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Terrorist Acts – Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases

Thomas E. Carbonneau
Penn State Law

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By THOMAS E. CARBONNEAU

*Diplôme Supérieur d'Etudes Françaises, Université de Poitiers (1971); A.B., Bowdoin College (1972); B.A., Oxford University (1975); J.D., University of Virginia (1978); M.A., Oxford University (1979); M.A., University of Virginia (1979); LL.M., Columbia University (1979).**

I. INTRODUCTION

In recent years, a number of transnational terrorists[1] have been apprehended on French soil and have been the subject of extradition requests from other countries. This article examines the progression of French jurisprudence on the extradition of transnational terrorists, focusing upon the issue of whether terrorist acts can be considered legally as political offenses and hence exempt from extradition. The analysis of this issue integrates French judicial decisions into the general context of international practice—beginning with an assessment of extradition procedures and proceeding to a discussion of the special problems raised by the application of the political offense exception. A survey of international extradition jurisprudence reveals that the tribunals of various countries have elaborated a series of tests by which to define the concept of a political offense.

Three principal tests have been developed and each of them responds differently to the vexed problem of attributing a precise legal status to relative political crimes, *i.e.*, to acts which have the characteristics of a common crime, but which also have political aspects. Despite the viability of the Anglo-American and the early French judicial methodologies, the Swiss approach appears best-suited to deal with this problem. This approach consists of weighing the two aspects of the act

* The author is a Jervey Fellow at the Parker School, Columbia University, and currently is at Tulane University.

1. For a 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, 219 n.1 (1977).

in question in an ad hoc fashion to determine whether its principal character is political or nonpolitical. It is noteworthy that the methodology of the French courts—originally committed to an objective test and to the notion of purely political crimes—has been altered as the jurisprudence of the courts developed. In contemporary litigation involving the extradition of alleged political offenders, the French courts have adopted a test which is similar to the one utilized by their Swiss counterparts. Since this study focuses upon French jurisprudence, the current methodology of the French courts relating to the extradition of transnational terrorists is described in some detail. Finally, the most recent French judicial decisions on the subject of the extradition of transnational terrorists are analyzed individually. The reasoning and the outcome of these cases are assessed in light of efforts to bring legal sanctions to bear against terrorist offenders despite their claims that their crimes are politically motivated.

II. EXTRADITION IN THE STRUGGLE AGAINST TERRORISM[2]

Modern means of transportation and communication as well as the development of sophisticated networks for clandestine activity between countries have enabled today's terrorists to pursue their activities unimpeded by national boundaries. The members of a terrorist group can be trained and equipped in one country to commit their acts of violence on the territory of another state. Furthermore, once their mission is completed, they can escape to yet a third country.[3]

Given these circumstances, the process of extradition constitutes one of the legal means by which to deal with the dilemma of transnational terrorism. By making an extradition request through the appropriate channels, a country can obtain an individual who allegedly has committed or who has been convicted of a crime on its territory and who has escaped and been apprehended in another country.[4] The

2. In this section dealing with extradition practice and transnational terrorism, the author has relied upon the information contained in a previous study. *See* Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 VA. J. INT'L L. 495, 495-96, 503-04 (1977). The substance of this previous study, however, has been updated and revised for the purposes of the present article.

3. 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. They then flew to Kuwait. *See* N.Y. Times, Dec. 18, 1973, at 1, col. 8; *id.* Dec. 20, 1973, at 1, col. 1. For an analysis of this incident, see Lillich & Paxman, *supra* note 1, at 277, 304.

4. Extradition has been defined as "the act by which one nation delivers up an individ-

practice of extradition, then, symbolizes a type of international cooperation aimed at the repression of criminal activity.[5] In French law, for example, the process of extradition is considered as part of interstate assistance designed to curb criminality and punish criminal offenders.[6] An extradition request also has a diplomatic character; it calls into play the legal duties of the national government as they arise under public international law.[7]

Under customary international law, however, states are not under a legal duty to grant the request for extradition of an alleged offender. A country has the discretion to extradite regardless of the character of the crime or crimes for which the individual is wanted. Any legal obligation which binds a country in a given extradition matter will flow from the provisions of bilateral or multilateral treaties to which the countries involved are parties. In the absence of an applicable extradition convention, the requested state has the unfettered discretion either to grant or to refuse the extradition request.[8] The prerogative of states in this area, of course, can become an obstacle to the punishment of internationally wanted criminals, especially to the punishment of transnational terrorists who have fled to a country which is sympathetic to their cause. Even in cases in which the provisions of a treaty are controlling, there is no absolute guarantee that a requested extradition will be forthcoming because often the charges for which an extradition request will be granted are limited to the set of offenses enumerated in the treaty.[9]

Moreover, the typical extradition treaty contains a political offense exception. Under such a provision, the request for the extradition of an individual cannot be granted when the crime for which he is sought is considered to be political either in character or in purpose.[10] The possible application of this provision in a case involving the extradition of a transnational terrorist can be a significant impediment to bringing legal sanctions to bear against fugitive criminal offenders.

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ual, 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." 1 J. B. MOORE, A TREATISE ON EXTRADITION AND INTERSTATE RENDITION 3 (1891). *See also* A. BILLOT, TRAITE DE L'EXTRADITION 1 (1874); BLACK'S LAW DICTIONARY 698 (4th rev. ed. 1968).

5. *See* F. PIGGOTT, EXTRADITION 5-16 (1910).

6. *See* Aymond, *Extradition* [II-Droit Pénal] ENCYCLOPEDIE DALLOZ ch. 1, sec. 1, para. 6 (1968).

7. *See id.* at ch. 1, sec. 1, para. 4, sec.2, para. 34.

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

9. *See id.*.

10. *See id.* at 300-03.

Finally, it should be noted that the essence of an extradition decision pertains to political matters. Extradition is a question to be resolved ultimately by the executive arm of the country of the requested state. The judiciary, of course, takes part in this process, but its role, at least in theoretical terms, is limited and subordinate. French law is instructive in this regard.

According to the provisions of the French extradition statute,[11] the main features of which relate to the allocation of decision-making authority in the process of extradition, the executive branch of the national government, while under a legal obligation to consult with the judiciary,[12] has the final word in matters of extradition.[13] The principal task of the *chambre des mises en accusation* of the Cour d'appel is to determine whether the extradition request is in conformity with procedural requirements.[14] The court does have power in the process in that it can deny an extradition request on substantive grounds and this denial is binding upon the executive.[15] But, otherwise, the executive is free to grant or to deny the request on the basis of its own determination.[16]

The subordinate role of the courts takes on greater significance when an offender seeks to invoke the political offense exception because it is for the judiciary to define the concept of political crime and to determine how it is to be applied in extradition litigation. While government officials can merely declare that they consider terrorist acts to be ordinary crimes of a particularly heinous sort regardless of the political coloration that is attributed to them by their perpetrators, the task of judicial determination is not quite so simple. A court must look for plausible reasons for distinguishing common crimes from political offenses in order to discredit allegations by the terrorists that their acts have a political character. The court is obligated to devise a set of criteria by which to determine the political character, if any, of terrorist

11. Law of March 10, 1927, [1927] Journal Officiel de la République Française [J.O.] 2874, 1 LA GAZETTE DU PALAIS [GAZ. PALAIS] 1019 (Fr.). For an analysis of the substance of this law, see Travers, *La loi française d'extradition du 10 mars 1927*, 54 JOURNAL DU DROIT INTERNATIONAL (J. DR. INT'L.) 595 (1927).

12. Law of March 10, 1927, arts. 14-17, [1927] J.O. 2877-79, 1 GAZ. PALAIS 1020. *See also* Aymond, *supra* note 6, at ch. 1, sec. 2, paras. 36, 38, 40.

13. Law of March 10, 1927, arts. 2, 18, [1927] J.O. 2874, 2880, 1 GAZ. PALAIS 1019-20.

14. Law of March 10, 1927, arts. 16-17, [1927] J.O. 2879, 1 GAZ. PALAIS 1020. *See also* Aymond, *supra* note 6, at ch. 1, sec. 2, para. 38.

15. Law of March 10, 1927, arts. 16-17, [1927] J.O. 2879, 1 GAZ. PALAIS 1020.

16. Law of March 10, 1927, art. 18, [1927] J.O. 2880, 1 GAZ. PALAIS 1020. *See also* Aymond, *supra* note 6, at ch. 1, sec. 2, para. 38.

acts when evaluating an extradition request.[17]

III. THE FORMULATION OF JUDICIAL TESTS RELATING TO THE DETERMINATION OF POLITICAL CRIMES[18]

A. The History of the Political Offense Exception to Extraditable Crimes

The emergence of the political offense exception to extradition is linked historically to the practice of granting asylum to criminal offenders. The latter practice had its origins in ancient civilizations;[19] for example, asylum was very much a part of the Greek legal culture.[20] Although the privilege of asylum was afforded to ordinary criminals in ancient times, it was not extended to political offenders because a political infraction was seen as an intolerable offense against the community and the gods that the community worshipped.[21]

The practice of asylum varied from society to society, the Church being the major force behind the practice until modern times.[22] By the 17th century, however, the protection afforded to common criminals had come to be perceived as a threat to the stability of international order and the formal practice of extradition eventually came to replace that of asylum.[23] While legal scholars of the 17th century were insensitive to the plight of fugitives from justice, they were keenly aware of the dangers of political persecution and religious intolerance. As a consequence, in addition to fostering the new concept of extradition, they also advanced the position that the victims of political persecution and religious intolerance should be afforded some form of safe haven in

17. *Id.*

18. In this section on the judicial construction of the political offense exception, the author has relied on the information contained in a previous study. *See* Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created*, 1 A.S.I.L.S. INT'L L.J. 1 (1977). The substance of this previous study, however, has been updated and revised for the purposes of the present article.

19. For a detailed discussion of the early origins of asylum, see L. KOZIEBRODZKI, LE DROIT D'ASILE 30 (1962); 2 J.B. MOORE, DIGEST OF INTERNATIONAL LAW § 291 (1906); S. SINHA, ASYLUM AND INTERNATIONAL LAW 5-6 (1971); Reale, *Le Droit D'Asile*, 63 HAGUE RECUEIL DES COURS 471, 479 (1938).

20. *See, e.g.*, Reale, *supra* note 19, at 499-501.

21. *See, e.g., id.*

22. *See, e.g., id.* at 485.

23. *See, e.g., id.* at 507-10.

neighboring foreign states. Accordingly, offenses of a political character replaced common crimes as the special exception to extradition.[24]

By the 18th century, the development of the political offense exception to extradition was buttressed by the development of a revolutionary political ideology. The status of the political refugee became privileged; it was deemed unjust to make the moral or legal validity of a political act dependent upon its success or failure.[25] The principle of the nonextradition of political offenders, however, was still subject to the discretion and calculations of national governments.

In practice, until about 1850, the extradition of political offenders took place quite frequently and the principle of their nonextradition did not become integrated into state practice until extradition treaties began to formally exempt political offenses from the grounds for extradition.[26] Once the principle was accepted, national governments attempted to limit the exception by adopting a narrow definition of the concept of a political offense.[27] By the end of the 19th century, although countries recognized the special legal status of political offenders, there was no international consensus on what was meant by the term political offense.[28] The major difficulty lay in distinguishing relative political crimes from common crimes, the former consisting of acts in which there was a political purpose or motivation, but which also included some elements of an ordinary crime.

B. The Present-Day Political Offense Exception

In the 20th century, although the political offense exception has become a viable part of the normal processes of extradition law, doctrinal hesitations still persist regarding the concept of a political offense. Three separate tests have emerged from the jurisprudence of the courts to deal with this problem of defining a political offense; this jurisprudence has particular relevance in determining whether a terrorist act constitutes a political offense for the purposes of extradition.[29] The first test is known as the traditional Anglo-American test, under which

24. *See, e.g.*, S. SINHA, *supra* note 19, at 18.

25. *See, e.g., id.* at 19.

26. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 390-91 (1905). *See also* Reale, *supra* note 19, at 545.

27. *See, e.g.*, L. KOZIEBRODZKI, *supra* note 19, at 43-45.

28. *See* 1 L. OPPENHEIM, *supra* note 26, at 392.

29. For a detailed description and analysis of these various approaches, *see, e.g.*, I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 169 (1971); Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1240-56 (1962).

crimes are considered to be political offenses if they are incidental to and committed in the furtherance of a political disturbance.

The Swiss test—known as the predominance test—contrasts with the Anglo-American version in that a crime is deemed to be a political offense only if its political aspects outweigh its common elements. Of the three tests to be discussed, it is the most flexible and allows the courts the greatest discretion.

Finally, the French courts in their early decisions on this matter articulated what became known as the objective test. Under this formulation, the category of political offenses is restricted to those crimes which directly injure the rights of the state, *i.e.*, to what are known as purely political crimes. The French version was by far the most restrictive and rigorous definition of what constituted a political crime. The utility of this formulation was short-lived; in recent decisions, the French courts have abandoned the objective approach and adopted a test which resembles the one used by the Swiss courts.

1. The Anglo-American Model

In English jurisprudence, *In re Castioni*[30] is the landmark case in the area of the extradition of would-be political offenders. In that case, the divisional court refused the extradition request of the Swiss Government for one of its nationals who had participated in an armed attack on a government building in which a government official was shot.[31] In its opinion, the court outlined the two major elements of the test used to determine whether a given act constitutes a political offense. It held that the acts of the accused must be "incidental to and form . . . part of political disturbances"[32] and that they must be "in the furtherance"[33] of those same disturbances.

Despite the recognition of a special status for political crimes, even at the end of the nineteenth century, the exemption afforded to political offenders was not construed by the English courts to apply to terrorist-like acts. In a subsequent case,[34] the divisional court granted the Swiss Government's extradition request for an anarchist who had bombed a café and an army barracks, notwithstanding the contentions of the accused that the explosion at the barracks constituted an attempt to de-

30. [1891] 1 Q.B. 149.
31. *Id.* at 150.
32. *Id.* at 165-66.
33. *Id.* at 166-67.
34. *In re* Meunier, [1894] 2 Q.B. 415. *See also* Pillet & Rafin, *Bulletin de la Jurisprudence Anglaise*, 22 J. DR. INT'L. 643, 643-45 (1895).

stroy government property and was, therefore, a political offense.[35] Noting that anarchists were "the enemy of all Governments,"[36] the court reasoned that, in order for there to be a political offense, "there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that . . . the offense is committed by one side or the other in pursuance of that objective . . . ."[37]

Political developments in the 20th century led to the elaboration of an exception in English jurisprudence to the rule that a political offense must be incidental to and in furtherance of a two-party struggle for political power. These exceptional circumstances involve the request for the extradition of an individual who has fled from a totalitarian regime. For example, in one case,[38] the Polish Government requested the extradition from England of seven Polish sailors who had taken over their fishing vessel and sailed it to an English port to seek political asylum. During the extradition proceeding, the sailors alleged that a political officer had recorded their conversations while at sea in order to prosecute them for their political opinions upon their return to Poland.[39] Despite the fact that the Polish request was based upon extraditable offenses and that there was no political disturbance to justify the crimes of the sailors, the divisional court denied the extradition request.[40] The court expanded the meaning of the term political offense by taking into consideration the fact that the request for extradition was made by a totalitarian regime for persons who were opposed to it.[41]

The English rule relating to the definition of a political offense has been applied by United States courts since the end of the 19th century. It was first incorporated into the holding of *In re Ezeta*,[42] in which the Salvadorean Government requested that persons be extradited from the United States on charges of murder and robbery. In their defense, the fugitives contended that the crimes for which they were sought were political in character because they had been committed during their unsuccessful attempt to thwart a revolutionary uprising.[43]

35. *In re* Meunier, [1894] 2 Q.B. 415, 417, 419.
36. *Id.* at 419.
37. *Id.*
38. *Ex parte* Kolczynski, [1955] 1 Q.B. 540.
39. *Id.* at 543.
40. *Id.* at 542.
41. *Id.* at 544.
42. 62 F. 972 (N.D. Cal. 1894).
43. *Id.* at 977-78.

Relying upon the reasoning of the English court in *Castioni*,[44] the United States court agreed with the fugitives' contentions and denied the extradition request on the ground that the crimes for which extradition was sought were political offenses.[45] Since the decision in *Ezeta*, United States courts have applied the English rule consistently in litigation involving the extradition of alleged political offenders. For example, in a recent case,[46] one federal court restated and affirmed the validity of the English rule, holding that in order for crimes to constitute political offenses "there must be an 'uprising,' and . . . the acts in question must be incidental to it."[47]

2. *The Predominance Approach of the Swiss Courts*

The Swiss courts have elaborated a somewhat more complex methodology than the English incidence rule to define a political offense. This development stems in large measure from the fact that the Federal Extradition Law[48] gives the judiciary broad discretion to assess the factual context in which an act took place and to determine whether it amounts to a political offense. Specifically, the law provides that "[t]he Federal Tribunal liberally construes in each particular instance the character of the infraction according to the facts of the case."[49]

In assessing the character of a crime, the Swiss courts look not only to whether the act was an incident of a political disturbance, but also to other factors, *e.g.*, the offender's personal motive as well as the relationship between his alleged purpose and the means he employed to achieve that purpose. In the relevant litigation, the Swiss courts have focused upon both the objective and subjective factors of an incident in order to reach a determination as to the character of the crime for which extradition is sought. They weigh the political aspects of the act against its common elements to determine which of the two features predominates over the other. This method of evaluating an offense is tailor-made to assess whether a crime for which extradition is requested is a political offense. In a word, the Swiss approach meets head on the most complex and most difficult problem in the extradition cases involving alleged political offenders.

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44. *Id.* at 997.
45. *Id.* at 999.
46. *In re* Gonzalez, 217 F. Supp. 717 (S.D.N.Y. 1963).
47. *Id.* at 721.
48. The Federal Extradition Law of January 22, 1892, *reprinted in* Garcia-Mora, *supra* note 29, at 1252.
49. *Id.*

The basic features of the Swiss predominance test are illustrated by the reasoning and holding of an early case. In *In re Ockert*,[50] Prussia had requested the extradition from Switzerland of a German national wanted on murder charges. The accused, a member of a militant political faction who had participated in a violent confrontation between opposing factions, allegedly killed another militant during the encounter. In his defense, Ockert contended that his crime was a political offense.[51] In denying the extradition request, the Federal Tribunal considered evidence of attendant circumstances which depicted the encounter as a political clash.[52] It held that "acts which have the character of an ordinary crime appearing in the list of extraditable offenses but which, because of the attendant circumstances, in particular because of the motive and the object, are of a predominantly political complexion"[53] are to be considered political offenses.

Like the English courts, the Swiss tribunals have modified their established judicial approach to take into account the fact that crimes may be committed by offenders in order to flee from totalitarian regimes. In a case decided in the early 1950's,[54] the Yugoslav Government requested the extradition from Switzerland of three nationals who had hijacked the plane on which they worked to seek asylum in Switzerland. The Federal Tribunal denied the extradition request, reasoning that the purpose and the motive of the hijacking, to flee a totalitarian regime, gave the offense "a distinctly political colouring."[55]

While the predominance test may be used to justify crimes which were committed "to escape the constraint of a State which makes all opposition . . . impossible,"[56] it is unlikely, in a situation other than one involving an escape from a totalitarian regime, that the status of a political crime would be attributed to terrorist-like acts under the Swiss test. The holding in one early case corroborates this view. In *In re Kaphengst*,[57] Prussia requested the extradition from Switzerland of the accused, who along with several accomplices, had committed a number of bombings, injuring one bystander and causing substantial damage to private property. Kaphengst claimed that the charges for which he was sought were political offenses, alleging that they had been committed to

50. 7 Ann. Dig. 369, 370 (Fed. Trib. Switz., 1938).
51. *Id.*
52. *Id.*
53. *Id.* at 370.
54. *In re* Kavic, Bjelanovic and Arsenijevic, 19 I.L.R. 371 (Fed. Trib. Switz., 1952).
55. *Id.*
56. *Id.* at 374.
57. 5 Ann. Dig. 292 (Fed. Ct., Switz, 1930).

further the ends of a political movement.[58] The Swiss court, however, granted the Prussian extradition request for two major reasons.

First, the court deemed the acts to be purely terrorist acts, not a series of actions aiming at an immediate overthrow of the State, and refused to consider the acts as relative political crimes on the basis of an incidence rationale.[59] Second, the court ruled that the alleged political motivation of the actor could not constitute a justification of his criminal conduct since the means he employed were not proportionate to the aim sought.[60] Using this analysis, the court concluded that "the danger to innocent people brought about by the bomb outrages . . . [was so] predominant . . . as to prevail completely over the political aspect of the act."[61] The holding in this case, and in others,[62] indicates that where particularly heinous and violent acts are involved, the political motive and purpose of the offender alone will not be determinative. In order to satisfy the requirements of the predominance test, such crimes must meet a rigid ends-means test under which the act must be indispensable to the furtherance of the end pursued.

3. The French Test

The jurisprudence of the French courts in this area is harder to define than the approach adopted by the English and Swiss courts. French case law has undergone some significant transformations. Moreover, the current evolution of the judicial doctrine on extradition has not yet stabilized; thus a clear-cut definition of the present test used by the French courts is not easy to elaborate.

On its face, the French extradition statute[63] contains a political offense exception which appears to follow the requirements of the traditional Anglo-American incidence test.[64] The legislative history of Article 5(2) of the extradition law reveals that the provision was in-

58. *Id.*

59. *Id.* at 292-93.

60. *Id.* at 293.

61. *Id.*

62. *E.g.*, *In re* Peruzzo, 19 I.L.R. 369 (Fed. Trib., Switz., 1952); *In re* Ficorilli, 18 I.L.R. 345 (Fed. Trib., Switz., 1951); *In re* Nappi, 19 I.L.R. 375 (Fed. Trib., Switz., 1952).

63. Law of March 10, 1927, [1927] J.O. 2874, 1 GAZ. PALAIS 1018.

64. Article 5(2) fo the Law of March 10, 1927 provides in relevant part that extradition should not be granted:

> when the crime or offense has a political character or when it is clear from the circumstances that the extradition is requested for a political end.
>
> As to acts committed in the course of an insurrection or a civil war by one of the other parties engaged in the conflict and in the furtherance. . . of its purpose, they may not be grounds for extradition unless they constitute acts of odious bar-

tended to exempt from extraditable offenses a broad range of crimes, its purpose being "to assure as complete an immunity as possible."[65] In contrast to the explicit language of the provision, the legislators who drafted the statute wanted the concept of a political offense to encompass the subjective motivation of the offender as well as the circumstances in which he committed his offense.[66]

The French courts appear to have had little regard for the underlying intent of the statutory provision in their early extradition decisions. The landmark case in the early French jurisprudence was decided shortly after World War II. In *In re Giovanni Gatti*,[67] the *Cour d'appel* of Grenoble considered the request of the Republic of San Marino for the extradition from France of one of its nationals who had been convicted of attempted murder and sentenced to a 12-year prison term. According to the record, the accused had fired several shots at a member of the Communist Party. Gatti, however, asserted that his action had been "uncontestably political" in character.[68] The court granted the extradition request, reasoning in effect that only those offenders who had committed such acts as espionage or treason could lay claim to the political offense exception.[69] Despite the legislative history of the extradition statute revealing that the term political offense should apply to the acts of all "those which the ardor of political passion alone led . . . to violate the law,"[70] the Grenoble court totally disregarded the actor's subjective motivation and adopted a purely objective definition of the concept of a political offense, limiting it to acts which directly injure the rights of the state.[71] In other words, the French court resolved the issue of the status of relative political crimes in extradition law by disregarding the issue altogether.

After the *Gatti* decision, French courts continued to rely upon the objective test. It was applied, most notably, in a series of cases involving the extradition of Belgian nationals who had fled to France after having been accused of war-time collaboration with the enemy.[72] In

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barism and vandalism prohibited by the laws of war, and only when the civil war has ended.

Law of March 10, 1927, [1927] J.O. 2874, 2875, I GAZ. PALAIS 1018, 1019.

65. Senate Debates of Dec. 10, 1926, [1926] J.O. 1734.

66. *See* Travers, *supra* note 11, at 601-02, 609-10.

67. 14 Ann. Dig. 145 (Cours d'appel, Grenoble, 1947).

68. *Id.*

69. *See id.* at 145-46.

70. Senate Debates of Dec. 10, 1926, [1926] J.O. 1734.

71. *In re* Giovanni Gatti, 14 Ann. Dig. 145 (Cours d'appel, Grenoble, 1947).

72. *E.g.*, *In re* Spiessens, Cour d'appel, Colmar, [1953] Recueil Dalloz, *Jurisprudence* [D. Jur.] 604.

most of these cases, the French courts refused to grant the extradition requests on the ground that crimes against the security of the state constituted purely political offenses.[73]

The French courts, however, soon manifested their disenchantment with the rigor and restrictiveness of the objective test. In a case decided shortly after the war-time collaboration cases, the Cour d'appel of Paris reoriented the tenets of French jurisprudence towards the adoption of a test which closely paralleled the predominance approach of the Swiss courts. In *In re Rodriguez*,[74] the Spanish Government requested the extradition from France of two of its nationals who allegedly had committed a variety of serious crimes in Spain, including arson and murder. The accused, however, contended that the Spanish Government had fabricated those charges in order to prosecute them for their opposition to the Franco regime.[75] In reaching its decision to deny extradition, the Cour d'appel of Paris relied heavily upon evidence indicating that both men were part of organized movements seeking to overthrow the existing Spanish regime.[76] The court concluded that the crimes for which extradition was sought were "at least relative political offenses"[77] and denied the extradition request.[78] Here, the court in effect weighed the political aspects of the charges against their common elements to arrive at an assessment of their predominant character.

In recent extradition cases, the French courts have resorted to the approach used in the *Rodriguez* case rather than apply the requirements of the objective test. They have looked to the kinds of circumstances in which the alleged political offense was committed and have considered the offender's motivation. Since these cases confirm a significant shift in the jurisprudence of the French courts in this area, each of them will be considered in some detail.

The first case to come down in this area was *In re Hennin*.[79] There, the Swiss Government requested the extradition from France of one of its nationals who was wanted in Switzerland on a number of serious charges including several counts of arson directed mostly at pri-

73. *Id.*
74. Cour d'appel, Paris, [1953] 2 GAZ. PALAIS 113.
75. *Id.*
76. *Id.* at 114.
77. *Id.*
78. *Id.*
79. Cour d'appel, Paris, [1967] Juris-Classeur periodique, la semaine juridique [J.C.P. II] No. 15274.

vate property.[80] Despite the terrorist-like character of his activities, the accused contended that his acts had been committed with a political motive and in a purely political context.[81] In light of this allegation, the court requested that the Swiss Government submit additional information regarding the accused and the circumstances in which the crimes had been committed.[82]

The additional documentation established that the accused had no previous criminal record and that, according to a psychiatric expert, he was a political fanatic whose acts were the result of his political convictions. Moreover, it appeared that the acts had been committed in the context of an intense local political climate.[83] Having considered this supplementary documentation, the Cour d'appel of Paris ruled that Hennin's crimes, however regrettable and blameworthy they might be, were acts committed from political motivation and for a political purpose and that, as a consequence, he was exempt from extradition.[84]

In *In re Inacio de Palma*,[85] the same court considered a case in which the Portuguese Government sought the extradition of one of its nationals on the charge of armed robbery. The accused, along with his accomplices, had entered a bank in Portugal and taken a considerable amount of money at gunpoint. As in *Hennin*, the accused contended that his crime had been done for a political purpose.[86] The Court d'appel again requested that the Portuguese Government supply it with additional information regarding the accused and the commission of the offense.[87] The supplementary documentation established that the accused had been tried previously in Portugal for crimes of a political character and that he was well known for his militant political activity.[88] On the basis of this information, the court denied the request for extradition on the ground that the crime for which the accused was sought was a political offense. Despite the seriousness of the crime upon which the extradition request was based, the court concluded that the act was connected to the political activity of the accused.[89] The liberal reasoning of the court in this case is in marked contrast with the

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. Cour d'appel, Paris, [1967] J.C.P. II No. 15386.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

position of the court in *Gatti*. It clearly shows the emergence of a trend among the French courts to favor the right of asylum and the freedom of political expression over the international interest in the punishment of criminal activity.

The most recent decision in this area of litigation confirms the existence of the trend established by the two previous decisions. The case of *Astudillo-Calleja*[90] was decided by the Conseil d'état in mid-June 1977. There, the Spanish Government requested the extradition of the accused on bank robbery and other theft charges. The accused, however, had a long history of opposition to the Spanish regime. He was, for example, the son of militant Spanish republicans who had died for their political cause; he had refused to be inducted into the army and was sentenced to a prison term; and he received additional prison sentences for charges relating to the dissemination of political propaganda against the government and the army.[91] While serving his prison sentence, he escaped and fled to France. Sometime later, the accused re-entered Spain clandestinely to commit various thefts and then returned to France.[92] The Spanish Government maintained that the acts of the accused did not have, in objective terms, a political character and that it could not be contended that they were inspired by a political motive.[93] A lower French court ruled that the accused should be extradited since the acts for which he was wanted were common crimes.[94]

On appeal, the Conseil d'état reversed that decision, ruling that, in light of the accused's past opposition to the political regime in Spain, the extradition request had been made for a political end.[95] The court's intent to afford the accused the right of asylum despite his criminal activity was manifest.[96] There may be reason to believe, although this reasoning is purely conjectural, that the outcome of this case aligns itself with those cases in English and Swiss practice in which an expansive interpretation was given to the political offense exception in order to permit the accused to escape a totalitarian regime. It should be recalled that the extradition request was made at the time when Franco held power in Spain.

90. Conseil d'état, 105 J. DR. INT'L. 73, 76 (1978); [1977] D.S. Jur. at 695, 699; *Jurisprudence*, 2 GAZ. PALAIS 640 (1977).
91. D.S. Jur., *supra* note 90, at 695.
92. *Id.*
93. *Id.* at 699.
94. *Id.* at 695.
95. *Id.* at 699.
96. 2 GAZ. PALAIS, *supra* note 90, at 642.

It is clear from these cases that the French courts have abandoned the objective test elaborated in the *Gatti* decision. Although it is not possible to affix a precise label to their present methodology, it appears that the French courts have given primacy to their discretion in these matters, and that they have adopted the ad hoc approach characteristic of Swiss practice. While looking to the seriousness of the crime for which extradition is sought and the common elements of the act, the French courts also take into consideration the circumstances in which the act was committed and the offender's motivation by requesting the introduction of evidence to that effect.

The provisions of the French extradition statute allow the courts to deny an extradition request not only on the ground that the crime of the accused constitutes a political offense, but also when the court deems that the extradition request was made for a political end. It is fair to say that, by adopting an extremely flexible definition of a political crime and of the political end that can underlie an extradition request, the French courts have given primacy to the subjective and circumstantial character of the cases involving the extradition of alleged political offenders and have lessened the importance formerly attached to the international repression of criminal activity by the objective test. In any event, the French judiciary now is prepared to deal doctrinally with the problem of relative political crimes.

However enlightened this approach may appear, it should be pointed out that its application to cases involving the extradition of transnational terrorists could have serious repercussions upon the international struggle to bring legal sanctions to bear against terrorists. Unlike the English and Swiss case law, there is no precedent in the French jurisprudence which establishes conclusively that terrorist or terrorist-like acts are outside the purview of the political offense exception. Indeed, the outcome and reasoning of *In re Hennin* and of some of the other cases indicate that there are some grounds for believing that, under certain circumstances, the French courts would not be averse to denying the extradition of a terrorist based upon the reasoning that his acts were a political crime.

In addition to the English and Swiss cases cited previously, there is some evidence in contemporary international practice indicating that terrorist crimes are without the substantive provisions of the political offense exception. Most courts ruling in cases involving the extradition of transnational terrorists have taken a restrictive view of the applicability of the political offense exception and have adopted a narrow construction of its substance when dealing with terrorist acts. For

example, Canadian courts extradited a United States national to the United States on charges relating to the bombing of university buildings despite the contentions of the accused that his acts were the symbol of his protest against the United States involvement in Vietnam.[97] A British court extradited another terrorist on the ground that it interpreted the political offense exception to apply only to acts of political opposition to the state requesting extradition.[98] Finally, the Supreme Court of Greece, in reversing a lower court decision concerning the extradition of Rolf Pohle—a member of the Baader-Meinhof terrorist gang[99]—declared that it was subscribing to "a very narrow definition of a political crime"[100] under which it took the political offense exception "to cover only actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives."[101] The French position on this matter has not been as clear-cut, nor has the outcome of the French judicial decisions been as uniform.

IV. THE EXTRADITION OF TRANSNATIONAL TERRORISTS BY FRENCH COURTS[102]

In the last five years, the Cour d'appel of Paris has been called upon to rule in a number of cases involving the extradition of transnational terrorists from France. These cases constitute a line of jurisprudence which has enabled the French court to address and consider the general body of legal problems to which the extradition of transnational terrorists gives rise. Most significantly, in the majority of these cases, the court has had to grapple, either explicitly or implicitly, with

97. *Re* State of Wisconsin and Armstrong, 28 D.L.R.3d 513 (1972), *aff'd* 32 D.L.R.3d 265 (1973). For a lengthy analysis of this case, see Note, *Asylum or Accessory: The Non-Surrender of Political Offenders by Canada*, 31 U. TORONTO FAC. L. REV. 93 (1973).

98. Cheng v. Governor of Pentonville Prison, [1973] A.C. 931 (H.L.); Le Figaro, Sept. 20, 1979, at 13, col. 2 (indicating that a British court also had extradited Astrid Proll, a member of the Baader terrorist gang, on June 23, 1979).

99. The court of appeals in Athens refused the request of the West German Government for Pohle's extradition on the ground that "his acts were those of a genuine revolutionary, and that they were not a criminal but a political offense." Wash. Post, Oct. 4, 1976, § A, at 24, col. 1.

100. The Times (London), Oct. 2, 1976, at 4, col. 1.

101. 261 THE ECONOMIST 65, 65 (1976).

102. In this section dealing with the French jurisprudence on the extradition of transnational terrorists, the author has relied on the information contained in two previous studies. *See* Note, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities*, 17 VA. J. INT'L L. 495 (1977); Carbonneau, *Extradition and Transnational Terrorism: A Comment on the Recent Extradition of Klaus Croissant from France to West Germany*, 12 INT'L LAWYER 813 (1978). The substance of these two previous studies, however, has been updated and revised for the purposes of the present article.

the difficult task of defining the role that the political offense exception is to play in extradition litigation. In all these cases, the court has had to contend with the external political circumstances surrounding the case, and its response to these external elements has varied. Moreover, although the corpus of cases is fairly limited in number, the decisions rendered in these cases at least can be said to constitute the beginnings of a doctrinal pronouncement, a nascent attempt to deal judicially with the legal problems that attend the request for the extradition of a transnational terrorist.

It should be stated at the outset that the progression of this jurisprudence has been uneven and somewhat inconsistent. In its first decisions, the court seems to have faltered by deviating from the longstanding tradition of judicial neutrality and independence. The outcome of these first cases was based upon a reasoning which was influenced by external political circumstances rather than by the doctrinal substance of the issues raised by the case. The Cour d'appel's latest decisions have been more acceptable from a doctrinal standpoint and more satisfying from the perspective of efforts aimed at controlling and repressing international criminality. Rather than promoting the would-be political rights of the terrorists, the more recent decisions of the court have emphasized the need to bring legal sanctions to bear against the perpetrators of heinous criminal acts.

To the knowledge of the writer, *In re Holder & Kerhow*[103] was the first decision to be rendered by the Cour d'appel in a case involving the extradition of contemporary transnational terrorists. Although the outcome of the case is significant from the standpoint of the political offense exception, this decision was not published in the relevant French law journals and it failed to capture the attention of both French and American legal commentators. In that case, the United States Government requested that two United States nationals be extradited from France. The two fugitives were wanted on charges relating to the 1972 hijacking of a plane on a flight from Los Angeles to Seattle.[104] In an astonishing decision, the French court ruled that the extradition request should be refused on the ground that the act for which the accused were wanted constituted a political offense.[105] The record of the proceeding, however, contained precious little indication of political motivation on the part of the two hijackers.

103. For a report of the facts of and the decision in, this case E. McDOWELL, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975, at168 (1975).

104. *Id.* at 169.

105. *Id.*

The evidence establishing political motivation was that during the incident one of the hijackers had ordered that the aircraft be flown in the direction of Hanoi but, when he was provided with a plane that could fly that distance, he changed his mind. The only other evidence of political motivation on the part of the hijackers was to the effect that they had made some vague allusions to Angela Davis and Eldridge Cleaver during the episode.[106] It was upon the basis of this rather weak evidence that the Cour d'appel ruled that the two fugitives were wanted for a political offense, despite the contentions of the United States Government that hijacking was an ordinary criminal act, especially when it resulted in the extortion of $500,000 from the airline company.[107]

The reasoning of the court in the *Holder* case represents a departure from what courts in other countries have concluded in regard to the applicability of the political offense exception in the terrorist context. It also reflects a certain estrangement on the part of the court from even the lax doctrine established in the *Hennin et al.* cases. There was no evidence in *Holder* showing that the accused acted from a political motivation that inspired both their immediate and long-range goals; that their act was committed in an intense political climate; that they were political fanatics whose every act was dedicated to advancing their political convictions; or that they would have been the victims of political persecution if they had been returned to the United States. The factual context of the incident points to a confused and not very well defined intention to hijack an airplane. The remunerative purpose of the venture was clear, but its political coloration is only vaguely apparent, if not invisible. The court must have been at some pains to apply the political offense concept in this case since, from a doctrinal perspective, the all-inclusive generality of the implicit definition it advanced could accommodate almost any criminal act provided the actors involved at least mention something of a political nature.

One cannot help but conclude that there was something very "unjuridicial" and "undoctrinal" about the court's reasoning and that the underlying motivation of the decision resided elsewhere than in the legal fabric of the case itself. It should be recalled that, at the time the decision was rendered, the United States still was involved in the Vietnam conflict and that the French Government had become very critical of the United States policy in Vietnam. Although it is impossible to corroborate this interpretation with concrete evidence, it seems that the

106. *Id.* at 171.
107. *Id.* at 172.

fundamental rationale of the *Holder* opinion lies in that external political factor.

Rather than act as the impartial arbiter of legal issues, the court chose to assume the role of spokesperson for French national political opinions, declaring in *ex cathedra* fashion that hijacking, on the basis of flimsy evidence was a political offense for which extradition would not lie. Why the court acted in this way remains somewhat of a mystery. It did have the option of confining its consideration to the procedural and legal issues presented and leaving the political decision on extradition to the executive branch. Perhaps dressing the decision in the garb of judicial neutrality was a way to avoid an embarassing political decision for the national government. Be that as it may, the apparent abandonment of judicial impartiality by the court was a sad commentary upon the French judiciary and augured ill for future cases involving the extradition of transnational terrorists and the international repression of criminal activity.

The *Abu Daoud* case was the second decision to come down in this line of jurisprudence.[108] Here, although the Cour d'appel's decision received considerable journalistic and legal commentary,[109] it did little to enhance the court's reputation as an independent tribunal. According to many commentators, the court not only voiced the political opinions of the national government, but it also acquiesced to executive branch pressure to reach a certain legal result that was politically expedient.[110] The court's considerations were limited exclusively to procedural matters. Therefore, it did not address the question of whether the terrorist acts in question constituted political offenses. The procedural holdings of the court in this matter merit discussion, however, in that they are instructive of the court's general attitude at this time towards the extradition of transnational terrorists.

Abu Daoud, allegedly an organizer of the 1972 Munich Olympics massacre, entered France under a false identity in early January 1977 as part of an official PLO delegation. Later that same day, the West

108. There is only one official report which deals with this case. That report, however, only deals with part of the decision. For reports of the case, see Ct. of Appeal, Paris, Fr., 104 J. DR. INT'L-CLUNET 843, 844 (1977); Le Monde, Jan. 13, 1977, at 2, col. 1 (reporting the French Ministry of Justice's official summary of the court's decision); Roubache, *A Propos De Droit*, 51-53 GAZ. PALAIS (1977).

109. *E.g.*, Rubin, *Abu Daoud Case: Flouting World Law*, Christian Science Monitor, Jan. 27, 1977, at 27, col. 1; Note, *The Abu Daoud Affair*, 11 J. INT'L L. & ECON. 539 (1977); *Recent Developments—International Terrorism: Extradition*, 18 HARV. INT'L L.J. 467 (1977).

110. Le Monde, Jan. 12, 1977, at 3, col. 1; N.Y. Times, Jan. 12, 1977, § A, at 20, col. 1; The Times (London), Jan. 12, 1977, at 1, col. 1.

German police furnished their French counterparts with information indicating Daoud's true identity.[111] The French police brought him in to verify his papers and later detained him for questioning. During the next several days, the West German and Israeli Governments announced that they would make requests for Daoud's extradition from France on charges relating to the 1972 Munich incident. The Israeli request would also include charges relating to Abu Daoud's complicity in other acts of terrorism carried out in Israel. Upon the basis of the West German and Israeli requests, Abu Daoud was placed under provisional arrest by the French authorities.

The day after the Israeli request had been made, the Cour d'appel convened *in camera* to rule upon the legality of the continued provisional detention of Abu Daoud.[112] The defense argued that the West German arrest warrant and the forthcoming Israeli extradition request were invalid on a number of technical legal grounds. After a brief deliberation, the Cour d'appel concluded that the principal defense arguments were correct. The court held that, since the West German arrest warrant had not been confirmed through diplomatic channels as required by the applicable extradition convention, there were no legal grounds upon which to justify Abu Daoud's continued provisional detention pending the anticipated extradition request. In regard to the Israeli request, the court held that no action could be taken on the request to hold Abu Daoud in custody in the absence of any act within the scope of the French-Israeli extradition agreement in effect in 1972. The court therefore concluded that Abu Daoud should be set free and the suspected terrorist left France the same afternoon on a flight to Algiers.[113]

The arrest of Abu Daoud placed the French Government in an exceedingly difficult diplomatic position.[114] On the one hand, French officials had taken a strong public stand against transnational terrorism; on the other hand, they had cultivated relations with the Arab countries.[115] Prior to the arrest, the President of France had announced plans for an official visit to Saudi Arabia to discuss an oil supply agree-

111. The following summary of the facts of the case was obtained from the Agence France-Presse Interview with Raymond Barre, Prime Minister of France, in Paris (Jan. 13, 1977) [hereinafter cited as Barre interview] (transcript obtained from the Informaton Service of the French Embassy, Washington, D.C.). A report of the Barre interview is found in N.Y. Times, Jan. 14, 1977, § A, at 1, col. 4.

112. *Id.*

113. Le Monde, Jan. 13, 1977, at 2, col. 1.

114. The Times (London), Jan. 11, 1977, at 6, col. 4.

115. Le Monde, Jan. 13, 1977, at 14, col. 3.

ment,[116] and the French Government also was about to close a $150 million defense deal with Egypt.[117] Moreover, government officials were 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.[118] The detention and possible extradition of Abu Daoud posed a serious threat to a French economy that is almost totally dependent upon Arab oil. Finally, some form of terrorist blackmail could be anticipated, threatening the security of France.[119]

After Abu Daoud was released, many Western governments and journalists 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.[120] 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 court and the perfect suitability of its conclusions as a legal justification of a foregone political conclusion, however, make that argument unacceptable.

The more plausible, albeit extreme, explanation of what happened is executive interference with the theoretically independent judiciary. Although the French court never reached the substantive question of whether the terrorist acts imputed to Abu Daoud were of a political nature, the technical character of the procedural holdings seems to indicate that political factors made themselves felt. This apparent consideration of extrajudicial criteria not only hinders the eventual punishment of transnational terrorists, but also lessens the viability of the courts as an independent institution of government and their capacity to dispense justice impartially. In the final analysis, 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.

The outcome and reasoning of the third decision in this line of cases represent a substantial reorientation of the French jurisprudence

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

117. Barre Interview, *supra* note 110, at 2.

118. Le Monde, Feb. 1, 1977, at 1, col. 3; *id.* Feb. 2, 1977, at 2, col. 1; *id.* Feb. 3, 1977, at 1, col. 2.

119. N.Y. Times, Jan. 12, 1977, § A, at 20, col. 1.

120. *See* text accompanying note 110 *supra*.

in this area. In the *Klaus Croissant* extradition case,[121] the Cour d'appel reached an independent determination exclusively on the basis of the legal issues presented by the case.[122] There, the Paris police arrested Klaus Croissant, a West German national and a former attorney for members of the Baader-Meinhof gang, on September 30, 1977. On July 10, 1977, Croissant, released on bail and pending trial on charges of aiding a criminal group, left Germay to seek refuge in France. On July 15, a Stuttgart court issued an international warrant for Croissant's arrest, charging, *inter alia*, that he had aided a criminal group and propagandized on its behalf. On July 19, the West German Government, pursuant to the provisions of its extradition convention with France, requested Croissant's extradition from France on the basis of the charges contained in the Stuttgart warrant. On September 30, the Federal Tribunal in Karlsruhe issued a second international warrant for Croissant's arrest which implicated him directly in more recent terrorist incidents. On October 1, the West German Government made a second request for Croissant's extradition on the basis of the Karlsruhe warrant.

French judicial action on the merits of the case was delayed several times owing to the practical difficulty of translating and considering West German documents.[123] Finally, on November 16, the Cour d'appel rendered a "partially favorable" decision, granting the extradition request for only one of the charges contained in the Stuttgart arrest warrant.[124] The court ruled that Croissant could be extradited "for [his] having, as a lawyer, contributed to organizing and operating an information system between imprisoned terrorists and others in liberty by transmitting correspondence, instructions and documents favoring, as a consequence, their activities".[125]

The Cour d'appel's consideration of the merits of the case reflected a high and unimpeachable standard of judicial conduct; accusations of judicial subservience to executive branch opinions and assessments of political exigencies cannot properly be levied at the court.[126] The court

121. No official report of the decision rendered by the Cour d'appel, Paris, has yet been reported in the relevant French law journals. For a report of the decision see, Le Figaro, Nov. 17, 1977, at 17, col. 3.

122. For a report of the facts of this case, Le Monde, Oct. 2-3, 1977, at 7, col. 1; *id.* Oct. 5, 1977, at 16, col. 5; *id.* Nov. 26, 1977, at 1, col. 3.

123. *Id.*

124. Le Figaro, Nov. 17, 1977, at 17, col. 3.

125. *Id.*

126. For the following analysis of the case, the author has relied extensively on a previous study. Carbonneau, *supra* note 102, at 819-21.

gave close scrutiny to the charges contained in both arrest warrants. It held that the charges contained in the Karlsruhe warrant constituted inadequate grounds for extradition, declaring that they lacked a sufficient evidentiary base to be a valid ground for extradition. In regard to the charges contained in the Stuttgart warrant, the court refused to grant the extradition request on the basis of the charge that Croissant had aided a criminal group by propagandizing on its behalf. The court ruled that, under French law, such crimes could not be a ground for extradition. The court rendered only a "partially favorable" decision based upon the charge that Croissant, in his capacity as a lawyer, had acted as an information link between imprisoned terrorists and others in liberty and, hence, favored their activities.

The court's opinion was a subtle piece of judicial reasoning. By disregarding certain charges for evidentiary reasons, the court avoided confronting the problem of having to draw an explicit substantive distinction between activities which allegedly have a political character and those which are solely criminal. The charge that Croissant had aided the "Red Army" faction, described in the arrest warrant as a "criminal group", by propagandizing on its behalf borders, by any definition of the term, upon the political. To have considered the charge as a viable ground for extradition would have required the court to consider the concept of relative political crimes and to engage in the task of distinguishing criminal complicity with a terrorist group from genuine political acts. Indeed, such an orientation might have led to the refusal of the extradition request since the court could have held that nonviolent acts, although they are associated with a terrorist group, when they are pursued solely to further a set of political convictions, are not crimes per se, but rather fall within the scope of the political offense exception to extradition. The possible impact on the instant case notwithstanding, it is in some ways regrettable that the Cour d'appel did not venture down this doctrinal road. Such a substantive holding would have gone far to refine the current law dealing with the applicability of the political offense exception to cases involving the extradition of transnational terrorists.

The court did grant the extradition request for a charge which was distinctly more criminal than political in character. As a consequence, the application of the political offense exception to the case became irrelevant, and instead the court relied, at least tacitly, upon the principle that Croissant's forthcoming trial in West Germany would be limited solely to the criminal charges. The importance of the *Croissant* decision should not be minimized. Not only were legal sanctions

brought to bear against an individual who had allegedly aided and abetted terrorists in their activities, but also the French court had established a precedent which contrasted markedly with its previous decisions in the area and could serve to support the contention that "terrorists should be judged according to their acts, not their intentions".[127]

In subsequent litigation,[128] the Conseil d'etat upheld the legality of the French Government's decision to extradite Croissant. Following the decision by the Cour d'appel, Croissant lodged an action with the Conseil d'etat in which he contended that his extradition to West Germany should not take place on twelve grounds.[129] One of Croissant's principal arguments centered upon the concept of political crime. He maintained that the charge upon which his extradition had been granted was a political offense and that the applicable extradition convention did not permit extradition for acts of this character.[130] The Conseil d'etat rejected all of Croissant's arguments including his contention that he was a political offender.[131]

The court reasoned that the charge of furnishing aid to persons who committed crimes was not political in its purpose despite the fact that the purpose of the crime was described in the arrest warrant as "to topple the established order in the Federal Republic of Germany".[132] Nor was, according to the court, the allegation that this act had been committed in order to have the rights of defendants respected sufficient to give the infraction a political character. The court concluded that the aid furnished to the imprisoned individuals had allowed them to pursue their criminal activity and that the seriousness of the charge prevented it from having a political character.[133]

According to a French commentator,[134] the decision of the Conseil d'etat re-established, to some extent, the objective norms for defining a political offense, namely, limiting it to those acts which touch the State in its political or social organization. By this analysis, a political offense was not, by its nature, a common crime. Although it is possible to characterize crimes as political by the motivation that underpins them, such a methodology, in the opinion of the commentator, allowed for

127. Comment attributed to Helmut Schmidt of West Germany.
128. Conseil d'état, sect. du contentieux, Fr., 106 J. DR. INT'L. 91, 96 (1979).
129. *Id.* at 91-95.
130. *Id.* at 94.
131. *Id.* at 91-95.
132. *Id.* at 94.
133. *Id.*
134. *See* Note, David Ruzié, *id.* at 96.

the possibility of affixing too easily the label of political upon ordinary criminal acts. The subjective interpretation of the concept of a political offense, *i.e.*, defining the political character of an act by its purpose, opened the door to too many abuses.[135]

For our part, the decision of the Conseil d'etat has a more restrictive, although nonetheless significant, import. Rather than address the issue of how the courts should go about defining a political crime, *i.e.*, either by reference to its objective political character or by weighing its common elements against its political aspects to determine which gives a predominant coloration to the act, the opinion of the court seems to focus upon the place of terrorist acts within this on-going debate. The key doctrinal pronouncement of the court resides in the fact that the seriousness of such crimes does not permit a court of law to take into account the possible political motivation of the act; otherwise, the interest in the protection and preservation of society would be jeopardized. Although the court may have recommended a return at least to the basic principles of the objective test, what is certain about its decision is that it places terrorist acts outside the debate concerning relative political offenses and outside the scope of the political offense exception because of the menace they pose to society.

For the court, it seems unquestionable that terrorist activities are ordinary criminal acts and that, despite the ideological coloration that their perpetrators attribute to them, they remain common crimes. A court, in a situation in which an individual opposed to a totalitarian or otherwise absolutist regime committed ordinary crimes because of his opposition to the government, *e.g.*, the *Astudillo Calleja* case, should retain some discretion to make a choice between the individual's right to asylum and the state's interest in repressing criminal activity. The determination in such cases should be made in an ad hoc fashion with reference to the particular circumstances of the case. It seems, however, that in a *Hennin* or *Holder* case, where the potential extraditee has committed ordinary crimes in a free and democratic society and the crimes have as their target innocent victims and as their purpose the reeking of havoc and confusion among the general population, the judiciary should be little disposed to consider the political coloration of these acts as an obstacle to extradition. The teaching of the decision of the Conseil d'etat seems to lie here: where viable channels of free political expression exist, there is little justification for wanton violent acts

135. *See id.* at 97-98. For an account of the legal decisions in West Germany concerning Mr. Croissant, see Le Monde, Nov. 10, 1979, at 8, col. 2.

regardless of the motivation that inspires them. Regardless of his personal political opinions, Croissant engaged in criminal activity by aiding criminals to commit their crimes; the interests of Western democratic societies dictate that this type of act should be punished by appropriate legal sanctions.

The *Piperno* case is the latest French decision concerning the extradition of an alleged transnational terrorist from France. This decision confirms the view that the holding in *Croissant* presaged a significant re-orientation of French jurisprudence in this area. In the light of doctrines established by these two recent cases, the Cour d'appel of Paris appears to be abandoning the position that it advanced in the *Holder* opinion and to be moving towards elaborating a definition of a political crime which lessens or perhaps eliminates the possibility that terrorist acts could be included in that category of crimes. Although the French jurisprudence still can be considered to be in its formative stages, the Cour d'appel seems to be asserting a much needed measure of judicial autonomy in these matters by disregarding external political factors and concentrating upon the legal issue presented. The French courts today are following the dominant trend among the courts of the world community and moulding their decisions in the spirit of the 1977 European Convention on the Suppression of Terrorism.[136]

The *Piperno* case arose as the result of an investigation that is currently being conducted in France by a team of special anti-terrorist agents in conjunction with the French police and Interpol.[137] The purpose of the investigation is to apprehend members of the terrorist group known as the Red Brigades who are believed to be hiding in France and who are suspected of having participated in the assassination of Aldo Moro.[138] The *Piperno* case involved two extradition requests made by the Italian Government for one Francesco Piperno, a 37-year-old physics professor who taught at the University of Cosenza and who

136. European Convention on the Suppression of Terrorism, *opened for signature*, Jan. 27, 1977, *reprinted in* 15 INT'L LEGAL MAT'LS 1272 (1976). The Convention was designed to be a European response to the increase in terrorist activities by providing for a unified and firm stance on matters relating to the extradition of transnational terrorists. According to the Convention, extradition is a "particularly effective measure" by which to guarantee that terrorist offenders will not escape prosecution and punishment. To achieve its ends, the Convention imposes upon signatory states a duty to prosecute-or-extradite perpetrators of terrorist acts, although it still gives the signatory states a certain amount of discretion in making the ultimate determination in these matters. For an assessment of the possible impact of the Convention upon extradition practice, see Carbonneau, *supra* note 18, at 39-43.

137. *Red Brigade Hunt Intensifies in France*, Int'l Herald Trib., Sept. 4, 1979, at 5, col. 1.

138. *Id.*

had taken an active part in radical left-wing politics.[139] Most notably, while in Italy, Piperno had been the leader of the Workers Autonomy Movement[140] and, more significantly, he had acted as quasi-intermediary between Italian parliamentary members and terrorists during the negotiations on the fate of Aldo Moro.[141] On April 7, 1979, when Italian judicial authorities charged Piperno with insurrection against the State and with membership in an urban guerrilla group, he went into hiding.[142] On August 18, 1979, he was apprehended in Paris and detained at the *prison de la Santé* on the basis of an arrest warrant issued on July 7, 1979, by an Italian magistrate.[143] After his apprehension, the Italian Government made a request for Piperno's extradition based upon the insurrection and subversive activities charges.[144]

Legal action on the extradition request was delayed several times.[145] The accused made appearances before the *chambre des mises en accusation* of the Cour d'appel of Paris on August 21 and 24,[146] but a judicial decision on the merits of the extradition request was postponed on these occasions for reasons which could not be ascertained from press reports or official documents. During at least one of these appearances, and once thereafter, Piperno made a request before the court for political asylum in France. Apparently, the court never gave serious consideration to these requests which more properly should have been lodged with government officials in the Ministry of Justice.[147] The court finally rendered its decision on August 31, rejecting the Italian Government's request for Piperno's extradition.[148]

The outcome of the decision was not surprising. Its basic rationale was based upon an elementary rule of extradition law that the three charges upon which the extradition request had been based *viz.* involvement with armed subversive groups, armed insurrection against the state, and hiding criminals, were not among the enumerated offenses contained in the Franco-Italian Extradition Convention of May 12, 1870 and were not, therefore, within the scope of the French Extra-

139. *Prisoner in Paris Charged in Moro Death*, Int'l Herald Trib., Sept. 3, 1979, at 6, col. 6.
140. *Id.*
141. Glucksman, *Le pantalon de M. Brejnev*, Le Monde, Sept. 27, 1979, at 14, col. 5.
142. *Red Brigade Hunt Intensifies in France*, *supra* note 137.
143. Le Figaro, Aug. 20, 1979, at 3, col. 1.
144. Le Monde, Sept. 2-3, 1979, at 20, col. 2.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*; Int'l Herald Trib., Sept. 3, 1979, at 6, col. 6.

dition Statute of March 10, 1927. Moreover, Italian judicial authorities apparently had anticipated the result because it appears that the charges for which extradition had been requested were deliberately stated in terms which contained no reference to a specific incident in order not to compromise the on-going investigation in France of the involvement of Red Brigades terrorists in the Aldo Moro murder.[149] This is apparent because on August 29, a few days before the court was scheduled to render its decision on the extradition request, the Italian Government already had made a second request for Piperno's extradition which contained forty-six specific charges including accusations of direct involvement in the murder of Aldo Moro on May 9, 1978 and other terrorist crimes perpetrated in Italy.[150]

Judicial action on this second request again was delayed several times due to the court's desire to take the matter into deliberation. A final judicial pronouncement was not forthcoming until October 17.[151] On that date, in a lengthy opinion, the *chambre des mises en accusation* of the Cour d'appel rendered a partially favorable judgment on the question of whether the accused should be extradited, limiting the grounds upon which extradition could be granted to two of the forty-six charges contained in the arrest warrant of August 29.[152]

These two charges related to Piperno's alleged complicity in the sequestration and murder of Aldo Moro.[153] The major part of the court's opinion discussed the defense arguments which had been advanced in the September 26 hearing. Piperno's lawyers contended that the August 29 arrest warrant referred to the same charges that were contained in the July 7 arrest warrant upon which the first extradition request had been based and refused. According to the defense, since these charges were essentially the same although they had a different juridical description, the second extradition request also should be refused.

149. *See, e.g.*, Int'l Herald Trib., Sept. 3, 1979, at 6, col. 6.

150. *See id.*; Le Monde, Sept. 2-3, 1979, at 20, col. 2.

151. *See* Le Figaro, Sept. 20, 1979, at 13, col. 2; *id.* Sept. 27, 1979, at 16, col. 1; Le Monde, Sept. 28, 1979, at 1, col. 5, at 13, col. 1.

152. Le Figaro, Oct. 18, 1979, at 14, col. 6; Le Matin, Oct. 18, 1979, at 1, col. 6 at 10, col. 1; Le Monde, Oct. 19, 1979, at 1, col. 5, at 14, col. 1.

153. For the following summary of the court's opinion, the author has relied upon the extensive report contained in Le Monde, Oct. 19, 1979, at 14, col. 1, which was verified by consulting an official extract of the court decision and a United States Department of State translation of the former document. These documents were furnished by Professor Richard B. Lillich of the University of Virginia School of Law to whom the author expresses gratitude for his cooperation. All paraphrases and quotations are from the news account; no other references will be made.

The court, however, rejected this argument. In its view, the two warrants were based upon two separate and distinct criminal investigations by the Italian authorities. The second arrest warrant was the result of criminal investigation number 1 482-78, which had originated in 1978 and revealed grounds for the common law charges of assassination, murder, and sequestration. A prior criminal investigation, number 1 067-79, had been instituted in 1979 by the same Italian investigative unit concerning the charges relating to insurrection and subversive activities. The court deemed that there was "an absolute difference" between these two investigations in that they related to "activities which [were] . . . far from being identical."

The court observed that the 1979 investigation which led to the delivery of the first warrant concerned charges which "came into the realm of political ideals", but that common law crimes such as assassination, murder or sequestration contained in the August 29 warrant were not crimes of a political character. Moreover, the investigation upon which the second warrant was based was still in progress and had resulted in the discovery of new and important elements which transformed the suspicions against the accused into legal presumptions of guilt. It is upon these grounds that the court "declared unfounded the principal defense arguments and rejected them."

The four factual allegations which supported the charges in the August 29 warrant of Piperno's complicity in the sequestration and murder of Aldo Moro were: (1) when the Italian police arrested two Red Brigades terrorists in a Rome apartment on May 30, 1979, in possession of weapons which had been used in the assassination of Aldo Moro, the owner of the apartment stated that she had taken these two persons in at Piperno's request; (2) the *Metropoli*, a magazine for which Piperno was principal editor, had published drawings of the topography of the place where Aldo Moro was being held; (3) the same publication had revealed the terms of negotiations which the accused had initiated concerning the fate of Aldo Moro while the latter still was being held; and, (4) the accused had named the conditions for Aldo Moro's release, namely, that he would be returned if imprisoned Red Brigades members were set free. The court stated that, in its consideration of these facts, it looked only to "what concerned the conduct of Mr. Piperno relative to the holding of Mr. Aldo Moro, to the threats of death against the latter and to his assassination." The court concluded that, although the accused had not been the direct "material agent" of these crimes, he was an accomplice to the sequestration and murder of Aldo Moro.

The doctrinally significant, albeit considerably shorter, part of the court's sixteen-page opinion concerned the would-be political character of the acts of the accused and of the extradition request. In the first part of its opinion, the court explicitly characterized the charges for which extradition could lie as charges of common law crimes. In the second section of the opinion, the court went on to give the reasons for that characterization. These reasons centered primarily upon the "seriousness" and "gravity" of the acts involved. In the court's view, neither the motivation for the acts nor the circumstances in which they were committed could be regarded as factors that dispel the common or ordinary aspect of these criminal acts. The court expressly stated that "whatever objective may have been sought, or whatever the nature of the context in which such facts could be integrated, they, in light of their seriousness, cannot be considered to have a political character."

Despite the brevity of its reasoning, the court took some pains to emphasize that, in its view, these extremely grave crimes posed a menace to society. Complicity in the moral and physical torture of an innocent person and in his subsequent assassination could, in the court's estimation, in no way be equated with or justified by the contention that they were the expression of political beliefs. One would assume, although the court never stated so explicitly, that the alleged ends pursued were simply too disproportionate with the means employed to merit consideration as a political crime. Finally, the principle of speciality which limits the grounds upon which the extraditee can be tried to those for which the extradition request was granted effectively dispelled any concern about a possible political motivation of the extradition request itself.

The Cour d'appel's holding in *Piperno* on the political offense question constitutes the statement of an invaluable judicial doctrine in the struggle to bring legal sanctions to bear against transnational terrorists and their accomplices. While the court made no explicit reference to a formal test in elaborating its holding on the political offense issue, it appears to be clear that it was deploying a set of criteria similar to the predominance test of the Swiss courts, namely, weighing the common aspects of the crime against its political features. Moreover, the court seems to have established conclusively that, even when the liberal requirements of a predominance test are applied to a given extradition case, terrorist acts will fall outside of the scope of the political offense exception to extradition. This position is in keeping with the jurisprudence established by the Swiss and other national courts to the effect that terrorist acts are an inappropriate and unacceptable means

of political expression; they represent an invidious threat of harm to innocent populations and civilization and are a disproportionate means to achieve any alleged political end.

It also should be pointed out that the reasoning of the Cour d'appel supports the spirit of the 1977 European Convention on the Suppression of Terrorism.[154] The Convention is basically an extradition agreement, assuring countries seeking the extradition of terrorists who have committed violent acts on their territories and fled to signatory countries either that extradition will be forthcoming when the terrorists are apprehended or, if extradition is not granted, that the terrorists will be prosecuted in the courts of the requested country.[155] The provisions of Articles 1 and 2 contain a detailed list of paradigmatic terrorist crimes which are exempted explicitly from the political offense exception. These crimes include airplane hijacking, attacks on the life and physical integrity of internationally-protected persons or other innocent persons, kidnapping, and the use of a bomb or rocket.[156] The Convention also excludes from the political offense exception any "attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."[157] By ruling that the "seriousness" of the charges for which Piperno could be extradited withdrew any application of the political offense exception, the Cour d'appel encouraged the courts of other countries to uphold the basic intention and consensus underlying the 1977 European Convention.

CONCLUSIONS

Terrorist crimes, like all criminal acts, pose a serious menace to innocent victims and societal interests. The transnational character of terrorist activities raises yet another obstacle to efforts to bring legal

154. See text accompanying note 135 *supra*. This Convention was signed by all member countries of the Council of Europe with the exception of Malta and Ireland. 16 INT'L LEGAL MAT'LS 233 (1977).

155. Convention, *supra* note 135, at preamble.

156. *Id.* at art. 1.

157. *Id.* at art 1(f). On Nov. 7, 1979, the *chambre d'accusation* of the Cour d'appel of Paris also rendered a favorable decision in a companion extradition case. This case concerned the Italian Government's request for the extradition of Lanfranco Pace, an associate of Mr. Piperno who also was wanted on charges relating to the sequestration and assassination of Aldo Moro. The court rendered a favorable opinion regarding the extradition request on the same grounds that it did in the *Piperno* case. It thereby reinforced its doctrinal position in regard to the extradition of transnational terrorists. For an account of the *Pace* case, see Le Figaro, Nov. 8, 1979, at 14, col. 5; Le Matin, Nov. 8, 1979, at 14, col. 5; Le Monde, Nov. 19, 1979, at 17, col. 1.

sanctions to bear against criminal offenders. The extradition of apprehended terrorists, of course, is one legal means by which to respond to this situation. The apparent consensus among the courts of the world community is that the political offense exception is not designed and should not be interpreted or modified to cover such acts. The reasoning in *Holder* and, to a lesser extent, the outcome of the *Abu Daoud* case were testimony to the fact that the French court did not subscribe to the prevailing view that terrorist acts could not be considered legally as having a political character. The *Croissant* and the *Piperno* decisions represent a significant departure from that earlier stance.

Despite the fact that French courts seem to have adopted a predominance approach to the definition of a political crime, the Cour d'appel in its two latest extradition decisions has excluded complicity with terrorist acts from the purview of the political offense exception. In *Piperno*, the court expressly excluded the extraditable offense from the exemption afforded to political crimes on the ground that the terrorist act in question was too grave and serious in nature to give consideration to its motivation or the circumstances in which it was committed. This re-orientation—which one hopes will be definitive—is a welcome change in the French jurisprudence in this area and should serve as an example to other jurisdictions of the need to bring legal sanctions to bear against terrorist offenders.