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"Between Minimal Courage and Maximum Cowardice": A Legal Analysis of the Release of Abu Daoud

Sandra E. Rapoport

"BETWEEN MINIMAL COURAGE AND MAXIMUM COWARDICE": A LEGAL ANALYSIS OF THE RELEASE OF ABU DAOUD*

*Sandra E. Rapoport***

INTRODUCTION

> Whereas, By means of an untruthful and invalid legal excuse, the French government refused to recognize a perfectly proper request of the Israeli government for the extradition of Daoud . . . now, therefore, be it Resolved by this legislative body of the State of New York, That the President and the Congress of the United States advise the French government that the faith and prayers and hopes and beliefs and principles of the free peoples of the world are far more important to the American people and its government than French profits at the expense of innocent lives . . . .[1]

These words express moral outrage at the release of Abu Daoud. International relations, however, are governed by legality as well as morality. France, by releasing Abu Daoud, has violated not only conventional and customary international law, but has also shocked the sensibilities of many. This article will discuss the events precipitating the French court's release of Abu Daoud, the relevant treaties governing the parties' actions, cases dealing with the law of extradition, and applicable general principles of international law.

I. FACTS[2]

On Friday, January 7, 1977, Abu Daoud, militant Pales-

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** Attorney, American Jewish Committee; B.S., Cornell University, 1973; J.D., St. John's University School of Law, 1976.

1. N.Y. Ass. Res. 49, 200th Sess. (1977). New York's resolution was the most strongly worded resolution passed concerning Abu Daoud. It was preceded by S. Res. 48, 95th Cong., 1st Sess., 123 Cong. Rec. S1535 (daily ed. Jan. 26, 1977), which unanimously condemned France's release of Abu Daoud. The House of Representatives passed a resolution expressing a similar view. H.R. Res. 105, 95th Cong., 1st Sess., 123 Cong. Rec. H377 (daily ed. Jan. 13, 1977). *See also* H.R. Res. 112, 114, 125, 147, 193, and 242, which repeat the sentiment of H.R. 105.

2. The facts were gleaned from a series of articles appearing in the *New York Times*.

tinian and Al Fatah leader, was arrested in Paris, where he had arrived to attend the funeral of a Palestinian activist. Daoud had entered France using an Iraqi passport and an assumed name. Officers of the French counterintelligence service, the Directorate for the Surveillance of the Territory, had made the arrest pursuant to an international warrant after they had received pertinent information by telephone from the West German police.

West German and Israeli interest in Daoud stems from the Palestinian's suspected role in planning and taking part in the massacre of eleven Israeli Olympics sportsmen and six other persons in Munich on September 4, 1972. On January 10, 1977, Judge Shalsi of the Jerusalem Magistrates Court issued a warrant for Daoud's arrest. He was accused of murder,[3] manslaughter,[4] conspiracy to commit a felony,[5] abduction,[6] causing grievous bodily harm,[7] unlawful wounding,[8] wounding and assault in grievous circumstances,[9] aiding and abetting, counselling, and procuring,[10] and conspiring[11] to commit these crimes under Israel's criminal code. Accordingly, on the same date, Israel submitted an urgent request to the French authorities for the provisional detention of their prisoner pending extradition proceedings. The Federal Republic of Germany also submitted a request for extradition,[12] but it was rejected by France on the grounds that identification of the prisoner was technically improper, and that German officials had not formally confirmed the extradition request through diplomatic channels.[13]

After deliberating for twenty minutes,[14] the French court, the Chambre d'Accusation, ruled that Israel had no right to demand detention of Daoud pending extradition since the crimes in question had not been committed on Israeli soil, nor by an Israeli

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N.Y. Times, Jan. 12, 1977, at A1, col. 1; *id.* Jan. 13, 1977, at 1, col. 1; *id.*, Jan. 14, 1977, at A1, col. 4; *id.*, Jan. 16, 1977, at 11, col. 1; *id.*, Jan. 18, 1977, at 1, col. 3.

3. Israeli Criminal Code Ordinance § 214 (1936), *Palestine Gazette* No. 652, Dec. 14, 1936, at 285 (Supp. 1).

4. *Id.* § 212.

5. *Id.* § 33.

6. *Id.* § 256.

7. *Id.* § 235.

8. *Id.* § 238.

9. *Id.* § 241.

10. *Id.* § 23.

11. *Id.* § 24.

12. The request was made pursuant to the terms of the Extradition Treaty, June 28, 1926, France-Germany, 53 L.N.T.S. 435.

13. N.Y. Times, Jan. 12, 1977, at A6, col. 2.

14. *Id.*, Jan. 16, 1977, at 11, col. 1.

citizen. It further held that the extradition treaty between France and Israel[15] was not applicable to the present case because the terrorist acts had been committed prior to the effective date of the agreement.

II. Applicable Treaties

On November 12, 1958, France and Israel signed an extradition treaty which entered into force on November 14, 1971.[16] Since that time, under section 11 of the Treaty, Israel has been granting extradition to France,[17] and it was under this section that Israel requested the extradition of Daoud. Section 11 required France to keep the subject, in this case Daoud, in provisional detention for a period of up to sixty days, pending the formal extradition request. He was to have been held until Israel could adequately support its extradition request.

Provisional detention is an infringement upon a suspect's liberty, but it must be balanced against the irreparable damage which would result if he were not held at least until the matter could be examined thoroughly.[18] In February 1973, according to Israel, Daoud confessed his involvement in the Munich massacre over Jordanian television.[19] Subsequently, both Israel and West Germany had made known their desire to institute formal extradition proceedings to bring Daoud to justice. In light of these facts, Daoud was, at the very least, a suspect wanted for a heinous crime, and holding him pending formal inquiry would not have been an extraordinary step for the French court to have taken. It is interesting to note that under French law, entry into the country under a false name and a foreign passport could have subjected Daoud to eighteen days' detention; this would have been sufficient time for Israel to begin the formal extradition procedures.[20]

The French contended that the French-Israeli Treaty did not enter into force and effect until 1975,[21] and since the acts attrib-

15. Extradition Treaty, Nov. 12, 1958, France-Israel, 805 U.N.T.S. 252.

16. *Id.*

17. Official Statement of Consulate General of Israel, in New York City (Jan. 13, 1977), on file with author.

18. See I.A. Shearer, Extradition in International Law 200 (1971) for a discussion of provisional arrest.

19. Official Statement of Consulate General of Israel, *supra* note 17.

20. N.Y. Times, Jan. 12, 1977, at A6, col. 2.

21. At the time of the Munich massacre, French internal law did not authorize the prosecution within France of foreigners who had committed offenses outside the country.

uted to Daoud were committed in 1972, the treaty did not apply to them. In fact, however, the extradition treaty was effective November 14, 1971, and, as noted above, has been the basis for extradition to France since that date. The Munich murders were committed in 1972; even if they had been committed prior to 1971, Article 23 of the treaty specifies that the treaty applies to crimes committed prior to its entry into force. Such a provision is valid and does not constitute an *ex post facto* criminal penalty since the acts in question were crimes when they were committed.[22] Only the method of extraditing the suspect was changed by the extradition treaty.

In the case of the abduction of Adolf Eichmann from Argentina in 1960, there was no extradition treaty in force between Argentina and Israel. When Eichmann was kidnapped from Argentina and taken to Israel for trial, Argentina correctly claimed that its territorial sovereignty had been breached. Had Israel and Argentina signed an extradition pact similar to the French-Israeli Treaty, Israel would have been hard-pressed to show why it had by-passed the treaty's mechanisms and had unilaterally taken the suspect into custody. Even without such a pact, the jurisdiction of Israel to try Eichmann was upheld, and Argentina recognized that no damage was done to its citizens or territory by the abduction, since Eichmann was an illegal alien.[23]

A 1975 amendment to France's internal law enlarged the competence of French courts to try such offenses. It was on this basis that France claimed that it had no jurisdiction over Abu Daoud until 1975. This was spurious reasoning, however, since Israeli law was a competent means of bringing the accused to trial, and no reciprocity of signatory nations' internal statutes was necessary under the French-Israeli extradition treaty. Law No. 75-624, arts. 11-14, July 11, 1975, [1975] J.O., [1975] J.C.P. III, No. 8, *amending* C. PR. PEN., arts. 689, 694, 696.

22. 1 D. O'CONNELL, INTERNATIONAL LAW 246 (1965). The general rule is that a treaty cannot be applied retroactively. Until recently, many writers supported the notion that ratification of a treaty is retroactive to the date of signature. Since 1930, however, a majority of commentators have altered their positions, and now accept the rule that the date of a treaty's operation is the date of ratification. *But see* Ambatielos Case (Greece v. United Kingdom), [1952] I.C.J. 28, 40 (retroactive effect given a treaty if there is "any special clause or any special object necessitating retroactive interpretation").

23. Argentina lodged a complaint with the Security Council of the United Nations, which passed a resolution requesting that Israel make appropriate reparation to Argentina in accord with the United Nations Charter and the rules of international law. S.C. Res. 138, 15 U.N. SCOR 4, U.N. Doc. S/4349 (1960). *See generally* M. PEARLMAN, THE CAPTURE AND TRIAL OF ADOLF EICHMANN (1963); Q. REYNOLDS, MINISTER OF DEATH: THE ADOLF EICHMANN STORY (1960). Argentina, in a joint communique with Israel, later waived its objections to the kidanpping. 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1110 (1968).

The Eichmann case was complex and was comprised of other factors bearing on the question of Israel's jurisdiction.[24] But the the presence or absence of an extradition treaty is an important element with respect to the Daoud case. Here, the mechanism for extradition had been established, and had been used by the two nations in the past. Israel set the process into motion and had every reason to believe that the Treaty would be adhered to by France.

III. Case Law

Despite France's disregard of the Treaty, Israel had alternative grounds for believing that France would extradite Daoud: the body of international law and custom developed to further the orderly and peaceful coexistence of sovereign States. If an extradition treaty is in force between the requesting and the asylum States, the treaty's provisions and mechanisms are examined in order to ascertain the correct legal manner of obtaining jurisdiction over a fugitive. Absent such a treaty, the principles of international law, as they have evolved in practice and custom among nations, become operative.[25]

At the time of the Eichmann case, the courts of many countries considered the relevant law to have been articulated by two United States Supreme Court cases, *Ker v. Illinois*[26] and *Frisbie v. Collins.*[27] Known as the *Ker-Frisbie* doctrine, the holdings of these cases provided that absent an extradition treaty, the manner in which an accused is brought into the court's jurisdiction, however illegal, in no way affects the competence of the court to try him.

The decision in *Ker v. Illinois* concerned a defendant who had been kidnapped from Peru and forcibly brought to the United State for trial without resort to the extradition procedures pre-

24. *See* Fawcett, *The Eichman Case*, 38 BRIT. Y.B. INT'L L. 181 (1962).

25. 1 L. OPPENHEIM, INTERNATIONAL LAW § 17 (7th ed. H. Lauterpacht 1948).

26. 119 U.S. 436 (1886).

27. 342 U.S. 519 (1952). The importance of these United States cases in international law derives from the fact that, for eighty years, they were the only cases of the courts of a major world power which had articulated basic extradition principles. In the Eichmann case the Israeli court, in determining the issue of jurisdiction over the defendant, relied upon these cases as the major holdings on the subject at the time. *See* Silving, *In Re Eichmann: A Dilemma of Law and Morality*, 55 AM. J. INT'L L. 307 (1961). For a discussion of United States practice, see Note, *The Status of Political Fugitives and Refugees Under United States Law*, 2 BROOKLYN J. INT'L L. 266 (1976).

scribed in a treaty between the United States and Peru. The United States Supreme Court held that Ker had not been denied due process since the manner in which he had been brought into the court's jurisdiction "had no tendency to increase the likelihood of an unfavorable verdict."[28]

> Although [the Court] . . . recognized the possibility that cases involving extreme circumstances might justify immunity from prosecution, the Court felt that such a case had not been presented. The Court grounded its decision on the overriding public interest in bringing the guilty to justice, the severe consequence of a contrary holding, and the availability of both civil and criminal sanctions against the abductor.[29]

Similarly, in *Frisbie v. Collins,* the Supreme Court stated that "[t]here is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."[30]

The *Ker-Frisbie* doctrine was reconsidered in two recent cases before the United States Court of Appeals for the Second Circuit, *United States v. Toscanino*[31] and *United States* ex rel. *Lujan v. Gengler.*[32] In the former case, the court took the position that a defendant's illegal, forcible seizure deprives the court of jurisdiction if the circumstances surrounding the seizure are so extreme as to "shock the conscience."[33] In the latter case, although the court used the same reasoning as it had in *Toscanino,* the facts alleged by the defendant were not found to be sufficiently unconscionable to deprive the court of jurisdiction.

In the *Toscanino* case, the defendant, an Italian citizen, was convicted of conspiracy to import and distribute narcotics. He argued that the proceedings against him were void because the court had unlawfully acquired personal jurisdiction over him. He contended that a member of the Uruguayan police force, as a paid agent of the United States government, had kidnapped him from his home in Uruguay, that he had then been smuggled to Brazil, interrogated and tortured for seventeen days, and drugged and

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28. Note, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law,* 47 U. COLO. L. REV. 489, 490 (1976).

29. *Id.*

30. 342 U.S. at 522.

31. 500 F.2d 267 (2d Cir. 1974).

32. 510 F.2d 62 (2d Cir.), *cert. denied,* 421 U.S. 1001 (1975).

33. Rochin v. California, 342 U.S. 165, 172 (1952).

placed on a New York-bound airplane. The Second Circuit reversed the trial court's decision, which had relied on the *Ker-Frisbie* doctrine.[34] The appellate court reasoned, in part, that such an abduction, if proven, would constitute a violation of the United Nations Charter[35] and the Charter of the Organization of American States.[36] The court stated that the appropriate remedy would then be dismissal of the charges against the defendant and his return to Uruguay.[37]

This retreat from *Ker-Frisbie* was "severely restricted"[38] by the same court eight months later in *Lujan.*[39] Lujan was an Argentine citizen and a co-conspirator of Toscanino. Lujan contended that he had been fraudulently induced by a United States agent to fly from Argentina to Brazil, where Bolivian police, also paid United States agents, had arrested him. He alleged he had been held there incommunicado for one week before being placed on a New York-bound airplane. In finding the court had jurisdiction over the defendant, the Second Circuit held that the reasoning in *Toscanino* did not extend to the facts presented in the *Lujan* case[40] and found no violation of international law.[41]

The theory relied upon in *Toscanino* was that the Government should not be permitted to benefit from its illegal conduct in abducting the defendant. The Second Circuit, in prohibiting the exercise of jurisdiction over the unconstitutionally-apprehended defendant, was, therefore, applying an "exclusionary remedy."[42] Thus, had Abu Daoud been sought by United

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34. 500 F.2d at 271.

35. *Id.* at 278. The United Nations Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." U.N. CHARTER art. 2, para. 4.

36. Article 17 of the Charter of the Organization of American States declares:

> The territory of a state is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another state, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.

CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

37. 500 F.2d at 281.

38. Note, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law*, *supra* note 28, at 494.

39. 510 F.2d 62.

40. *Id.* at 66.

41. *Id.*

42. Note, *International Abduction of Criminal Defendants: Overreaching by the Long Arm of the Law*, *supra* note 28, at 495.

States agents, the *Toscanino* rule would have required that he be accorded rights under the fourth and fifth amendments of the United States Constitution to prevent the operation of the exclusionary rule once he had been brought into the United States.[43]

Israel, however, did not go so far as to allow its agents to seize Daoud. It has been rumored, although not confirmed, that Israeli agents informed the French Directorate for the Surveillance of the Territory of Daoud's whereabouts.[44] Even if this were so, the Israelis chose a "hands-off" policy and favored use of the established extradition procedures rather than risk a possible violation of the rights of the accused.

Although *Toscanino*'s result has been modified by *Lujan,* Israel's restraint in requesting Daoud's extradition would have complied with even the strict *Toscanino* ruling. It would seem, therefore, that the French court, by releasing Daoud following a cursory proceeding, and by denying Israel's legitimate extradition request, was, in effect, allowing the accused to benefit unjustly from Israel's adherence to predetermined procedure. Moreover, it appears that *Lujan*'s reasoning would have justified even an abduction of the offender, assuming there were no extradition agreement, since a court would view such an abduction in light of a balancing of two policy considerations: the need to bring the guilty to justice and the need to deter illegal procedures by law enforcement agents. The *Lujan* court found the release of the narcotics dealer to be an unacceptable result; *a fortiori,* the release of a suspected murderer should be unacceptable to a reasoning court.

The presence and effect of the extradition pact between France and Israel provide an ordered set of procedures which would have lent dignity and sobriety to an action against a suspect such as Abu Daoud. In light of this consideration, France acted unconscionably in failing to hold Daoud pending formal extradition proceedings. The terrifying implication of France's failure to administer the law is that in the future, the mechanism of the law may be by-passed.

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43. The court in United States v. Tierney, 448 F.2d 37 (9th Cir. 1971), for example, reasoned that application of the exclusionary rule would be appropriate when evidence was seized in a foreign country by American agents, in order to deter unlawful conduct by law enforcement officers.

44. N.Y. Times, Jan. 12, 1977, at A6, col. 4.

IV. PRINCIPLES OF INTERNATIONAL LAW

Assuming, *arguendo,* that the French-Israeli extradition treaty was not in effect at the time of the Munich killings, there are several tenets of international law upon which jurisdiction may be based when a nation claims the right of extradition.[45] Such jurisdiction arises under customary international law and also, by implication, from the European Convention on the Suppression of Terrorism.[46]

One such basis of jurisdiction is the territorial principle. This theory provides that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."[47] As a consequence, a State is entitled to punish any individual who has allegedly committed an offense within the State's territory.[48] Thus, in the case of Abu Daoud, the territorial principle would have been the basis for West Germany to claim jurisdiction and request extradition, had the country's lengthy extradition procedure been completed in time for the "swift and unexpected judicial hearing."[49]

The nationality principle is a theory of criminal jurisdiction which grants a State the power to try its own citizens or nationals even when they commit crimes outside that State's territory.[50] Abu Daoud holds an Iraqi passport, but is generally termed a Palestinian national. That no Arab nation claims jurisdiction over him with respect to prosecution for the Munich massacre is clearly demonstrated by the fact that the decision of the French court to release Daoud evoked praise from Arab States.[51] Thus, this principle would not have conflicted with Israel's extradition request.

The protective principle permits a State to try criminals, including aliens, for crimes committed outside that State's territory, if those crimes were "against the security, territorial integ-

45. See Harvard Research in International Law, *Draft Convention on Jurisdiction with Respect to Crime,* 29 AM. J. INT'L L. 435 (Supp. 1935), for an authoritative exposition of this topic [hereinafter cited as Harvard Research].

46. Nov. 10, 1976, art. 2, 15 INT'L LEGAL MATS. 1272 (1976).

47. Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812).

48. Harvard Research, *supra* note 45, at 480.

49. N.Y. Times, Jan. 12, 1977, at A1, col. 1.

50. Harvard Research, *supra* note 45, at 519.

51. N.Y. Times, Jan. 14, 1977, at A2, col. 5.

rity, or political independence of the State."[52] Israel could have asserted jurisdiction under this principle because Abu Daoud was acting as a member of the "Black September" Al Fatah terrorist group, whose existence is dedicated to the destruction of Israel. As such, the Olympics massacre was but a single event aimed at destroying Israel's security, territorial integrity, and political independence. The assertion of this jurisdiction "has found agreement in international law because the state exercising such jurisdiction has particularly suffered as a result of the crime: it is the effect of the crime which confers jurisdiction on the state."[53]

The passive personality principle also allows a State to exercise criminal jurisdiction over an alien, if the latter's victim was a citizen of the requesting State.[54] Under this principle, the Israeli court, in the Eichmann case, held that Israel had jurisdiction to try Eichmann, based on the concept of the "quasi-nationality" of his victims.[55] This result occurred despite the fact that Eichmann's victims, although Jews, were not citizens of Israel since that country did not exist at the time of the crimes.[56] Thus, this doctrine should apply even more strongly to the Daoud case because eleven victims of the Munich Olympics massacre were Israeli citizens.

Yet another theory of international law can be applied to the Daoud case. The piracy principle recognizes universal jurisdiction over a "pirate" since he is a common enemy of all mankind: *hostes generis humani.*[57] Vice-President Walter F. Mondale has termed terrorists "the new breed of pirates,"[58] and the analogy could indeed be considered valid. This principle forms the basis of an extraordinary exercise of jurisdiction as it allows enemies common to all countries to be detained and brought to justice even by a State which bears no juridictional nexus to the criminal.

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52. Note, *International Law: Jurisdiction Over Extra-territorial Crime,* 46 CORNELL L.Q. 326, 328 (1961). *See also* C. RHYNE, INTERNATIONAL LAW 117 (1970).

53. C. RHYNE, *id.*

54. Harvard Research, *supra* note 45, at 589. *See* C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 255-56, 302 n.133 (1974).

55. Silving, *supra* note 27, at 331.

56. 36 INT'L L. REP. 5 (H. Lauterpacht ed. 1968) contains the full text of the district court and Supreme Court judgments in the Eichmann case. *See also* Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law,* 72 MICH. L. REV. 1087 (1974).

57. Harvard Research in International Law, *Draft Convention on Piracy,* 26 AM. J. INT'L L. 739, 759-60 (Supp. 1932).

58. N.Y. Times, July 20, 1976, at 31, col. 1.

Murder is recognized everywhere as a crime. Although in the case of Abu Daoud, France's citizens were not his victims; the murders did not occur on French soil; and Daoud was not a French citizen, the theory of universal jurisdiction would have allowed France to acquire jurisdiction over him. The best reason for universal jurisdiction over *hostes generis humani* is that they are a threat to every State, and may be treated as outlaws.[59]

At his arraignment in the French court, Abu Daoud's defense rested upon the absence of a jurisdictional link between Israel, the requesting State, and the crimes in question.[60] Despite the existence and international acceptance of the passive personality and protective principles of criminal jurisdiction, the French court upheld Daoud's defense and asserted that Israel had no jurisdiction over Daoud because "the crimes in question had not been committed on Israeli soil, nor by an Israeli citizen."[61]

It is interesting to note that Daoud also stated that since he had entered France to attend a funeral as a member of the Beirut Palestine Liberation Organization delegation, he considered himself to be immune from extradition as a diplomat during his mission. This latter point was not ruled upon by the French court; indeed, it would make a mockery of criminal justice if it were possible for a perpetrator to cloak himself with diplomatic immunity in order to avoid apprehension for past crimes.

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59. C. RHYNE, *supra* note 52, at 109.

60. N.Y. Times, Jan. 12, 1977, at A6, cols. 1-2.

61. *Id.* An interesting event, which followed on the heels of the release of Abu Daoud, places the French court's action in sharp relief against the conventional method of dealing with a request for the extradition of a criminal. A few days after Daoud's release, Mr. Karl Sussman, a businessman and naturalized United States citizen of German origin, was brought before the French Chambre d'Accusation on charges of swindling. An international warrant for Sussman's arrest on those charges had been outstanding, at the request of a Munich court, since August 6, 1975, and Sussman had been detained by the French since October 23, 1976. The government of the Federal Republic of Germany, which had supplied information to the French authorities to enable them to hold Sussman, later sought his extradition.

In proceedings before the Chambre d'Accusation, Sussman's attorney requested his client's release on the basis of the "Abu Daoud precedent," claiming that the German authorities had not sent the requisite information to the French court within the prescribed time period, and that there had not been diplomatic confirmation of the extradition request. The French prosecutor's office answered only that the French government does not always advise the court when diplomatic confirmation is given for an extradition request. Sussman was not released. *See* Letter from the European Director of the American Jewish Committee, Paris, to the Foreign Affairs Department of the American Jewish Committee, National Office, New York (Jan. 14, 1977), on file with author.

A. *Political Offenses*

Since the nineteenth century, States have generally refused to extradite fugitives accused of political offenses.[62] A political offense has been defined as "an act against the security of the State."[63] In theory, the reason for the existence of such an exemption from extradition is that a true political offense is directed exclusively against the State, and no element whatever of an ordinary crime is present. For instance, sedition, treason, and espionage may be viewed as political offenses. On the other hand, a common crime may be so connected with a political act that the entire offense is regarded as political, such as the assassination of a government official, or of a private person during a political revolt.

> In brief what distinguishes the political crime from the common crime is the fact that the former only affects the political organisation of the state . . . while the latter exclusively affects rights other than those of the state. . . . The offence does not derive its politice character from the motive of the offence but from the nature of the rights it injures. The reasons on which non-extradition is based do not permit the taking into account of mere motives for the purpose of attributing to a common crime the character of a political offence.[64]

The reasoning which argues that an airplane hijacker should not be allowed to successfully claim exemption from extradition on the basis that the nature of his crime was "political," may be applied to the case of Abu Daoud. Commentators have stated[65] that it is irrational to maintain that the political freedom of one or two individuals, that is, the hijackers, should be held to outweigh the risk to the lives of air travelers. So it is at an Olympic game, where hundreds of thousands of persons convene to watch

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62. *See generally* 1 L. OPPENHEIM, INTERNATIONAL LAW §§ 333-34 (7th ed. H. Lauterpacht 1948); 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 316 (1942). At the time of the Nuremberg trials, in fact, the accused war criminals sought to classify their offenses as political in order to escape extradition. S. GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT 162-70 (1944).

63. García-Mora, *War Crimes and the Principles of Non-extradition of Political Offenders*, 9 WAYNE L. REV. 269, 275 (1963).

64. McGrane, *A Search for an International Solution to the Problem of Aircraft Hijacking*, 2 AUCKLAND U.L. REV. 83, 94 (1975), *quoting In re* Giovanni Gatti, 14 ANN. DIG. & REP. PUB. INT'L L. CASES 145-46 (1947) (French Court of Appeals).

65. Van Panhuys, *Aircraft Hijacking and International Law*, 9 COLUM. J. TRANSNAT'L L. 13 (1970).

or participate in international sports competition. When the rights of those involved are balanced, it is clear that Abu Daoud's "political" freedom should carry less weight than the lives of those persons. Considering the nature of the Munich massacre of eleven Israeli athletes, it would seem that the horror of the murders is so overwhelming, from the aspect of common crime, that any "political" act has ceased to exist.[66]

B. *European Convention on the Suppression of Terrorism*

In the past few years, the European community has endeavored to deter politically-motivated violence by explicitly exempting certain acts from the category of political offenses. On November 10, 1976, the Council of Europe adopted the European Convention on the Suppression of Terrorism.[67] Article 1 of the Convention lists offenses which are not to be considered political offenses: an attack against the life of an internationally protected person or diplomat; the kidnapping and taking of hostages, or any unlawful detention; and complicity in any of the above by any person. Moreover, Article 2 gives contracting States the right to recognize as non-political "other serious acts of violence against persons" claimed by their perpetrators to be politically motivated. Accomplices are again included as offenders.

France was under an international legal obligation to hold Abu Daoud pending extradition. Absent a decision in favor of the prisoner's extradition, France was itself bound to try Daoud because the Convention contains a provision which makes it incumbent upon the State which holds the fugitive to charge and try him if he is not extradited.[68] This provision, an extension of the principle of universal jurisdiction, is another major aspect of the Convention, since it carries the policy of the agreement to its logical end: terrorist acts must be stopped, and a forum for trial of the accused supplied.

Similarly, in the situation of aircraft hijackings, an earlier European convention, the Hague Convention of 1970,[69] requires every contracting State to "take such measures as may be necessary to establish its jurisdiction over the offense in the case where

66. *See* C. BASSOUINI, *supra* note 54, at 416.

67. 15 INT'L LEGAL MATS. 1272 (1976).

68. *Id.* art. 7.

69. Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, 12 U.S.T. 1641, T.I.A.S. No. 7192.

the alleged offender is present in its territory and [the State] does not extradite him."[70] This provision mandating assumption of jurisdiction has been considered necessary "in order to increase the possibility of effective punishment, even if the hijacker is not prosecuted in, or escapes from, the State of landing, or is not extradited to the State of registration of the aircraft."[71]

Sovereign states generally seek to preserve the largest possible freedom of action in matters vital to their security, and are usually reluctant to surrender attributes of sovereignty, such as exclusive jurisdiction over acts committed within their territory. It is significant, therefore, that by adopting the Hague Convention and the Convention on the Suppression of Terrorism, European countries are, in effect, stating that the policy against terrorism supersedes the State's need to retain autonomy over criminal "political" offenders.

Although the Convention on the Suppression of Terrorism has not yet been ratified by the adopting countries and therefore cannot bind any State, its adoption is nevertheless a formal manifestation of the European community's intentions. As such, it stands beyond custom and closer to statute in persuasiveness.[72] Thus, the fact that France was among the countries which adopted the Convention raises the question, at the very least, of that country's sincerity and good faith in enforcing the Convention's provisions in light of Abu Daoud's release.

CONCLUSION

The international community has gone on record as recognizing the need for certain terrorist offenders to be charged and tried. The principles discussed above, as well as the existence of international agreements, provided a substantial basis for the French court to detain Abu Daoud pending a formal extradition hearing. Abu Daoud's release by the court was a monumental breach of France's legal obligations to the sovereign states of Israel and the Federal Republic of Germany. Israeli Foreign Minister Yigal Allon stated in the Knesset on January 11, 1977 that France was

70. *Id.* art. 4, para. 2.

71. McGrane, *supra* note 64, at 88.

72. Article 38 of the Statute of the International Court of Justice articulates the four bases of international law: international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of highly qualified publicists.

put to an elementary test: that of adhering to its "clear-cut international obligations" or of committing a "gross violation of its undertakings for monetary profit." Mr. Allon termed it a test "between minimal courage and maximum cowardice."[73] It was a test which France failed.

73. Statement by Foreign Minister Yigal Allon in the Knesset, Consulate General of Israel, in New York City (Jan. 11, 1977), on file with author.