

## Bringing the Terrorist to Justice: A Domestic Law Approach

Jeffrey B. Gaynes

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## NOTES

### BRINGING THE TERRORIST TO JUSTICE: A DOMESTIC LAW APPROACH

On January 11, 1977, a French court ruled that Abu Daoud, one of the alleged perpetrators of the 1972 "Munich Massacre," could not be maintained under provisional arrest pending possible extradition to West Germany or Israel.<sup>1</sup> Daoud's release and his subsequent departure to Algeria, where he was virtually certain to remain free from prosecution, highlight the need to reexamine the problem of bringing the international terrorist to justice.<sup>2</sup>

The problem is not new.<sup>3</sup> Yet, despite long-standing international con-

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1. Judgment of Jan. 11, 1977, Chambre d'Accusation de la Cour d'appel, Paris (complete French text on file at the offices of the Cornell International Law Journal) [hereinafter cited as the Abu Daoud case]. Excerpts of the opinion in French may be found in 97 GAZETTE DU PALAIS, janvier-février 1977, at Jurisprudence 105. Excerpts of the opinion in English may be found in Service de Presse et d'Information, New York, Ambassade de France, Communiqué Issued by the French Ministry of Justice Concerning the Release of Abu Daoud January 11, 1976 [sic], Press Release No. 77/3. For additional factual background on the Abu Daoud case, see the following issues of the New York Times: Jan. 10, 1977, at 1, col. 1; Jan. 11, 1977, at 4, col. 3; Jan. 12, 1977, at A1, col. 1; Jan. 13, 1977, at 1, col. 1; Jan. 14, 1977, at A1, col. 4; and Note, *The Abu Daoud Affair*, J. INT'L L. & ECON. 539, 540-45 (1977).

References will be made to the Abu Daoud case throughout this Note. Only those aspects of the case involving France and Israel will be discussed. The West German efforts to guarantee the continued detention of Daoud pending extradition to West Germany failed because of a procedural technicality not relevant to this Note. For a legal critique of the Abu Daoud decision dealing with both the West German and Israeli aspects of the case, see: Rapoport, "Between Minimal Courage and Maximum Cowardice": A Legal Analysis of the Release of Abu Daoud, 3 BROOKLYN J. INT'L L. 195 (1977); Note, *supra* note 1 at 551-60; and Rolland, *Une étonnante célérité judiciaire*, Le Monde, Jan. 15, 1977, at 2, col. 3.

2. The terms "terrorist" and "terrorism" will be used throughout this Note but will not be defined. There is no universally accepted definition of either term. See note 4 *infra*. For an exploration of the difficulties inherent in any effort to define these terms, see Jenkins, *International Terrorism: A New Mode of Conflict*, in INTERNATIONAL TERRORISM AND WORLD SECURITY 13 (D. Carlton & C. Schaerf eds. 1975).

3. Terrorism was the subject of international concern even before the Second World War. See Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, 19 LEAGUE OF NATIONS O.J. 23 (1938); Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431, 433 n.6 (1975). If broadly defined, terrorism can be traced as far back as the anarchist violence of the late 19th century or the political assassinations of still earlier periods. Cochard, *Le terrorisme et l'extradition en droit belge*, in RÉFLEXIONS SUR LA

cern, there has been no successful, worldwide response. One factor has been the absence of international consensus in the area. Countries can scarcely agree on what a terrorist is, let alone on how to proceed against him.<sup>4</sup> Another difficulty has been the low level of prosecutorial fervor<sup>5</sup> in what might be referred to as neutral states.<sup>6</sup>

Given such difficulties, the most practical solution for bringing terrorists to justice would be to strengthen the traditional bilateral extradition process, thereby assuring the return of terrorists to those states which have clearly manifested a willingness to prosecute them. This Note will examine the obstacles to strengthening extradition and will suggest that

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DÉFINITION ET LA RÉPRESSION DU TERRORISME 207, 210-16 (1974). A brief historical review of international responses to terrorism may be found in: David, *Le terrorisme en droit international*, in RÉFLEXIONS SUR LA DÉFINITION ET LA RÉPRESSION DU TERRORISME 105 (1974); and Paust, *supra* at 432-44.

4. See generally Report of the Ad Hoc Committee on International Terrorism, 28 U.N. GAOR Supp. (No. 28) 1, U.N. Doc. A/9028 (1973). The report groups together various draft proposals for a treaty on terrorism and illustrates the wide divergence of views on precisely what activity should be suppressed.

Commentators have set forth a number of interesting proposals for combatting terrorism. Most, however, depend upon a high degree of multilateral cooperation and would be unworkable until the lack of consensus on the fundamental nature of the problem is resolved. See, e.g., Milte, *Prevention of Terrorism Through the Development of Supra-National Criminology*, 10 J. INT'L L. & ECON. 519 (1975); Paust, *supra* note 3. This is not to say that the field of multilateral cooperation shows no promise at all. Agreement already has been achieved in certain areas, although usually only where the crime was traditionally subject to universal jurisdiction or, if not, was easily assimilable to such a crime. Air piracy and aircraft sabotage are examples of the latter. See Hague Convention, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. 7192; Convention for Civil Aviation (Sabotage), *done* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. 7570. Multilateral cooperation has also been attempted at the regional level, but it is as yet too early to gauge its effectiveness. See, e.g., European Convention on the Suppression of Terrorism, *reprinted in* 15 INT'L LEGAL MATERIALS 1272 (1976) (signed by the plenipotentiaries of 17 member states of the Council of Europe on January 27, 1977) [hereinafter cited as European Convention]; Organization of American States Convention on Terrorism, Feb. 2, 1971, T.I.A.S. 8413, *reprinted in* 27 U.N. GAOR V Annexes (Agenda Item 92) 1, U.N. Doc. A/C. 6/418 (1972) [hereinafter cited as O.A.S. Convention].

5. Apart from the difficulty of achieving international agreement on what constitutes terrorism, is the problem of motivating a state to proceed against a terrorist. Despite the protestations of many states that they condemn all terrorist activities, the truth is that such condemnation is not always reflected in practice. For example, where a terrorist who is a citizen of state *A*, carries out an attack in state *B* against the nationals of state *C*, and then surfaces in state *D*, state *D* might prefer to avoid taking any action rather than prosecute and lock up the terrorist on its own soil. State *D* might reasonably fear that it would be the next target of an attack, this time to liberate the first terrorist. State *D* might also be concerned that prosecuting the terrorist would poison relations with states sympathetic to his cause. Such concerns, highlighted by the Abu Daoud case, show why the concept of universal jurisdiction over acts of terrorism, even if it could be achieved on paper, might in practice be only a partial solution.

6. A neutral state, as referred to in this Note, is a state where a terrorist has chosen either to act or to seek refuge, but which itself is neither the ultimate target of the terrorist's acts nor avowedly friendly to his cause.

the means for overcoming these problems can be found within the bounds of national legislation.

## I

## POLITICAL OBSTACLES—A CAVEAT

A possible drawback to any system of international criminal suppression keyed to the extradition process is that judicial decisions on whether or not to extradite may not be binding on the politically influenced executive branch.<sup>7</sup> In most nations the judiciary's decision is final only when the extradition request has been denied. Where the court has ruled in favor of extradition, the executive branch has the power to reject the decision and grant asylum.<sup>8</sup> In other countries the executive makes the initial and final determination with the judiciary playing no role whatsoever in the decision-making process.<sup>9</sup>

This right of executive veto power is significant in light of the great extent to which the prosecution of terrorists is influenced by international politics. Most terrorists seek haven in countries that they perceive as friendly to their cause. In such countries, it is unlikely that even in the complete absence of legal obstacles, a request for extradition would be granted. The only exception would be where the decision on extradition rested entirely in the hands of a judiciary independent of both the executive branch and popular political sentiment. Such systems are anything but the norm.<sup>10</sup>

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7. The present section deals with the politics of extradition, a topic not to be confused with the political offenses exception. See notes 41-60 *infra* and accompanying text. The executive, when seeking to justify a decision to grant asylum, could rely on the political offenses exception; however, he is not limited to this basis. See I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 198-99 (1971).

8. This system, commonly referred to as the Anglo-American system, is currently in use in most countries of the world, including France, which had given its name to the alternative system of exclusive executive control. See note 9 *infra*. See also J. LEMONTEY, DU RÔLE DE L'AUTORITÉ JUDICIAIRE DANS LA PROCÉDURE D'EXTRADITION PASSIVE 54-61 (1966); I. SHEARER, *supra* note 7, at 199-200.

Belgium is an example of a country where the judiciary's decisions on extradition, both pro and con, are merely advisory. For an indication of the occasions on which the executive has chosen to ignore the judiciary's advice, see Cochard, *supra* note 3, at 216-19.

9. This purely executive decision-making model was the system originally prevailing in France. See, I. SHEARER, *supra* note 7, at 198. In fact, the system has been referred to as the French system. France adopted its present mix of judicial/executive decision-making in Articles 10-18 of the Law of March 10, 1927, [1927] Journal Officiel de la République Française [J.O.] 2874, [1927] Recueil Dalloz Périodique et critique [D.P.] IV 265, *unofficial English translation in Research in International Law, Extradition*, 29 AM. J. INT'L L. 15, 380 (Supp. 1935). See generally J. LEMONTEY, *supra* note 8, at 44-53.

10. Shearer cites only one country, West Germany, where the judiciary is theoretically in total control, and, even here, he notes that in practice the West German system functions basically like the Anglo-American model. See I. SHEARER, *supra* note 7, at 200.

However, the situation is not as irremediable when the terrorist surfaces in a country less sympathetic to his activities, and less hostile to—or perhaps neutral or friendly towards—the country which was the ultimate target of his attack. Consider the case of Abu Daoud, the alleged perpetrator of an attack aimed at Israel who surfaced for a funeral in France, a neutral country. When such a country receives an extradition request, it is conceivable that despite the executive right of veto, the request would be granted. The executive could argue that although he might not be constitutionally bound to uphold the court's decision, he should, nevertheless, show proper deference to the judiciary so as not to undermine respect for the country's legal institutions. By cloaking himself in the law, he could temper the political ill-will that might be generated by the decision to extradite in countries friendly to the terrorist's cause. Thus, while political factors could prove to be a major problem in certain cases, many instances could still be envisaged where the political element would not constitute an insurmountable barrier to extradition.

## II

### LEGAL OBSTACLES TO EXTRADITION

Assuming that political considerations will not preclude a legal determination, there are a number of juridical obstacles which must be overcome before an extradition request will be granted.<sup>11</sup> In the present context, three requirements deserve special attention: (1) the need for jurisdiction in the requesting state; (2) the need for jurisdiction in the requested state; and (3) a determination by the requested state that the offense for which extradition is being sought is not a "political offense."<sup>12</sup>

#### A. JURISDICTION IN THE REQUESTING STATE

Extradition makes little sense if the requesting state cannot proceed against the alleged criminal. Therefore, the requested state must ascertain whether the requesting state has sufficiently extended its scope of jurisdiction as to overcome this initial hurdle to extradition. A state which fears that its citizens or interests may be subject to attack from terrorists beyond the reaches of its borders will wish to extend its criminal juris-

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11. See generally Research in International Law, *supra* note 9.

12. An obvious fourth requirement has been left off the list, namely, a valid extradition treaty. Although extradition may be possible in the absence of a treaty, see I. SHEARER, *supra* note 7, at 27-33, reliance on treaties is the standard practice. In the following discussion it will be assumed that there is an extradition treaty in force between the requested and requesting states.

diction beyond the scope of mere subjective territoriality.<sup>13</sup> Objective territoriality<sup>14</sup> might provide some help, especially if given a liberal reading, but a more effective approach would be to base jurisdiction on the protective and passive personality principles.<sup>15</sup>

### 1. Protective Principle

The protective principle grants jurisdiction over crimes committed outside of a state's territory which threaten the state's security, institutions, or national interests. It is based on the notion that since a state would have no real interest in sanctioning the activities of an individual who, while inside that state, impaired the security or injured the institutions of another state, that other state should be able to act on its own behalf.<sup>16</sup> For instance, there is no reason why Belgium should be expected to have laws prohibiting the counterfeiting of French money on Belgian soil by the nationals of a third state. Yet, such activities would injure France. If French criminal law did not permit prosecution in such a case,

13. This process might immediately give rise to concern over the extent to which one state should delve into the laws of another. See F. PIGGOTT, EXTRADITION 229 (1910). In most civil law countries the requesting state is not examined extensively by the requested state. Submission by the requesting state of the proper documents—arrest warrant, statement of charges, and copy of the law under which it asserts jurisdiction—will normally be sufficient. See S. BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 141-42 (1966). Common law states may require the requesting state to provide evidence establishing a prima facie case. *Id.* at 142-43; *accord*, Research in International Law, *supra* note 9, at 163. But in neither case does the requested state pass judgment on whether it believes the jurisdiction of the requesting state to be justified. 4 M. TRAVERS, LE DROIT PÉNAL INTERNATIONAL 689, 696-97 (1921). The issue is strictly whether or not the requesting state's criminal jurisdiction encompasses the act in question.

14. Territorial jurisdiction is the fundamental basis for jurisdiction in international law. It is based on the view that "a state is competent to deal with any offense committed within its territory, without regard to the nationality of the offender." J. BRIERLY, THE LAW OF NATIONS 299 (6th ed. 1963).

Territorial jurisdiction has been subdivided into subjective and objective territoriality. Under subjective territoriality the criminal would have to be corporeally present within the state at the time of the crime for that nation to have jurisdiction. Objective territoriality, on the other hand, grants a nation jurisdiction over acts which have effects in that state regardless of where the acts took place. *Id.* at 299-301. See generally Bassiouni, *Theories of Jurisdiction and their Application in Extradition Law and Practice*, 5 CALIF. W. INT'L L.J. 1 (1974); Feller, *Jurisdiction over Offenses with a Foreign Element*, in II A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (M. Bassiouni & V. Nauda eds. 1973); Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435 (Supp. 1935); Schultz, *Compétence des juridictions pénales pour les infractions commises à l'étranger*, 22 REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ 305 (1967).

15. This proposal is not one of pure abstraction, but is being given serious consideration by Ireland, a country immediately concerned with the problem of terrorism. See Costello, *International Terrorism and the Development of the Principle "Aut Dedere aut Judicare,"* 10 J. INT'L L. & ECON. 483, 497-98 (1975).

16. See H. DONNEDIEU DE VABRES, TRAITÉ ÉLÉMENTAIRE DE DROIT CRIMINEL 968-69 (1938). See generally García-Mora, *Criminal Jurisdiction Over Foreigners for Treason and Offenses Against the Safety of the State Committed Upon Foreign Territory*, 19 U. PITT. L. REV. 567, 578-83 (1958).

then, in all likelihood, the counterfeiters would be able to proceed secure from all fear of punishment.<sup>17</sup>

Two relatively recent pieces of legislation illustrate some of the advantages and pitfalls of using the protective principle to assert jurisdiction over terrorist acts committed abroad. The principle's potential for abuse was highlighted by the 1972 amendment to the Israeli penal law on offenses committed abroad.<sup>18</sup> The amendment gave the Israeli courts the competence "to try under Israeli law a person who has committed abroad an act which would be an offense if it had been committed in Israel and which harmed or was intended to harm the State of Israel, its security, property or economy . . . ."<sup>19</sup> In 1973, proceeding under this law, the Israeli authorities tried before a military court a Turkish national captured in Lebanon who was allegedly a member of Al Fatah.<sup>20</sup> This alleged membership was the extent of his crime.<sup>21</sup> Conceivably, if the Turk in

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17. It is precisely such cases as counterfeiting, forging entry papers, and giving false statements on immigration applications which have proved the most widely accepted instances for application of protective jurisdiction. Even the American courts, which are generally opposed to the protective principle, have been willing to give it effect in these areas. 2 D. O'CONNELL, *INTERNATIONAL LAW* 903-04 (1965). Nevertheless, the American courts have often preferred to view their competence in terms of an expansively interpreted objective territoriality, rather than invoke the protective principle. See *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). See generally *United States v. Pizzarusso*, 388 F.2d 8 (2d Cir.), cert. denied, 392 U.S. 936 (1968); *United States v. Rodriguez*, 182 F. Supp. 479 (S.D. Cal. 1960), aff'd in part sub nom. *Rocha v. United States*, 288 F.2d 545 (9th Cir.), cert. denied, 366 U.S. 948 (1961). By whatever name, the protective principle in this limited sense causes few states any real difficulty.

Problems arise, however, where states seek to expand the protective principle beyond forgery and counterfeiting to acts which injure state security. Since it would be for each state to define security as it wished, the principle is seen by some as far too open-ended and thus laden with risks. See, e.g., *García-Mora*, supra note 16, at 586-87.

It could be argued that individual freedom would be seriously curtailed if citizens in one state were subject to liability in another state because remarks uttered in the former were regarded by the latter as somehow injurious to the latter's security. While such concerns are not to be discounted, they do not justify a total rejection of the protective principle. A state wishing to expand its protective jurisdiction to cover terrorist offenses, but not other acts that conceivably could be deemed as threatening its security, should be able to draft legislation accordingly.

Whatever the misgivings of common law countries, there appears to be no rule of international law requiring a restriction on the exercise of the protective principle. *García-Mora*, supra note 16, at 587. Article 7 of the Draft Convention on Jurisdiction with Respect to Crime includes a clause which limits the principle's applicability, but the accompanying comment admits that this restriction was designed to change rather than codify existing law. See *Research in International Law*, supra note 14, at 543, 557.

18. Law of 6th Nisan, 5732 (March 21, 1972), Penal Law Amendment (Offences Committed Abroad) (Amendment No. 4), [5732 (1972)] Sefer Ha-Chukkim No. 651, at 52 (Israel), authorized translation in 26 Laws of State of Israel 53 (5732-1971/72).

19. *Id.* sec. 3(1), § 2(a).

20. Judgment of Aug. 7, 1973, Military Court, Lod, Israel. See Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087 (1974).

21. A critique of this far-reaching exercise of extraterritorial jurisdiction may be found in *id.* at 1100-03.

question had not been captured by Israel but rather had been made the subject of an Israeli extradition request, the necessary safeguards against his rendition probably would have been available either in the form of an executive grant of asylum<sup>22</sup> or the judicial adoption of the political offense exception.<sup>23</sup> Still, it is just such an overly broad exertion of criminal jurisdiction which serves to reinforce skepticism as to the propriety of the protective principle, thereby hindering its adoption in situations where it would be not only useful, but entirely justified.

More promising is the 1975 amendment to the French penal code<sup>24</sup> which was adopted in response to the terrorist attack the year before against the French Embassy in The Hague.<sup>25</sup> The text, with the new language italicized, now provides that:

Every foreigner who outside the territory of the Republic renders himself guilty, either as perpetrator or as accomplice, of a felony or misdemeanor against the security of the State . . . *or of a felony against French diplomatic or consular agents or offices* may be prosecuted and tried according to the provisions of French law if he is arrested in France or if the Government obtains his extradition.<sup>26</sup>

The amendment represents a good example of the proper use of the protective principle.<sup>27</sup> While it expands protective jurisdiction, it does so in a clearly defined and limited fashion, focusing only on particular targets of terrorist activity and establishing that the offense must be of a minimum degree of gravity, namely, a felony.

Prior to the 1975 amendment France might have been unable to suc-

22. See notes 7-10 *supra* and accompanying text.

23. See notes 41-60 *infra* and accompanying text.

24. Law of July 11, 1975, Law No. 75-624, arts. 10-14, [1975] J.O. 7220, [1975] Dalloz-Sirey, Législation [D.S.L.] 261 (France).

25. For the factual background to the attack in The Hague, see the following issues of the New York Times: Sept. 14, 1974, at 1, col. 4; Sept. 15, 1974, at 1, col. 4; Sept. 16, 1974, at 1, col. 1; Sept. 17, 1974, at 3, col. 1; Sept. 18, 1974, at 1, col. 1; Sept. 19, 1974, at 1, col. 7.

Mr. Gerbet, Rapporteur of the National Assembly Committee which examined the 1975 French Penal Law Amendment referred in his report to the need to intensify the repression of terrorists. I ASSEMBLÉE NATIONALE REP. NO. 1616, 5th Legis., 2d Sess. Ordinaire 2, 20 (1975) (France). Mr. Lecanuet, Minister of Justice, referred specifically to the incidents at The Hague when he spoke in favor of the legislation during both the Assembly and Senate debates. [1975] J.O. DÉBATS PARLEMENTAIRES, ASSEMBLÉE NATIONALE 2745; [1975] J.O. DÉBATS PARLEMENTAIRES, SÉNAT 1713.

26. Law of July 11, 1975, Law No. 75-624, art. 13, [1975] J.O. 7220, [1975] D.S.L. 261 (English translation of prior text from THE FRENCH CODE OF CRIMINAL PROCEDURE 215 (G. Kock trans. 1964), English translation of new text by the author).

27. If a criticism were to be made, it might be that the statute is too narrowly drawn. Terrorists can be expected to commit acts against persons other than diplomatic personnel. However, passive personality jurisdiction could be invoked to fill any gaps. See notes 28-32 *infra* and accompanying text. The wisest course is not to create so broad a scan of protective jurisdiction as to discredit the principle among the members of the world community.

cessfully request the extradition of terrorists who committed crimes such as those involved in the incident at The Hague. Reliance would have had to have been placed on prosecution by a foreign state which for numerous reasons might fear imprisoning the terrorist on its soil. By adopting protective jurisdiction over this type of crime and broadening the scope of its criminal jurisdiction, France has closed this loophole. In so doing, France has strengthened its own security, enabled the requested state to disdain prosecution without risk of international opprobrium, and, most importantly, made it less likely that such terrorists will go free.

## 2. *Passive Personality*

The passive personality principle gives a state jurisdiction over acts against its nationals wherever those acts take place. Despite a long history<sup>28</sup> and a fairly broad-based modern acceptance, especially in civil law countries,<sup>29</sup> the principle has been subject to much criticism.<sup>30</sup> This criti-

28. H. DONNEDIEU DE VABRES, *supra* note 16, at 977.

29. By the time of the Harvard Draft, the passive personality principle had been adopted by "an important group of states." Research in International Law, *supra* note 14, at 578. See also Feller, *supra* note 14, at 29 n.22; Schultz, *supra* note 14, at 318-20. Israel adopted passive personality jurisdiction in 1972 through its amendment to the Offences Committed Abroad Law. Law of 6th Nisan, 5732 (March 21, 1972), Penal Law Amendment (Offences Committed Abroad) (Amendment No. 4), [5732 (1972)] Sefer Ha-Chukkim No. 651, at 52 (Israel).

In perhaps the most important recent development, France adopted the principle in its July 11, 1975 amendments to the penal law. Law of July 11, 1975, Law No. 75-624, Title II, [1975] J.O. 7220, [1975] D.S.L. 261. The adoption of passive personality jurisdiction represented a major reversal in French thinking. As the Socialist Deputy Jean Pierre Cot was quick to point out during the Assembly floor debate, France was the country that had argued against such jurisdiction in the famous case of *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10, at 22. The response of Jean Foyer, Chairman of the Assembly Committee on Laws (which had supported the Code revision), was to remind Cot that France had lost the *Lotus* case. [1975] J.O. DÉBATS PARLEMENTAIRES, ASSEMBLÉE NATIONALE 2763. To say that Cot's arguments may have fallen on deaf ears seems too generous. The truth is that they fell on virtually no ears at all. This major revision in the French Penal Law was adopted in a late-night session just before a major holiday weekend, with only a smattering of deputies present in the chamber. *Id.* at 2754.

30. The United States vehemently condemned the passive personality principle in *The Cutting Incident*. U.S. Dep't of State, [1887] FOREIGN RELATIONS OF THE UNITED STATES 751. The case involved an American citizen, A.K. Cutting, who had been incarcerated in Mexico for publishing a newspaper story in Texas that allegedly libeled a Mexican citizen. A Mexican criminal statute had accorded the Mexican courts passive personality jurisdiction.

The dissenting opinions and separate opinion in *The S.S. Lotus* also questioned the soundness of the passive personality principle. The *Lotus* majority, however, did no more than reserve its opinion on the matter. *The S.S. Lotus*, [1927] P.C.I.J., ser. A, No. 10, at 22-23. Since the *Lotus* case remains the only principal international decision on this question, the validity of the passive personality principle can only be assessed in the light of national attitudes and scholarly writings. The practice among nations has been mixed. A number of countries, and by no means unimportant ones, have now approved the principle. See Feller, *supra* note 14, at 29, n.22; Schultz, *supra* note 14, at 318-20. Others, especially the

cism, though perhaps possessing some merit in a generalized context,<sup>31</sup> is much less solidly grounded in the context of terrorism.

Concededly, passive personality, if given sweeping coverage, carries a potential for abuse. A person dealing with a foreign national might face entirely unforeseen risks of liability in the foreign state. But, if implemented with a direct and limited purpose, namely securing the safety of one's citizens from terrorist acts abroad, the risk of abuse would be minimized. For, while it may be too much to expect the average citizen to be familiar with all of the criminal laws of every country, it is not unrealistic to assume he would realize that committing a terrorist act might subject him to foreign prosecution.

Passive personality could prove to be a useful tool in the prosecution of terrorism and a necessary complement to the protective principle. For example, where a state *A* terrorist kidnapped and held hostage in state *B* a businessman of state *C*, the protective principle, even in the modified French form, might not prove effective.<sup>32</sup> If state *B* were a neutral state, unprepared to prosecute but ready to extradite, the existence of criminal jurisdiction in state *C* over the state *A* terrorist could prove crucial to the granting of extradition. Passive personality would provide such jurisdiction. State *C*, by adopting passive personality jurisdiction, would reinforce the protection it is able to guarantee for its nationals, ease the pressures on state *B*, and, as with the protective principle, help bring the terrorist to justice.

Thus the first legal obstacle to extradition, jurisdiction in the state making the extradition request, can be surmounted. Potential requesting states may meet this requirement with little difficulty if they undertake a

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territorially oriented common law countries, including the United States, persist in rejecting it. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (2), Comment (e)(1965). The commentators also tend to oppose the application of the principle. See, e.g., H. DONNEDIEU DE VABRES, *supra* note 16, at 978; Bassiouni, *supra* note 14, at 44; Sahovic & Bishop, *The Authority of the State: Its Range with Respect to Persons and Places*, in MANUAL OF PUBLIC INTERNATIONAL LAW 311, 374 (M. Sorensen ed. 1968).

31. The opposition is not unlike that voiced against the protective principle. See Note, *supra* note 20, at 1100-03. The same fear is present, namely that a person in state *A*, while obeying all the laws of that state, may be subject to criminal liability in state *B*. Under the protective principle, this could result from actions in state *A* which state *B* deemed harmful to its security. Under passive personality, liability could stem from simple violations of state *B*'s criminal code which cause injury to state *B* citizens. In both instances, the person in state *A* would be required to know and follow the laws of a state other than that of his residence.

32. See Law of July 11, 1975, Law No. 75-624, art. 13, [1975] J.O. 7219, [1975] D.S.L. 261 (limiting jurisdiction to felonies against French diplomatic or consular agents or offices). But see Law of 6th Nisan, 5732 (March 21, 1972), Penal Law Amendment (Offences Committed Abroad) (Amendment No. 4), Sec. 3(1), § 2(a) [5732 (1972)] Sefer Ha-Chukkim No. 651, at 52 (Israel) (providing that protective jurisdiction may be based on economic injury).

careful and controlled expansion of their criminal jurisdiction through the adoption of the protective and passive personality principles.

#### B. JURISDICTION IN THE REQUESTED STATE - DOUBLE CRIMINALITY

For an offense to be extraditable most treaties require that it be a crime of a specified degree in both the requested and requesting state.<sup>33</sup> This element, often referred to as the double criminality principle,<sup>34</sup> "serves the most important function of ensuring that a person's liberty is not restricted as a consequence of offenses not recognized as criminal by the requested State."<sup>35</sup> In addition, the requested state is not put in the awkward position of extraditing a person who would not be subject to punishment under its own laws.<sup>36</sup>

Because the double criminality requirement involves the interpretation of the laws of the requested state, that state is deemed to have the exclusive authority to judge whether this element has been satisfied. In the Abu Daoud case,<sup>37</sup> the French court relied upon Article 3 of the Law of March 10, 1927,<sup>38</sup> which incorporated into French law one aspect of the double criminality requirement. The law provided that in the case of crimes committed abroad by non-French nationals, extradition could be granted only where the criminal was subject to prosecution under French law.<sup>39</sup> The court implied that the 1975 French Penal Law Amendment would have authorized prosecution of Daoud if it had been enacted prior to the events in Munich. However, since the 1975 Amendments were not retroactive, Daoud's acts were not crimes under French law and extradition was not possible.<sup>40</sup> Thus, because of the limited jurisdictional reach of France in 1972, the prosecutorial competence of requesting states was greatly restricted.

All such loopholes in the international criminal justice system ought to be closed. While revision of treaties might be one road to a solution,

33. See, e.g., Convention on Extradition, Nov. 12, 1958, France-Israel, art. 2, para. 1, ratified Nov. 16, 1971, [1971] J.O. 11268.

34. See generally I. SHEARER, *supra* note 7, at 137-41.

35. *Id.* at 137.

36. *Id.* This rationale is open to challenge since a state may have excellent reasons for regarding certain acts as criminal—reasons that do not obtain in other national settings. M. TRAVERS, *supra* note 13, at 655-57. In such circumstances, there seems to be little justification for letting the requested state thwart the requesting state's criminal process. For instance, most coastal states have legal regimes geared to protect maritime interests. A violator of the coastal state's criminal law seeking refuge in a non-coastal state might be secure from extradition unless the relevant treaty expressly covered such crimes.

37. The Abu Daoud case, *supra* note 1.

38. [1927] J.O. 2874, [1927] D.P. IV 265.

39. *Id.* art. 3.

40. The Abu Daoud case, *supra* note 1.

international negotiation can be a complex and cumbersome process. The better path would be for states to expand, or at least liberally interpret, their own powers of criminal jurisdiction so as to remove the stumbling block of double criminality. Just as expanded jurisdiction under the protective or passive personality principles would help overcome the first legal obstacle to extradition, competence of the requesting state, it would also help overcome the second obstacle, jurisdiction in the requested state.

### C. THE POLITICAL OFFENSES EXCEPTION

The political offender was originally the prime candidate for extradition.<sup>41</sup> Indeed, throughout much of the history of extradition law, the common criminal was generally ignored. However, during the 19th century the common criminal became the main target of extradition and political offenders the exception.<sup>42</sup>

France, the most prolific maker of extradition treaties in the 19th century, was the country most responsible for the rapid growth of the political offenses exception.<sup>43</sup> Beginning with their 1834 treaty with Belgium, virtually all French agreements incorporated an exception for political offenses.<sup>44</sup> These treaties, however, did not include any explanation of the exception's scope and purpose. Nor was there any legislation to fill the vacuum. The French precedent of simply setting forth the exception, without guidance as to its meaning, has been widely followed to the present day.<sup>45</sup> As a result, "it has been left to the courts, to executive authorities and to commentators to put flesh upon these meagre bones."<sup>46</sup>

The executive authorities have tended to tailor the exception on a case

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41. Research in International Law, *supra* note 9, at 108; I. SHEARER, *supra* note 7, at 166-67; *see id.* at 56-57.

42. Research in International Law, *supra* note 9, at 108. The Harvard Draft on Extradition credits the change to two factors: "(1) the evolution of political institutions following the French Revolution; [and] (2) the growing consciousness of the interdependence of nations following the Industrial Revolution." The first factor explains the decreasing willingness of states to return political criminals. As more countries escaped from the dominance of aristocratic rulers and moved toward democracy, the idea of returning the "proponents of liberalism" to suffer at the hands of a tyrant became increasingly distasteful. Emphasis was placed on the need to grant asylum rather than on the duty to grant extradition. The second factor accounts for the rising interest in sanctioning the common criminal. Thanks to improved means of travel and communication, countries began to view themselves as part of a community in which a certain degree of order should be maintained. *Id.* at 108-09.

43. *See* I. SHEARER, *supra* note 7, at 16-19.

44. *Id.* at 167.

45. Articles 1 and 2 of the European Convention, *supra* note 4, marked a break with tradition. By laying down a list of specific exceptions to the political offenses exception, they provide the kind of guidance previously lacking in this area.

46. *See* I. SHEARER, *supra* note 7, at 168-69.

by case basis to fit the prevailing political climate or their own sense of justice. The courts and commentators have attempted to be more systematic and have established two broad categories of political crimes: the pure political offense and the relative political offense.<sup>47</sup> The former is an act directed solely against the political order<sup>48</sup> and therefore does not involve any of the elements of a common crime. The printing of subversive literature falls into this category, as does mere membership in a subversive group. The relative political offense, on the other hand, involves a common crime with political overtones. Murder for political purposes is the clearest illustration.

There is general agreement among the courts and commentators that the pure political offender falls within the exception to extradition.<sup>49</sup> The much more common relative political offense, however, is the object of considerable debate. The English courts have read the political offenses exception broadly enough to bring in relative offenses.<sup>50</sup> The American courts have taken a similar view.<sup>51</sup> The Swiss Federal Tribunal in the case of *In re Pavan*<sup>52</sup> developed a narrower interpretation of the exception. Under the Swiss theory of "predominance," the exception is limited to crimes of a predominantly political character.<sup>53</sup> The criminal action must be "immediately connected with its political object," and the damage caused must not be out of proportion to the desired result.<sup>54</sup>

The Swiss theory of predominance was reaffirmed in *Ktir v. Ministère Public Fédéral*.<sup>55</sup> The case involved the alleged political assassination of an Algerian citizen on French soil by Ktir, a French citizen of Algeria and a member of the FLN.<sup>56</sup> Following Ktir's arrest in Switzerland, the French requested his extradition pursuant to the Franco-Swiss extradi-

47. See generally Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217, 245-54 (1969). Latin American and European courts and commentators further subdivide relative offenses into the "délit complexe" and the "délit connexe." See I. SHEARER, *supra* note 7, at 181-83. This distinction is not essential to the present discussion.

48. See Bassiouni, *supra* note 47, at 245.

49. See I. SHEARER, *supra* note 7, at 182.

50. *Id.* at 177.

51. *Id.* at 178-79.

52. Judgment of June 15, 1928, Bundesgericht, Switz., 54 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BGE] I 207, 54 Arrêts du Tribunal fédéral suisse, Recueil officiel [ATF] I 207, [1927-1928] Ann. Dig. Pub. Int'l L. Cases 347 (unofficial translation).

53. See *id.* at 213-15, 54 ATF at 213-15, [1927-1928] Ann. Dig. Pub. Int'l L. Cases at 348-49.

54. *Id.*

55. Judgment of May 17, 1961, Bundesgericht, Switz., 87 BGE I 134, 87 ATF I 134, 34 Int'l L. Rep. 143 (unofficial translation).

56. Front de libération nationale.

tion treaty of 1869,<sup>57</sup> a treaty containing a political offenses exception.<sup>58</sup> The Swiss Tribunal granted the French request. After conceding that the FLN was engaged in a struggle manifestly political in character, and that *Ktir* acted out of political and not personal motives, the Tribunal stated:

It does not, however, follow that the act had a predominantly political character. For this to be the case it is necessary that the murder of Mezai should have been the sole means of safeguarding the more important interests of the F.L.N. and of attaining the political aim of that organization. That is not so.<sup>59</sup>

In light of *Ktir*, there is ample basis for arguing that the political offenses exception, even in the case of so politically motivated an offender as the terrorist, is not an insurmountable barrier to extradition.<sup>60</sup>

### III

#### PROPOSALS

The major legal obstacles to the extradition of terrorists can be overcome or avoided through the controlled and focused expansion of jurisdiction.<sup>61</sup> The principal goal, therefore, should be for states to legislatively adopt the protective and passive personality principles. As to passive personality, this should not be done on so broad a scale as the French law of 1975.<sup>62</sup> Rather, safeguards should be included to restrict the reach of extraterritorial jurisdiction to acts of terrorism.

Admittedly, the unilateral expansion of criminal jurisdiction is an indirect approach to the problem of extradition. Nevertheless, it could prove to be the most effective way to deal with the problem. It leaves the resolution of the problem at the domestic law level where lack of international consensus need not constitute a barrier to positive action. By helping itself—that is, by expanding its jurisdiction and thereby increasing the protection of its interests and its nationals abroad—a country helps potential requesting countries as well, thereby strengthening the international criminal justice system as a whole.

Beyond the expansion of jurisdiction, the legislature should promulgate rules or guidelines to aid the judiciary in its interpretation of extradition

57. Treaty on Extradition, July 9, 1869, France-Switzerland, [1870] D.P. IV 18.

58. *Id.* art. 2.

59. 87 BGE I at 138-39, 87 ATF I at 138-39, 34 Int'l L. Rep. at 145.

60. Dugard, *Towards the Definition of International Terrorism*, 67 AM. SOC'Y INT'L L. PROC. 94, 97-98 (1973).

61. Admittedly, the political obstacles may remain. See notes 7-10 *supra* and accompanying text. Some of the proposals offered in this section may help overcome this problem.

62. See European Convention, *supra* note 4, art. 1; O.A.S. Convention, *supra* note 4, art. 2.

matters. A legislative policy of liberal interpretation of double criminality provisions in extradition treaties and legislative guidance as to the meaning of "political offense" would be helpful.

Where constitutionally feasible, the legislature should adopt rules clearly delineating the powers of the executive and judicial branches over extradition. Preferably, the role of the generally less politically sensitive judiciary should be increased. A shift to increased judicial control should not be effected in a legislative vacuum but should be accompanied by legislative guidelines on the exercise of that authority. Giving the judiciary exclusive control over extradition or making all executive decisions subject to review would foster more systematic treatment of extradition requests.

The domestic law approach need not be regarded as exclusive. States should continue to explore the possibilities of achieving solutions on a bilateral or multilateral plane. In particular the problem of defining the political offenses exception to exclude terrorists could be resolved through the revision of extradition treaties.

#### CONCLUSION

The present system of international criminal law must be viewed as patently flawed when it allows an alleged terrorist such as Abu Daoud to escape prosecution. But, through careful modification of both extradition agreements and national legislation, these flaws can be remedied. Furthermore, the modifications suggested may produce other benefits as well. The greater certainty of prosecution should provide a limited degree of deterrence. Also, a target country will no longer be faced with the choice of either striking back with force or remaining helpless. A judicial means of subduing the attackers will be available. Most importantly, as more terrorists are prosecuted, the feeling will grow that there does exist an international legal order and that terrorism has no place in it.

Total reform will take years, and the caprices of international politics will always be a factor with which to contend. However, if states are genuinely interested in thwarting the international terrorist, the domestic law approach provides a workable first step.

*Jeffrey B. Gaynes*