its implementation had to remain confined to a select group—high-ranking officials of the Ministry of Foreign Affairs. Thus, it was impossible for officials in the Ministry of the Interior to coordinate their action with their counterparts in the Ministry of Foreign Affairs.

Regardless of which of the foregoing hypotheses best explains the incident, it is clear that the Abu Daoud case was more than a "simple police matter," as the French Government first contended.<sup>77</sup> The extremely unusual circumstances in which the court acted, as well as the strained and highly technical character of its decision, are indicative of the political importance of the matter and possibly of the pressure exerted upon the court to reach an

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74. See *Le Monde*, Jan. 11, 1977, at 6, col. 3, Jan. 12, 1977, at 7, col. 3.

75. *Le Monde*, Jan. 13, 1977, at 7, col. 3.

76. See *Le Monde*, Jan. 12, 1977, at 5, col. 1.

77. *N.Y. Times*, Jan. 13, 1977, at 4, col. 3.

immediate decision which conformed to the French Government's political assessment of the matter.

Without condoning the deficiencies of the French court's decision, one can still note that the U.S. propensity to view law as an instrument for achieving change in the international community is not shared by French lawyers and magistrates.<sup>78</sup> The French legal system maintains a strict distinction between law, which is seen as an appropriate instrument for the resolution of private disputes, and such issues as the interpretation of treaty obligations, which are seen as primarily political rather than legal matters and consequently are within the exclusive province of the executive branch of government.<sup>79</sup>

Given this caveat, the French Government, when confronted with the choice of taking an unbending position in regard to transnational terrorism or yielding to the possible threat of oil boycotts and terrorist blackmail, was free to pursue a course of political expediency. Its discretion, however, did not include the right to dress the self-serving political character of its choice in the cloak of judicial impartiality. Since proof of direct interference is not available, one might argue that the decision simply reflected the personal view of the judges as to what was best for their country in these circumstances. The highly technical reasoning of the decision, however, and its perfect suitability as a legal justification of a foregone political conclusion make that argument unacceptable.<sup>80</sup> The more plausible, albeit extreme, explanation of what happened is executive interference with the theoretically independent judiciary.<sup>81</sup> If this thesis is accepted, the political manipulation of the court was abhorrent simply because it was unnecessary in light of the fact that the executive branch has ultimate authority in matters of extradition and the judiciary plays only an advisory role.<sup>82</sup> The French Government should have taken responsibility for its policy determination without hiding behind an extremely questionable judicial decision.

A fair analysis of the implications of the Abu Daoud case upon the integrity of French political and judicial institutions as well

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78. See R. DAVID, *FRENCH LAW* 71 (1972); R. DAVID & H. DE VRIES, *THE FRENCH LEGAL SYSTEM* 45 (1958).

79. See R. DAVID, *FRENCH LAW* 98-107 (1972).

80. Another possible influence on the decision may have been the French judges' concern for career advancement. Interview with Peter Herzog, Professor of Law, Syracuse University, in Charlottesville, Virginia (March 4, 1977).

81. See *Le Monde*, Jan. 13, 1977, at 3, col. 1.

82. See text at notes 42-43 *supra*.

as upon the struggle against transnational terrorism must take into account the fact that neither the French Government nor the *Chambre d'accusation* acted in isolation. The West German Government's retreat into self-serving diplomatic silence is no more laudable than the action of its French counterpart. Both governments chose to follow a course of political expediency rather than adopt an unyielding policy toward transnational terrorism—a policy which would have threatened their political and economic interests. Since realistic decisionmaking is the essence of national survival, neither the French nor the West German Governments can be said to have acted in a substandard fashion. Indeed, there is little evidence that other Western democracies, although quick to chastise the French court's decision, would have acted differently.<sup>83</sup>

The Abu Daoud case underscores the difficulty, if not the impossibility, of reconciling the immediate interests of a State with the long range goals of a coherent international policy against transnational terrorism. Even if political realism justified these decisions, the actions undermined the apparent consensus embodied in the recently signed European Convention Against Terrorism.<sup>84</sup>

New conventions or laws, however, are not the entire solution; in a more immediate perspective, what is needed is to have the political authorities of all countries invoke existing legal sanctions against suspected or convicted terrorists. This should be done despite threats of oil embargos or terrorist reprisals. The only way to lessen the threat of terrorist blackmail is to create a firm legal consensus in which each member of the international community binds itself without reservation to the prosecution or extradition of terrorists, even if political and economic interests are threatened. The outcome of the Abu Daoud case is testimony to the fact that such a consensus is a distant, if not illusory, goal.

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83. See *The Times* (London), Jan. 19, 1977, at 15, col. 4.

84. Council of Europe: European Convention On The Suppression of Terrorism, reprinted in 15 INT'L LEGAL MATERIALS 1272 (1976). The Convention was opened to signature by the Member States of the Council of Europe on January 27, 1977. It was signed by seventeen countries, including France and West Germany. See 16 INT'L LEGAL MATERIALS 233 (1977).

The Convention purports to limit the "political offense" exception, but the language of article 5, restoring the discretion of individual States, could substantially lessen its value. For a discussion of the Convention, see *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, *supra* note 69.

