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The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists

The Quest for an Appropriate Doctrinal Analysis Revisited

Thomas E. Carbonneau*

STATEMENT OF THE PROBLEM

The hijacking of three commercial aircraft in Venezuela and of a Libyan airliner in Rome on December 7, 1981,¹ and the even more recent kidnapping of General Dozier in Italy by Red Brigade terrorists² constitute an unmistakable and forceful illustration that acts of terrorism³—allegedly committed to further the ends of a political cause—continue to plague the stability and security of the international legal order.⁴ There is no doubt that terrorism is a dangerous, costly and complex problem. Commentators have speculated extensively about its ideological character and other analysts have studied its sociological roots and psychological origins.⁵ Despite all this attention, there is a lack of consensus in the international community about whether terrorism is no more than a sensational form of criminality or a legitimate mode of political expression.⁶

This article does not attempt to deal with all of the multifarious aspects of contemporary terrorism; its ambition is much more modest in scope, centering upon traditional legal mechanisms and doctrines that can be adapted to deal with terrorism. Using the decisional law of France as an illustrative model, this article analyzes the transnational and political character of terrorist acts and seeks to establish the implications of those characteristics for litigation dealing with the extradition of terrorist offenders. Several assumptions underlie the analysis. First, the effort to repress international crime is seen as a laudable objective of the interna-

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tional legal order and cooperation among nations. Second, concomitantly, terrorism—political or otherwise—is perceived as a significantly disruptive form of criminality, the continued presence and growth of which must be curtailed. Finally, the view that terrorist acts constitute a non-criminal means of expressing dissenting political opinions is deemed to be an untenable position—at least in terms of the articulation of applicable legal norms and the elaboration of applicable juridical standards.

With these assumptions in mind, this article examines the role of the French judiciary in creating standards for international judicial cooperation in the process of extraditing alleged terrorist offenders. The chief inquiry centers upon whether terrorist acts should be characterized as political offenses, thereby exempting their perpetrators from extradition.⁷ Given the international efforts to create consensus in this area⁸ and the extensive executive branch discretion in the process of extradition,⁹ do the courts function as the standard-bearers of stability and consistency, allowing juridical norms to guide—and perhaps unravel—the web of political determinations?

Following a line of previous studies,¹⁰ this article considers the French example, and its successes and failures in bringing legal sanctions to bear against terrorists. Until now, commentators have focused on the decisions of the *Cour d'appel* of Paris that related to celebrated cases involving the extradition of terrorists or would-be terrorists whose activities attracted worldwide attention.¹¹ The present study attempts to reorient previous efforts by engaging in a more comprehensive study of the French jurisprudence and the French national policy on terrorism and the repression of international crime. The Paris court opinions are integrated into a wider judicial context and are compared to executive branch pronouncements in this area. Finally, this datum is assessed to determine whether, given the political underpinnings of this litigation, the courts can curb political pressure adequately and maintain the integrity of doctrine, articulating juridical norms which create a consistent framework for resolving these controversies and providing the international legal order with a much-needed sense of stability.

THE CONCEPTUAL DILEMMA

The extradition of terrorist offenders engenders a nearly intractable doctrinal problem: articulating a viable definition of the notion of "terrorism" and the concept of "political offense." The difficulty of definition resides in part in the fact that the two terms overlap to some extent; it may well be impossible to articulate a conceptually suitable and functional definition of either term without first defining the other. Moreover, an abstract

definition may be entirely unworkable from the vantage point of prosecution and judicial application since the meaning of the two notions is largely dependent upon the special circumstances of the specific cases. Finally defining the role of the political offense exception in litigation dealing with the extradition of terrorist offenders translates the ideological rift between various areas of the world which are dominated by opposing political creeds and which have attained various levels and stages of economic development ¹²

For purposes of extradition and the international repression of crime, terrorist acts, once they are perpetrated across national boundaries or flight is taken to countries other than target nations, become problematic precisely because of the would-be motivation that underlies them. The political offense exception long has been recognized as a means by which to afford refuge to potential extraditees who otherwise would be persecuted for their political beliefs and actions in the requesting State. ¹³ It translates a humanitarian concern: the legitimacy of political beliefs should not be determined according to whether the acts to which they give rise succeed or fail in establishing a new political regime in the requesting State. ¹⁴

The method of establishing judicially the political character of an act has been the subject of an extensive debate and various methodologies have been proposed. ¹⁵ The recourse to assassination to bring about a change in political regime, for example, traditionally has been excluded from the purview of the political offense exception. ¹⁶ Nineteenth and—to some extent—twentieth century courts sometimes have required that the act take place in the context of an on-going two-party struggle for power. ¹⁷ A discredited line of decisional law once limited the political offense exception to purely political crimes, such as treason. ¹⁸ Yet other methodologies had the courts engage in a balancing process, weighing the various circumstances of the case to arrive at an *ad hoc* characterization of the “predominate” character of the act involved. ¹⁹ Finally, the recognized limitations on the exception were sometimes disregarded in cases of flight from totalitarian regimes. ²⁰

The political offense exception was born of special and by-gone historical factors and translated an aspiration toward freedom of political expression and actions. ²¹ Even the courts of that period, however, were quick—for example, in the case of anarchists ²²—to introduce restrictions upon the new immunity, to mix aspiration with reality and to establish a sensible and functional balance between freedom of political activity and expression and the need to repress criminality. The question becomes one of determining whether this doctrinal heritage still retains a semblance of contemporary relevance and, if so, what limitations should be imposed upon it to respond to the vexed question of the nature of terrorist acts and their juridical qualification.

CHARACTERISTICS OF THE CIVILIAN SYSTEM

Certain procedural aspects of the French court system and process of adjudication must be taken into account in order to understand the substance of French extradition law.²³ First, the received wisdom is that *stare decisis* has no role in the elaboration of law in a civilian jurisdiction.²⁴ The notion of *jurisprudence constante* or *établie*, however, has emerged in the French system and, for all intents and purposes, can be viewed as the civilian analogue of the common law notion of *stare decisis*.²⁵

Second, to provide for some consistency in the application of law by the lower courts, the *Cour de Cassation* (the French Supreme Court) was entrusted historically with the task of supervising the process of judicial adjudication in order to maintain uniformity in the application of the laws.²⁶ This systemic feature tending toward harmonization of legal doctrine was, however, specifically excluded by the applicable statute in the case of extradition requests. The Law of March 10, 1927—which governs matters of extradition in France—excludes the supervision (*contrôle*) that normally can be exercised by the *Cour de Cassation* over the decisions rendered by the *cours d'appel*.²⁷ The various regional courts of appeal in France, therefore, can articulate and apply a definition of the political offense exception which will be limited to the cases which come before it.

The French extradition statute also provides that a court ruling which denies the extradition request is binding upon the government, whereas a favorable ruling acts only as a judicial recommendation and is not binding upon the executive branch.²⁸ As a consequence, the regional *cours d'appel* have the potential of thwarting the efforts to bring sanctions to bear against terrorist offenders by adopting a liberal definition of the concept of political offense. Moreover, given the tacit laws of French judicial organization,²⁹ it would seem that the *cours d'appel* would be more vulnerable to executive branch pressure to reach a certain result than would the *Cour de Cassation*. For this reason, the courts of appeal might be more likely or willing to act as the "impartial" judicial spokesmen for the political views of the executive branch and its perceptions of what is in the best interests of the country.

Although the decision of the competent *cour d'appel* is not subject to higher judicial scrutiny,³⁰ a form of review does take place at a later time, but it is directed at the executive branch action on the case. In general terms, France has a bifurcated system of adjudication with two high courts of appeal and last resort.³¹ On the other hand, there is the *Cour de Cassation* which is the highest court in private law and criminal law matters; on the other hand, the *Conseil d'Etat* acts as the court of last resort in administrative law matters and reviews the legality of government action in matters involving litigation between private parties and the government.³²

The significance of the system of court organization in matters of extradition can be illustrated by the following hypothetical example. *A* hijacks an airplane in the United States to further the cause of a dissident ethnic minority group. He kills several passengers in the process, and extorts several million dollars from the airline company. At the request of *A*, the plane is flown to Paris where the hijacker, who is requesting political asylum, is taken into custody by French police officials. Arguing that hijacking, murder, and extortion are common crimes despite any political motivation on the part of the actor, the United States Government makes a request for the extradition of *A* pursuant to the relevant extradition treaty and the principles of public international law.

Under one set of circumstances, assuming that the French Government, for whatever reason, is opposed to the extradition of *A*, the Paris *Cour d'appel* could deny the extradition request, ruling, under pressure from the executive branch, that the crimes involved were political offenses. Under the applicable statutory rules, this decision would be binding upon the French Government³³ and relieve it from any responsibility for making a difficult diplomatic decision. The French Government would contend that, by law, its hands are tied by an impartial judicial determination as to what is criminal and what is political in these circumstances. In such a scenario, the court of appeals could be seen as acting as the spokesman of national political views—a position which could undermine the institutional integrity of the judiciary and which would be a questionable view were there review by the French Supreme Court on doctrinal grounds.

Under another set of circumstances, assuming that the French Government is anxious to extradite *A* to the United States despite public outcries in France supporting *A*'s acts, a favorable ruling by the Paris *Cour d'appel* on the extradition request would allow the government to make its own decision in the matter.³⁴ Here, the final action on the matter is not a judicial decision which by statute is excluded from further review,³⁵ but rather it consists of governmental action which is subject to the scrutiny of the *Conseil d'Etat*. In this setting, the problem becomes one of the timeliness of the available remedy. Upon receiving a favorable court ruling, the executive branch could have *A* extradited to the United States within several hours. An action to have the government action reviewed by the *Conseil d'Etat* could take weeks, if not longer; a ruling by the *Conseil d'Etat* that *A* is a bona fide political offender who should be exempted from extradition would constitute post facto and essentially useless judicial review. The extradition has become *un fait accompli* and the question of its legality no longer is of any moment. The decisions of the regional courts of appeal and their susceptibility to political pressure are, therefore, critical in the evaluation of the French doctrine and methodology in this area.

THE DEFINITION OF THE POLITICAL CHARACTER OF AN ACT

The consecrated formulae and equations to deal with the political offense question can be easily turned upside down and used, in a distorted and inconsistent form, to translate what is in the best interests of the country in a given case. In other words, the political offense exception in terrorist cases may function as an empty shell and be used to articulate a judicial response to an external political context. The meaning of political offense may vary according to the existing relationship between the French Government and the requesting state and will translate the perceptions of the executive branch as to what would be expedient in the given circumstances. Judicial determinations, then, cease to deal with law and to operate in an effective system of checks and balances.

It could be argued with some persuasiveness that the latter process is not really offensive or unacceptable; matters of extradition are quintessentially political matters. Whether a State will act as a safe haven for certain types of fugitives is a determination to be made by the existing political administration which usually is subject to the effective protests of the public. How the balance between the repression of crime and the expression of political convictions is to be established is a matter for determination by political organs who bear diplomatic and domestic responsibility for this determination.

Although the French extradition statute attributes a rather formalistic role to the courts in deciding upon extradition requests, it also gives them a substantive part to play.³⁶ Presumably, that statutory mission was to be carried out with the usual judicial impartiality. The French *Cours d'appel* not only must ascertain whether an extradition request conforms to statutory requirements and procedural technicalities, but also these courts are entrusted with a determination on the political offense question (which, if found to apply, excludes any further action on the part of the executive branch).³⁷ The participation of the courts in this process, then, is not exclusively procedural and can have some very significant bearing upon the substance of the case.

The drafters of the extradition statute, it seems, were concerned with taking the decision on an extradition request in which the political offense exception was invoked from the exclusive purview of political considerations.³⁸ The courts were to act as a source of neutral authority, guaranteeing that expressions of political conviction would not be subject in this setting to the calculated whim and caprice of national political expediency. Yet, in reading some of the relevant French cases, one wonders whether the political offense doctrine is to be taken seriously as a limitation on the outcome of the case or whether the results are foregone, arbitrary conclu-

sions which are arrived at by a stealthy manipulation of doctrine for reasons external to the legal dimensions of the case.³⁹

THE INITIAL ORIENTATION: "HOLDER" AND "ABU DAOUD"

The first set of cases, ranging from the 1975 *Holder* opinion⁴⁰ and the *Abu Daoud* decision⁴¹ in 1977 to the *Pace*⁴² and *Piperno*⁴³ cases in 1979 present fact patterns falling into a classic mold: an international terrorist is apprehended in the French territory (usually Paris) and is taken into custody on the basis of international arrest warrants.⁴⁴ The alleged terrorist offender is then held pending extradition requests from interested States. For these fugitives, France received extradition requests primarily from Germany and Italy, with a single request coming from Israel and the United States. The conformity of these cases with one another ceases with the basic similarity in their general circumstances; each attests to a shift and evolution in the application of the political offense exception by the French courts.

The *Holder* decision,⁴⁵ rendered in 1975, perhaps best illustrates one extreme in the French courts' interpretation of the concept of political offense in the context of terrorism. There, Holder and an accomplice had hijacked an airplane in the United States and eventually commanded that it be flown to Paris, extorting in the meantime \$500,000 from the airline company and making some vague allusions to prominent American radicals.⁴⁶ Apparently following the French Government's criticism of U.S. policy in Vietnam, the *Cour d'appel* of Paris held that the acts involved (airplane hijacking and extortion) were political offenses, and denied the extradition request on that basis.⁴⁷ Had the reasoning and doctrine articulated in *Holder* been meant to be taken seriously for its precedent-setting value, it would have been a very unfortunate ruling for the efforts aimed at curtailing terrorist activities.

Indeed, there was precious little in the *Holder* record to indicate political motivation for the hijacking, and—even if there had been more evidence—the gravity of the offenses for which extradition was requested should have outweighed the political character of the act. In this case, the French court chose to adopt a lax definition of the concept of political offense apparently for extra-judicial reasons. The court arrogated to itself an executive role, reaching a decision which voiced or supported national political views. In terms of doctrine and the elaboration of norms, the *Holder* determination, however, was essentially unsupported by the record. Under the *Holder* reasoning, it seems that any reference to political convictions (no matter how oblique) in the commission of a crime could suffice to prevent the extradition of an alleged offender. In articulating its ruling, the court

did not appear to be constrained by any doctrinal or systemic imperatives: it arrogated to itself the prerogative of declaring any and all criminal acts to be political in character.

Although no explicit mention of the political offense exception was made in the *Abu Daoud* case, this decision⁴⁸ confirmed the view that the *Cour d'appel* of Paris was extraordinarily sensitive to the external political circumstances which surrounded a request for the extradition of an alleged terrorist offender. There, the would-be Arab organizer of the Munich Olympics Massacre was arrested in Paris and requests for his extradition were made by the West German and Israeli Governments.⁴⁹ Due to the potentially explosive political circumstances which attended the case, the proceeding took place in haste and the ruling denying the extradition requests was based upon an extremely technical procedural reasoning⁵⁰ (which essentially reflected a breakdown of communications between the French and West German Governments).⁵¹ Despite his apprehension by law enforcement officials, the would-be organizer of an international mass murder incident was not brought to justice because of the possible political consequences which might accompany a decision to grant extradition (the threat of an oil embargo or possible terrorist reprisals).⁵² Again, the court seemed to be influenced by political considerations and willing to fabricate a judicial determination which would accommodate non-legal exigencies.

These first decisions portended badly for the future orientation of the French jurisprudence in this area of litigation. Previously, the French courts had espoused an extremely restrictive view of the political offense exception, limiting it to what were termed objective political acts such as treason.⁵³ By the mid-1970s, it was clear that the French courts had reconsidered their former position on this issue and fashioned their own version of the Swiss predominance test (essentially, an *ad hoc* approach under which a variety of factors are weighed to arrive at an assessment of an act's predominant character—political or criminal).⁵⁴ In doing so, however, the French courts seemed to have gone from one extreme to another; their version of the predominance test appeared to allow them to consider both juridical and extra-juridical variables. As applied by the *Cour d'appel* of Paris, the French definition of political offense could result in a whimsical and capricious determination, unguided by accepted views in the area (as in *Holder*), or in an unjustifiably broad consideration of all the external political factors which might surround a given case (as in *Abu Daoud*). The court usurped the executive branch function or at least acquiesced to executive dictates.

THE DEVELOPMENT OF A NEW STANDARD: "CROISSANT" ET AL.

Another series of cases demonstrated a shift in the French jurisprudence dealing with the application of the political offense exception in litigation involving the extradition of terrorists. These cases, it seems, were less politically charged, involving extradition requests that were less sensitive diplomatically and in terms of the French perception of the *realpolitik*. Also, the administration of former President Valéry Giscard d'Estaing was in the process of articulating a new French policy on international crime, known as *l'espace judiciaire européen* (the European Judicial Area), which attempted to promote EEC cooperation in the apprehension of criminal fugitives—specifically terrorists.⁵⁵ This idea, born of the French President's desire to establish a secure and independent European Community and to assure French leadership in its creation and maintenance, was a logical sequel to the text of the European Convention on the Suppression of Terrorism. The corpus of cases in this new stage of the French decisional law began with the *Croissant* decision,⁵⁶ included the extradition of other West Germans,⁵⁷ and ended with the *Piperno*⁵⁸ and *Pace*⁵⁹ cases.

In the *Klaus Croissant* case, the West German attorney for members of the Baader-Meinhof gang fled to France after being arrested in West Germany; apparently, his aim in coming to France was to seek political asylum.⁶⁰ Once he was taken into custody by French police authorities, the West German Government made a request for his extradition on charges relating to his complicity with the terrorist group. German authorities alleged that Croissant had acted as an information conduit between imprisoned terrorists and those who were still at liberty, and that he had "propagandized" on behalf of the terrorist group.⁶¹ The case generated outcries and protests—especially from members of the French bar. Lawyers, legal academicians, and journalists perceived the action as an infringement of the attorney-client privilege, an unwarranted restriction of the freedom of political speech, a fascist reaction to the security problem posed by terrorism, and an undermining of France's long-cherished status as a haven for political asylum and reputation for the promotion of the "rights of man" (*les droits de l'homme*).⁶²

Although some of the charges for which extradition was sought clearly smacked of the political (at least much more so than in *Holder*), the court very quietly and astutely avoided a consideration of this factor and a larger doctrinal pronouncement on the issue of the political offense exception.⁶³ The court rendered a "partially favorable" opinion, relying on the principle of speciality and limiting the extradition to the charges which were so serious in terms of their criminality so as to preclude a consideration of their political character.⁶⁴ The new formulation was that the

"gravity" of the offenses (their "odious" criminal character) precluded a consideration of their political motivation. This doctrine was to *faire jurisprudence*, to become the basis for many subsequent decisions of the *Cour d'appel* of Paris in this area.

THE CONSEIL D'ETAT AND CROISSANT

To the continued protests of members of the French bar and the opposition political parties, Croissant was extradited immediately to West Germany.⁶⁵ Thereafter, Croissant's attorneys lodged an appeal before the *Conseil d'Etat*, alleging that the government's action was illegal and claiming that Croissant was a political offender who should have been exempted from extradition.⁶⁶ Although it appears that such post facto review would be of little consequence to Croissant, a declaration of illegality might have been taken into account by the West German political and judicial authorities. Moreover, such a ruling from the highest administrative court in France might be enough to fuel the fires of the opposition and result in a severe public discrediting of the government's action. Finally, a holding that Croissant was a political offender might have a sufficient impact to get the *Cour d'appel* of Paris and its regional analogues to reconsider the precedent set by the initial *Croissant* ruling.

Whatever the motivation for the subsequent appeal, it was significant in itself that the *Conseil d'Etat* decided to hear the case.⁶⁷ Under previously applicable procedure, the *Cour d'appel* was, as it were, the court of last resort in extradition; it was empowered by statute to determine whether the extradition request satisfied the relevant legal requirements and its decision, once rendered, had *res judicata* effect.⁶⁸ To characterize the opinion in proper French procedural terms, it was neither an *arrêt* nor a *décision* (both subject to appeal), but merely an *avis motivé* (a simple reasoned opinion not susceptible of appeal).⁶⁹ In an attempt to integrate some measure of review into this process, some writers had argued that the *Cour d'appel* was not in this context simply a court with private law jurisdiction. Rather, it was really engaging in an administrative proceeding when reviewing requests for extradition.⁷⁰ This characterization would allow an appeal through administrative court review, but without answering the vexed question of how extensive this administrative review should be in actual practice. Their theoretical cohesiveness notwithstanding, these recommendations were never formally adopted.⁷¹

Beginning in 1937, the *Conseil d'Etat* began asserting and progressively expanding its own jurisdiction in these matters.⁷² It first held that it had jurisdiction to review the regularity of an extradition decree for the violation of a domestic procedural law norm; then, it held that its jurisdictional

mandate also allowed it to assess the regularity of an extradition decree for the violation of an international convention.⁷³ Both of these rulings gave the *Conseil d'Etat* power to scrutinize extradition decrees that were issued by the French Government for infringement of basic principles of domestic and international law, a sort of public policy scrutiny.

Finally, in 1977, the *Conseil d'Etat* held that it had the authority to review the regularity of an extradition decree by ascertaining whether the reasons (*motifs*) given by the *Cour d'appel* for granting or refusing the extradition request corresponded to those contained in the applicable international convention.⁷⁴ This ruling allowed the *Conseil d'Etat* to consider whether the acts for which extradition was requested were political or criminal in character under the applicable law. Although the *Cour de Cassation* (here, the ordinary channel of appeal) did not have the power to review the *Cour d'appel*'s decision, the *Conseil d'Etat* would be able to engage in a substantive review of the appellate court decision⁷⁵ because the Government would act upon the basis of the court's reasoned opinion. While in most cases such review would come too late to have any practical impact for the individual extraditee (presumably, the government would have already acted), it provided for the possibility not only of embarrassing the government, but also of attributing some degree of uniformity to the French jurisprudence on the political offense exception question. Higher court review on doctrinal and other grounds had been excluded specifically by statute, but now was integrated into the extradition framework through the ingenious interpretations of the *Conseil d'Etat*.

The procedural significance of *Croissant* (and subsequently *Salati*)⁷⁶ lies in the fact that it confirmed the principle that administrative court review of an extradition decree was possible on the ground that there had been an abuse of power.⁷⁷ The *Cour d'appel*'s reasoned opinion in these matters was considered as the exercise of an administrative function and jurisdiction by a private law court.⁷⁸ Moreover, in terms of substance, the *Conseil d'Etat*'s decision in *Croissant* did provide for a degree of uniformity that had not been known in this area of litigation.⁷⁹ The highest administrative court in France confirmed the view of the *Cour d'appel* that the common law criminal accusations against the would-be offender were too grave to be considered as political offenses. As a result, this became the consecrated doctrinal formulae in subsequent cases considered by the *Cour d'appel* of Paris.

AN EVALUATION OF THE EMERGING DOCTRINE

Although far from being entirely satisfactory, this doctrinal framework at least had the advantage of imposing certain principled constraints upon the

courts. The reigning French judicial position, as affirmed by the highest French administrative court, was that legal sanctions needed to be imposed against fugitive terrorist offenders by creating a type of presumption that held their activities to be exclusively criminal in character because of their gravity.

Some might argue that the courts were no more independent or neutral in deploying this doctrine than they had been in the *Holder* or *Abu Daoud* cases. This newly-found French judicial posture simply reflected the position of the Giscard d'Estaing administration in regard to international criminality and its efforts to spearhead the creation of a European Judicial Area. While such criticism may be valid—perhaps indicating no more than a basic consensus of opinion between the executive and judicial branches on the subject of terrorism, the rulings were not rendered in *ex cathedra* fashion nor did they turn exclusively upon procedural technicalities. Rather, they represented a principled and consistent doctrinal approach which grappled persuasively with a difficult issue. Although there may have been agreement between the executive and the judiciary, there was no explicit subordination, submissiveness, or interference; the judicial determination was separable from the political action in terms of form and substance.

SOCIAL AND POLITICAL CRIMES DISTINGUISHED

This line of jurisprudence also gave rise to another, equally felicitous distinction—which acted in effect as a corollary to the gravity of the acts principle. The distinction centered upon the difference between social crimes and political offenses, and can best be illustrated by the reasoning in the *Winter* extradition.⁸⁰ There, the West German Government sought the extradition from France of one Winter who allegedly had helped to establish a terrorist group among those awaiting trial in Nuremberg.⁸¹ According to the group's propaganda, its aim was to make the inmates revolt "in order to achieve the abolition of existing social conditions and to oppose the State according to the example of the 'Red Army Faction' with the means of urban warfare, to promote revolution, and eliminate through violence the established order in the Federal Republic of Germany."⁸²

In ruling favorably upon the extradition request, the *Cour d'appel* of Paris differentiated between crimes committed with a predominantly political motivation and acts which advocated complete social destruction, removing anarchistic crimes—as the nineteenth century courts had done—from the purview of the political offense exception.⁸³ The court excluded Winter's activities from the political offense exception by characterizing the purpose of the movement in which he had participated and instigated

as not being able to be attributed a political character once the movement in question did not have as its objective attacking the political structure of the State but those of the German Nation as a socially organized group. . . . The social crime, born at the end of the nineteenth century, is distinguished, in criminal law, from the political offense and is considered both by the decisional law and by doctrinal writers, as a common law crime.⁸⁴

AN EXAMPLE OF THE NEW METHODOLOGY

In conjunction with the reasoning in *Croissant*, this new doctrine was applied in a subsequent case involving twin extradition requests for two West German nationals.⁸⁵ The potential extraditees, Ingrid Barabass and Sieglinde Hofmann, were apprehended in Paris during the early summer of 1980 and requests were made by the West German Government for their extradition.⁸⁶ The international arrest warrants alleged that Barabass was involved in the kidnapping of the industrialist Walter Palmers and Hofmann in the kidnapping and subsequent murder of Juggen Ponto.⁸⁷

In ruling favorably upon the extradition requests, the *Cour d'appel* of Paris combined the *Croissant* and *Winter* doctrinal methodologies, holding implicitly in both cases that the acts for which extradition was sought were social crimes and not political offenses because of their gravity:

[t]he fact that these acts, would have had as [their] objective . . . to upset and transform by violence, the established order in the Federal German Republic, does not suffice, in light of their gravity, to have them seen as having a political character. . . .

Moreover, it is significant, in this regard, to note that the requesting authorities, defined the objective of the group[s] in question, as being the destruction of a fundamental order, without further qualification. . . .⁸⁸

POSSIBLE MOTIVATION FOR THE EMERGING DOCTRINE

In the litigation dealing with the extradition of terrorists who were West German nationals, the *Cour d'appel* of Paris systematically rendered opinions favoring the extradition of the fugitives. While failing to articulate fully and explicitly a definition of a political offense in this context, the court at least removed the terrorist acts in question from the purview of the political offense exception and elaborated two negative criteria relating to political crimes. These criteria refined the concept of political offense by excluding terrorist acts which were of a particularly serious criminal character (kidnapping or killing to advance a political cause) and by excluding

anarchistic crimes aimed at eradicating the social structure of an existing society rather than uprooting the current political regime.

According to this jurisprudence, two presumptions of nonapplicability of the political offense exception were at work in cases involving the extradition of a would-be West German terrorist: first, terrorist acts were of a "profound [criminal] gravity" and, second, they constituted crimes which endeavored to create total social—and not merely political—upheaval. In the words of the *Croissant* court, "these acts are essentially cold-blooded crimes which arose from a sort of political motivation, [but] this factor without more is not enough to create an obstacle to extradition. . . ." ⁸⁹ The elaboration of such a doctrine was a welcome change from the porous and whimsical approach deployed in *Holder* and *Abu Daoud*—not only because of the result, but more importantly because of the articulation of a cogent doctrine for use in international litigation. What factors, however, explain the shift in the court's attitude and approach? Had the *Cour d'appel* of Paris suddenly become considerably less aware of the political ramifications of these cases and more concerned with the need for judicial integrity and predictable juridical norms?

One could argue that the previous decisions were freakish results—aberrations rendered at a weak point in the court's tenure when it was under intense political pressure. Possibly, the *Conseil d'Etat's* decision in *Croissant* had a sufficient impact. It is difficult, however, to excise these decisions and the emerging doctrine from the external political circumstances that surrounded them and the ebb and flow of French international policy. *Holder* had been decided at a time when Franco-American relations were in a difficult phase; the administration of Valéry Giscard d'Estaing had been unabashed in its criticism of the U.S. policy in Vietnam to the point that pro-government French newspapers regularly accused the United States of imperialism. Moreover, a few months before, the United States had indicated which candidate it preferred in the upcoming 1974 French presidential elections—a *faux pas* which the French considered an unwarranted and inexcusable interference in their internal affairs. The *Abu Daoud* decision was not merely an exchange of injurious insults between national governments. The case also presented France with an explosive political, economic, and diplomatic situation especially when the West German enthusiasm for extradition waned into unexplained reticence and silence.

In contrast, none of the West German extradition cases were engulfed by such circumstances; cooperation in these instances was actually politically desirable. In addition to the Giscard d'Estaing administration's efforts to promote international judicial cooperation through the creation of the European Judicial Area, Franco-German relations were extremely good and cemented by the personal friendship of the two national leaders. More-

over, the cases involved the extradition of West German nationals for acts committed in West Germany.

Although the *Croissant* case generated some domestic turmoil and involved a debate about possible limitations on a fundamental right, the acts for which extradition was requested involved conduct the criminal nature of which was evident. Since the decisions presented no real political difficulty, the court was free to elaborate a doctrine which met at least minimal standards of acceptable judicial reasoning. If there were any political pressure, it would be to reach a result which favored extradition and minimized the scope of the political offense exception. Whether the established doctrine was molded in complete judicial neutrality is an unanswerable question, but the *Conseil d'Etat*'s ruling in *Croissant* indicates that the doctrine was the product of judicial consensus, rather than any direct executive-judicial branch complicity. It does remain, however, that the doctrine was one which conformed to the French Government's *realpolitik*; its status, therefore, remained fragile.

THE RESURFACING OF THE PRIOR METHODOLOGY: "MacCANN"

The fragility of judicial doctrine in the face of the self-interest of national political policy is forcefully illustrated by the contrast between the foregoing West German cases and the *MacCann* litigation which also involved an extradition request from the West German Government. In *MacCann*,⁹⁰ the accused, an Irish national who was suspected of belonging to the IRA, entered West Germany and placed two bombs in the English sector of a German city. The record indicated, however, that the bombs had been placed in an area which was open to the general public.⁹¹ On the basis of this information, the *Cour d'appel* of Paris held that the acts in question had a political character, denying the extradition request on this basis. To provide some justification for its conclusion, the court's short opinion noted that the explosion of the bombs had not resulted in any fatalities and had damaged only physical property.⁹²

Although there is an earlier French case⁹³ which bears some, albeit tenuous, resemblance to the result and reasoning in *MacCann*, it seems that the latter is totally inconsistent with the other decisions concerning West German extradition requests that have been discussed. The act of placing a bomb in a public place can easily be considered as grave as acting as an information link between terrorists or kidnapping prominent business leaders. Moreover, it could plausibly be argued that such conduct aiming at wanton destruction may be a type of anarchistic social crime rather than a political offense. Despite the strength of his purported political motiva-

tion, MacCann never had the presence of mind to place the bombs near a British institution in West Germany. The possibility that MacCann was a demented lunatic babbling political slogans was perhaps more likely an explanation of his conduct than his being a political offender. Yet, the court's superficial and conclusory reasoning did not consider this possibility.

MacCann falls into line with the cluster of cases represented by *Holder* and *Abu Daoud*. Unlike the other West German cases, the potential extraditee was not a West German national, and it was clear that he was a member of the IRA. Either because of executive branch influence or because of the judicial perception of the French national interest, the court must have considered the possibility of IRA reprisals in France in reaching its determination. As in the *Holder* and *Abu Daoud* cases, however, that pre-eminent-ly political consideration should have been taken into account by the executive branch and not the court.

For purposes of underscoring the point, it should be reiterated that in extradition matters, the court of appeal acts basically in an advisory capacity, ascertaining whether the extradition request satisfies the procedural requirements established by the domestic statute or the applicable international convention.⁹⁴ It plays a greater substantive role when it considers the political offense question, but it should be reiterated that a positive ruling is not binding upon the executive.⁹⁵ In other words, a favorable or partially favorable opinion on an extradition request means only that the latter satisfies existing legal norms and the executive branch can do whatever it thinks fit according to its perception of political considerations. Extradition remains a matter of sovereign State discretion. It is only when the court renders a negative opinion that it prevents the political arm of the government from acting on its own will.⁹⁶

Do the opinions in *Holder*, *Abu Daoud*, and now *MacCann* reflect what the *Cour d'appel* of Paris thinks in these matters as a neutral judicial body applying the consecrated legal norms in this area of litigation? In all of these cases, the opinions have been rushed and flimsy—there is a notable absence of doctrinal reasoning in all of them and a manifest disregard of certain evident considerations. The court's dogmatic opinions voice foregone political conclusions. It is one thing to articulate a rational legal doctrine to deal with a given issue—a doctrine which happens to coincide with national political views on that issue, but it is quite another thing to have the courts not only confirm but also advance political decisions based on non-existent doctrine. It seems that the independence of the courts and the elaboration of carefully considered juridical norms are a reality only when the dictates of national political feasibility allow for it.

EXTRADITION DOCTRINE THOUGH THE PRISM OF THE ITALIAN CASES

Another set of cases, this time dealing with the extradition of Italian terrorists, attests to the fact that the two-prong doctrinal methodology elaborated in the West German cases continues to have some vitality in French extradition litigation. This new set of cases involved the extradition of Italian nationals—Piperno and Pace—who allegedly were members of the Red Brigades and had been involved in the kidnapping and murder of Aldo Moro.⁹⁷ In granting these extradition requests, the *Cour d'appel* of Paris addressed only one of the issues of the two-prong analysis and found it to be dispositive of the political offense question.⁹⁸

Unlike an earlier case involving the extradition of a Red Brigades terrorist⁹⁹ and some of the West German cases,¹⁰⁰ the court did not focus directly upon the question of whether the Red Brigade activities constituted political conduct. In previous cases, the court had ruled—much as in the West German litigation—that “the armed band called the Red Brigades [was] created to topple through violence the economic and social order of the Italian State,”¹⁰¹ implying quite clearly that their activities amounted to social as opposed to political crimes. In *Piperno* and *Pace*, the court of appeal did not address the issue of whether the activities of the Red Brigade group were political or social crimes (for example, the court never stated that these activities were devoid of political character). Instead, the court held that the gravity of the acts for which extradition was sought precluded any further consideration of the possible political motivation of the acts.¹⁰² If the potential extraditee allegedly had engaged in serious criminal activity, his acts (for purposes of extradition) remained common law offenses no matter what their political motivation. This reasoning appears to be very similar in its rationale to the nineteenth century doctrine termed the “*attentat* clause,” which exempted political assassinations from the purview of the political offense exception.¹⁰³

AFFATIGATO

A number of more recent French extradition cases, all decided in 1980, confirm the continued relevance of the two-pronged approach. The *Cour d'appel* of Paris, for example, rendered a partially favorable opinion concerning the extradition of Pinna and Bianco. These two Italian nationals were part of a left-wing Italian terrorist group. Accordingly, the court allowed the extradition, but limited it to classic common law crimes (e.g., armed robbery and drug dealing).¹⁰⁴ In the leading case of *Marco Affatigato*,¹⁰⁵ the *Cour d'appel* of Aix-en-Provence adopted a methodology similar

to that deployed by its counterpart in Paris, illustrating that the two-prong doctrinal approach also has some currency among the French regional courts of appeal.

In *Affatigato*, the accused was a right-wing Italian militant who had been arrested in southern France; the Italian Government requested his extradition on a number of grounds, including hiding and giving refuge to fugitive criminals and engaging in the reconstitution of the fascist party in Italy.¹⁰⁶ In regard to the first charge, Affatigato had been found guilty of giving refuge to Mario Tutti who had killed two police officials; as a result, Affatigato had been sentenced to three years and six months in prison.¹⁰⁷ The *Cour d'appel* of Aix-en-Provence ruled that

[t]he subsequent hiding of which Affatigato is accused is that of an individual having committed the most serious crimes according to morality and the common law, crimes which created a collective danger and were committed in a context of violence, by having recourse to means which were those of a base criminality; that, in light of the existing connexity, the gravity of the acts is such that consideration must end with their objective character, without admitting the political character that Affatigato wants to have attributed to them.¹⁰⁸

Here as elsewhere, the dispositive criterion was the gravity, the serious criminal character of the acts which precluded a consideration of their alleged (and more subjective) political character.

In regard to the second charge (reconstituting the fascist party), the court held, despite the unmistakable political connotations of the accusation, that article 17 of the Peace Treaty of February 10, 1947 with Italy created a "special juridical situation."¹⁰⁹ According to the provision of the Peace Treaty, Italy assumed the responsibility of "not tolerating the reconstitution of fascist organizations on its territory" which the *Cour d'appel* construed as creating a mandatory "public international law norm" for Italy.¹¹⁰ The ground for extradition, in the court's view, "did not constitute a spontaneous initiative on the part of the requesting State."¹¹¹ The charge was not related to internal measures of political repression which the Italian State had initiated, but rather was the expression of the violation of an international norm by an individual.

Affatigato already had been tried for a charge of reconstituting the fascist party in Italy and had several years of a prison term to serve.¹¹² Deeming that international treaty obligations superseded any inconsistent provisions of internal law and that the offense was punishable in France by imprisonment, the French court gave "a favorable opinion to extraditing Affatigato to satisfy the remainder . . . [of his prison term] for the charge of reconstituting the fascist party. . . ." ¹¹³

The *Affatigato* opinion has a two-fold significance. First, it confirms the doctrinal methodology articulated in the jurisprudence of the *Cour d'appel* of Paris by adopting the gravity rationale (and adding the notion of "base criminality") to exempt terrorist acts from the purview of the political offense exception. A principled and seemingly unbiased application of juridical norms, therefore, holds sway among the various *cours d'appel*. Second, perhaps more importantly, the decision of the *Cour d'appel* of Aix-en-Provence permits the extradition to take place on the additional ground of what appears (on its face at least) to be a manifestly political offense. The French court, however, seems to have engaged in a studied and subtle piece of judicial reasoning which implicitly sheds light on the French judicial conception of the notion of political offense. The crime in question did not arise from a violation of any provision of domestic Italian law *per se*, but rather of an international obligation imposed on the Italian State as a result of its wartime conduct. From the perspective of political history, the obligation was deemed essential to European security and, as a matter of policy as determined by European political leaders, was deemed to pre-empt the value placed on the freedom of political expression and activity.

One commentator¹¹⁴ concluded that the *Affatigato* opinion disregarded the letter of the 1927 French Extradition Statute by using the gravity rationale and extending the scope of extradition to include purely political crimes.¹¹⁵ These observations indicate a complete misunderstanding of the extradition law and of the limited nature of the court's holding in regard to the political charge. Like most extradition laws, the French Extradition Statute does provide for the application of the political offense exception;¹¹⁶ once this is acknowledged, the critical problem becomes one of defining what is meant by a political offense. The statute provides little guidance on that problem, and—since the nineteenth century—the definition has been a matter of judicial construction.¹¹⁷ The view that terrorist acts, despite their possible political motivation, are simply too heinous a form of criminality to merit a consideration of their contorted political motives does no disservice either to the letter or spirit of the 1927 statute. Rather, it adds needed substance to the statutory language in a principled fashion with a doctrinal reasoning that has historical antecedents and contemporary echoes in the decisional law of other jurisdictions.

To claim that the court established the principle that extradition would be granted for purely political crimes is an outrageous misreading of the opinion. The court unequivocally pointed out that this situation was exceptional and limited; it articulated a determination which accommodated that situation logically and convincingly without posing the possibility of French judicial acquiescence to and cooperation in political repression.

AN ASSESSMENT OF THE ITALIAN LITIGATION

As with the West German cases, one could argue that the emergence and continued vitality of the doctrine in the Italian litigation was possible only because of auspicious external political circumstances. Fearing political repression and the demise of France's reputation as a haven for political refugees,¹¹⁸ left-wing journalists emphasized the dangers of cooperation among European nations in criminal matters. Yet, the self-interest of the French and Italian States dictated that legal sanctions be brought to bear against these fugitives. In addition to preserving the amicable tenor of Franco-Italian relations, the positive rulings of the French courts lent credence to the French initiative to create a European Judicial Area in criminal matters and advanced a strong French position against terrorism (with only a minimal threat of reprisals). Once again, the courts were allowed to function normally, as it were, because it was a politically tenable position to allow them to do so.

The various cases have given rise to an emerging doctrinal position apparently unperturbed by considerations of political expediency. This position can be summarized in the following terms: as a general rule, the French courts view terrorist acts as criminal acts. Despite the purported political motivation which underlies their behavior, terrorist offenders will be extradited from France if their acts reflect criminal conduct of a serious nature. Even when the act is not such a serious offense, extradition may take place if the acts in question are characterized as social crimes—aimed at toppling the existing social order and not merely the existing political regime.

THE SPANISH CASES

The final group of cases involves the extradition of Spanish Basque militants. These cases confirm the view—advanced in the analysis of the *Holder* and *Abu Daoud* cases—that the French courts at times will act as the indirect spokesmen for French national political policy, at the expense of articulating and applying consistent juridical norms. On the one hand, there are a considerable number of Basques in southern France and a pro-Spanish Government posture adopted either by the French courts or Government in these extradition matters could entail domestic turmoil of not insignificant proportions. On the other hand, France traditionally has been attached to its reputation as a haven for political refugees. It has advocated the rights of man with respect to political freedoms, and historically has been critical of the Franco regime in Spain. Despite the liberalization of the Spanish regime with the advent of King Juan Carlos, the Basque issue

remains a sensitive and delicate issue in Franco-Spanish relations. The election of a socialist regime in France could only exacerbate the already existing tensions. The jurisprudence (primarily of courts of appeal in southern France) has not neglected the political climate which surrounds the Basque issue and, in fact, at times has taken it into account to the detriment of doctrine.

THE EXAMPLE OF THE CONSEIL D'ETAT IN "ASTUDILLO-CALLEJA"

A 1977 decision of the *Conseil d'Etat* indicates the tenor of some of the French court opinions dealing with the extradition of politically militant Spanish nationals. In *Astudillo-Calleja*,¹¹⁹ 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 had received prison sentences, *inter alia*, for refusing to be inducted in the army and for propagandizing against the government and the army.¹²⁰ The Spanish Government maintained that the acts of the accused, in objective terms, did not have a political character and were devoid of political motive.¹²¹

The *Cour d'appel* ruled that the acts for which extradition was requested were common law crimes; the *Conseil d'Etat* reversed that decision, holding that—in light of the accused's past opposition to the Spanish political regime—the extradition request had been made with a political end (another ground in the French extradition statute upon which to refuse extradition for political reasons).¹²² The extradition request had been made at the time when Franco held power in Spain and the court evidently was concerned with granting the accused the right of asylum despite his criminal activity. No mention was made of the gravity of the offenses or whether they could be deemed to be social as opposed to political crimes.¹²³

OTHER CASES: GROPPING FOR CONSISTENCY

The appellate court determinations in the Spanish litigation have not been fully consistent, but there does appear to be a predisposition on the part of the French courts to view Spanish terrorists as political militants deserving of refuge regardless of the extent of their criminal conduct.

The *Cour d'appel* of Paris has exhibited a hesitant attitude in these matters. For example, in the *Manuel Viusa-Camps* case,¹²⁴ the Paris court avoided any consideration of the political offense question or of the gravity of the crimes for which extradition was sought (which included the charge of

collaborating with armed bands).¹²⁵ The record did not depict Viusa-Camps as a political militant belonging to an organized group, although the arrest warrant seemed to link him to Basque separatist organizations.¹²⁶ Rather than address the political issue head on, the Paris court focused upon the issue of whether the charges were punishable both in France and Spain (a requirement of the Franco-Spanish Extradition Convention). Adopting a rather involved and somewhat specious discussion of the definition of the term "armed bands," the court concluded that the offenses were not punishable in France and, therefore, not extraditable offenses under the applicable convention.¹²⁷ This sort of intricate and arguably incorrect technical reasoning was not the approach characteristic of the West German cases, although it did surface in the *Abu Daoud* opinion.¹²⁸ The *Cour d'appel* of Paris cleverly side-tracked while rendering a "politically appropriate" decision.

The provincial appellate courts located in the south of France have shown considerably less reticence in such litigation, perhaps because these courts have a greater affinity to the problem that is raised, have a more sympathetic view of its political ramifications, and—being located in a geographically more volatile area—may sense greater pressure to reach politically viable determinations. The *Elorriaga*¹²⁹ and *Azcargorta*¹³⁰ decisions attest to this difference in attitude. There, the accused were wanted for a number of serious charges, including, the murder of policemen, armed robbery, and possession of arms.¹³¹ The *Cour d'appel* of Aix-en-Provence, however, rendered an unfavorable decision in regard to their extradition by holding that the charges had a political character.¹³² Both men were political militants and members of a group known as the ETA.¹³³ The court reasoned that "it followed from all the elements of the case, that all of the charges alleged, *no matter how serious they were*, were perpetrated in the context of the struggle led by a part of the population of the Basque provinces of Spain aiming to obtain political autonomy."¹³⁴

Exactly the opposite reasoning had been applied in the West German and Italian cases to give judicial support to the extradition of the alleged offenders. The acts of which the Spanish nationals were accused were no less heinous or odious than those of the West German nationals. The applicable statutory and treaty law was the same, allowing the gravity of certain crimes to preclude a consideration of their possible political motivation and character. The doctrinal principle which seems to emerge from the Spanish Basque cases, however, is unfavorable to extradition and the repression of international criminal activity: no matter how serious the criminal character of the acts, Spanish Basque militants will not be extradited because their activities have a sufficient political motivation. The only explanation for the contradistinction between the judicial doctrine deployed in the West German and Italian cases and the analytical frame-

work that applies in the Spanish cases resides in the continuing French sympathy for Spanish militants.¹³⁵

The *Conseil d'Etat's* decision in *Astudillo-Calleja* indicated that the Spanish cases were singled out for special treatment—an approach which reflects the national self-interest in not provoking tension between the French Government and the Basque population in southern France. Moreover, France has long been an opponent of the Franco policies in Spain, and—despite the change in the Spanish regime—continues to have serious doubts about the admission of Spain to the EEC. In addition, France wants to maintain its reputation for affording political asylum to political dissenters from other countries. It is, however, difficult to reconcile the latter aspiration with France's commitment to and leadership in the repression of international criminal activity; in terms of logic and consistency, France cannot be *une terre d'asile* for some criminal-political offenders and not for others depending upon the nationality of the offenders and the self-interest of French national policy. Finally, although it is not possible at the present time to confirm speculation about contemporary developments, the entire complexion of extradition litigation—at least from the executive branch perspective—may be altered considerably by the socialist ideology of the Mitterand administration.

Recent cases involving the extradition of Spanish nationals have generated mixed results. For example, on July 8, 1981, the *Cour d'appel* of Pau precluded the extradition of six Spanish Basques who were wanted in Spain for crimes which included armed robbery and the possession of explosives.¹³⁶ Five of the six fugitives, however, were held for charges in France,¹³⁷ a factor which may indicate that the French policy in this area might be evolving toward a makeshift (perhaps token) prosecute-or-extradite position. The Pau court did give favorable rulings in three other cases in which the fugitives were wanted for murder—notwithstanding the possible political coloration that could be attributed to these acts.¹³⁸

Despite its geographical isolation from the French Basque population, the *Cour d'appel* of Paris rendered what could be considered an exemplary decision in a recent Spanish Basque case. There, one Linaza, a Spanish Basque militant and member of the ETA, was arrested on March 23, 1981, at the Charles-de-Gaulle airport near Paris.¹³⁹ The Spanish Government requested his extradition for crimes which included the assassination of a local Spanish government official, an attempted attack upon a Spanish nuclear plant, and the ambush of a Spanish military convoy in which six soldiers were killed.¹⁴⁰ In rendering an opinion favorable to the extradition, the Paris court followed the doctrine it had elaborated in *Croissant*—deeming the acts to be of such an odious character as to preclude consideration of their motivation or of the context in which they were committed.¹⁴¹

The decision created an important diplomatic problem, aggravating already tense Franco-Spanish relations.¹⁴² The French "Socialist" Administration eventually decided not to extradite Linaza, stating that its decision did not reflect an unbending policy position in these matters, but rather indicated that extradition would be decided on a case-by-case basis.¹⁴³ The significance of *Linaza* lies in the fact that the Paris court reached a determination that apparently was independent of external political factors and exemplified the neutral application of existing juridical norms. One may speculate that this newly-found independence might be related to the socialists' recent rise to power in France. Such an interpretation is extremely conjectural, however. The *Linaza* opinion probably represented the disinterested application of legal norms by the court.¹⁴⁴

CONCLUSION

The corpus of cases that has been analyzed reflects a hesitant and sometimes perplexing evolution of the French judicial application of the political offense exception in contemporary litigation involving the extradition of terrorist offenders. The elaboration of juridical norms never is an easy task; the difficulties become nearly insurmountable when the task includes devising a definition of the term political offense which segregates it persuasively from a purely criminal act in the context of terrorist activities. In addition, two equally fundamental policies are in direct competition in this analysis: the value attributed to the freedom of political expression and dissent by Western democratic societies and the necessity of curbing international criminal activity.

These problems are exacerbated by external political factors which could turn extradition into a vehicle for the pursuit of national self-interest. It is easier for the national government to couch a difficult or embarrassing political decision in the garb of judicial neutrality and objectivity—be it to establish a European policy on cooperation in criminal matters, to criticize implicitly Spanish political policies, or to deter Arab oil blackmail and terrorist reprisals. The need to reach a politically expedient determination can be communicated to the court, especially when the judges are civil servants and subject to possible tacit administrative sanctions. Also, the courts can be willing participants in a politicized judicial process, yielding to the temptation of reaching popular results which express their concern for the national interest. Neither of these positions, however, are tenable given the necessity of an independent and neutral judiciary in a democratic society.

The French courts have elaborated a jurisprudence which, to some extent, satisfies the need for predictability and consistency in the articulation

and application of legal norms, despite the lack (until recently) of higher court review. Starting from the restrictive post-World War II premise that political offenses encompassed only objective political crimes (for example, treason), the French courts moved progressively toward the adoption of a predominance approach which had been applied by the Swiss courts. This approach consisted of a broad assessment of the political and criminal elements of an act to determine which element outweighed the other. The *cours d'appel* grappled with the problem of terrorist acts using the predominance approach. They have arrived at a reasonably consistent doctrine although it suffers at times from arbitrary and inconsistent application.

The proverbial black letter of French jurisprudence on the political offense exception can be summarized as follows. Terrorist acts are criminal acts, and their grave criminal character precludes any consideration of their underlying political motivation for purposes of extradition. Even when the acts are not sufficiently grave or odious, terrorist activities are not quintessentially political crimes, but rather are akin to anarchistic activities—a social crime for which extradition will lie. This position appears to be the constant doctrine of the French courts when they function as neutral arbiters of disputes; it is a stance which merits study and imitation by the courts of other countries.

The influence of external political circumstances has detracted considerably from the elaboration of this doctrine in certain cases—such as *Holder*, *Abu Daoud*, and the Spanish cases. It is extremely unfortunate that the French judiciary acquiesced to the dictates of executive branch policies or willingly gave voice to them in its determinations through unreasoned pronouncements or by resort to artificially technical analysis. The *Linaza* decision illustrates the proper judicial posture in such matters. The decision ought to serve as a model for future French judicial decision-making in this area.

The blackletter position and the mixed results that have been achieved in actual French practice, of course, do not cover all of the possible factual variations that could be encountered in this type of litigation. Assume, for example, that the potential extraditee took part in the activities of a dissident faction during a period of extreme civil strife in Italy. The group committed classic terrorist acts, including murder, kidnapping, and arson, during that period. When a new government finally assumed power and stabilized the situation, the extraditee fled to France and was apprehended by French authorities some weeks later. Whether a French court would consider the acts in question as political offenses in this case is a matter of speculation. This case might involve an accommodation of the current predominance approach of the French courts with the Anglo-American test requiring a two-party struggle for power.¹⁴⁵ Although the hypothetical example goes beyond the guidance proffered by contemporary French

jurisprudence, it nonetheless points to certain deficiencies in the law of extradition which center precisely upon the role of the judiciary in the process.

The definition of the notion of a political offense presents many of the same issues which are involved in a determination of whether a defense of sovereign immunity and/or act of state is applicable to a particular litigation. Given the political context of the litigation, one wonders whether the question is justiciable, whether the courts have the expertise or necessary sensitivity to matters diplomatic to render a ruling. In many instances, this type of adjudication may raise challenges to the judiciary's image of neutrality and impartiality. The exigencies of the political process might overwhelm the usual procedures of judicial adjudication. For example, prior to 1976, in applying the doctrine of sovereign immunity, the U.S. courts felt bound by executive determinations.¹⁴⁶

In recent treaty practice in the area of extradition, the United States has adopted a similar approach in dealing with the political offense exception. Under the provisions of the newly ratified treaties with the Netherlands and Colombia, political questions which arise in the process of extradition are assigned exclusively to the Secretary of State.¹⁴⁷ One commentator has characterized this approach as "[a] better division of labor" which leaves "diplomacy to diplomats [and] provides better and speedier justice."¹⁴⁸

However one assesses the merits of such an approach, if it were applied to the French litigation, it would have the advantage of dismissing any apprehensions about the neutrality of the courts and their role in reaching a determination on the political offense question. Extradition, under established dogma, is within the domain of sovereign discretion and a government determination of political questions that surface in the extradition process would only strengthen that view, leaving courts under French law with the more limited responsibility of supervising the procedural regularity of the extradition request. There would be no need for the courts to articulate a conceptual framework by which to define the notions of political offense and terrorism, to choose between competing tests, and to ponder the facts of widely divergent cases and the possible non-judicial consequences of a given determination. The blackletter law would fall into disuse, the mixed results would not need to be reconciled, and the challenge of the hypothetical example would be confronted by efficient and appropriately attuned men of state, not judges.

The emerging United States approach obviously has much to recommend it in light of the laborious and sometimes inconsistent results achieved by the judiciary. The approach clearly represents a radical departure from past practice and, in fact, may be a hurried and unthinking response to the difficulties presented by the political context of certain extradition cases. Although it is beyond the scope of the present endeavor

to assess critically the emerging United States approach, it seems that it mistakes speedier justice for better justice by undermining any effective system of checks and balance in the extradition process. While the terms political offense, terrorism, and mixed crimes may present nearly intractable problems of judicial definition, there is at least some sort of institutional mechanism for guarding against arbitrary and capricious governmental action—though it is not always effective. The history of the political offense exception shows that its vitality is dependent upon its application by neutral tribunals which stand above or to the side of the vicissitudes of political considerations. While efficient and expedient, the United States proposal appears to be a dangerous infringement upon fundamental safeguards.

This study of the French decisional law illustrates markedly that the courts of one country have achieved extremely mixed and sometimes dissatisfying results in repressing international crime. The courts at times plod their way through cases, respond inappropriately to external pressures, and are unable to maintain a consistent and ascertainable doctrinal approach in some instances. A sense of political realism and a concern for the equilibrium of power, however, dictates that that approach, despite its glaring imperfections, is preferable to unlimited government discretion of any kind, especially for determinations relating to political questions.

NOTES

¹ N.Y. Times, Dec. 8, 1981, at A1, col. 1.

² N.Y. Times, Dec. 18, 1981, at 3, col. 1; *id.*, Dec. 19, 1981, at 3, col. 4; *id.*, Dec. 20, 1981, at 4, col. 1; *id.*, Jan. 1, 1982, at 3, col. 4; *id.*, Jan. 2, 1982 at 3, col. 2.

³ This article adopts an expansive definition of terrorism, taking the term to encompass most acts or threats of violence which are ideologically motivated. A precise definition would surely be helpful, but the difficulty of determining such a definition is indeed one of the underlying problems of the cases discussed in this article. See *infra* text accompanying note 12. Another problem is the doubtful ideological motivation of some purported terrorists. See *infra* text accompanying notes 90-96.

The International Law Association has proposed the following definition:

The offense of international terrorism shall consist of any act of violence or threat thereof by an individual or by groups of individuals, however denominated, directed against internationally protected persons, internationally protected organizations, internationally protected places, internationally protected transportation systems or internationally protected communications systems, with the intention of intimidating such persons or members of the general public, or of causing injury to or the death of such persons or of members of the general public who have been seized as hostages or otherwise singled out as objects of terrorist attack, or causing loss, detriment or damage to such places or property in order to undermine friendly relations among States or among the nationals of different States or to disrupt the activities of such international organizations or such international transportation or communications

systems or to extort concessions from States, whether committed internally or externally.

The offense shall comprehend conspiracy to commit, attempts to commit and complicity in the commission of the offense.

Draft Outline of Single Convention on Legal Control of International Terrorism art. 1(1), INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SEVENTH CONFERENCE 119, 143-44 (1976). This proposed definition, however, is certainly not the only solution to a difficult definitional problem. See, e.g., Dugard, *Towards the Definition of International Terrorism*, PROC. AM. SOC'Y INT'L L., 67 AM. J. INT'L L. 87 (No. 5) (1973); Franck & Lockwood, *Preliminary Thoughts towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69, 72-82 (1974).

⁴ See also *Terrorist Incident Chart[s]* in INT'L RISKS, QUARTERLY RISK ASSESSMENT, Jan.-Mar. 1980, at 22; Apr.-June 1980, at 29; July 1980, at 14; Aug.-Oct. 1980, at 12; Nov. 1980, at 17; Oct.-Dec. 1980, at 26.

⁵ See, e.g., Bobrow, *Preparing for Unwanted Events: Instances of International Political Terrorism*, 1 TERRORISM: AN INT'L J. 397 (1978) [hereinafter cited as TRM]; Bonanate, *Terrorism and International Cooperation in the Field of International Political Terrorism*, 1 TRM 199 (1978); Franck, *International Legal Action Concerning Terrorism*, 1 TRM 187 (1978); Vinci, *Some Considerations on Contemporary Terrorism*, 2 TRM 149 (1979). For a discussion of terrorism from a regional perspective, see Anderson, *The Ambiguities of Political Terrorism in Central America*, 4 TRM 267 (1980); Fiorillo, *Terrorism in Italy: Analysis of a Problem*, 2 TRM 261 (1979); Russell, *Europe: Regional View*, 3 TRM 157 (1979); Tugwell, *Politics and Propaganda of the Provisional IRA*, 5 TRM 13 (1981); Whetten, *Italian Terrorism: Record Figures and Political Dilemmas*, 1 TRM 377 (1978).

⁶ The substance of the relevant United Nations resolutions reveals that the phenomenon of terrorism is debated along the lines of the North-South schism: what most developed Western nations consider to be hideous criminal acts is reinterpreted and defended by many less-developed countries as a lawful reprisal for global inequity and exploitation. See, e.g., Aston, *The United Nations Convention Against the Taking of Hostages: Realistic or Rhetoric?*, 5 TRM 139 (1981); Hoveyda, *The Problem of International Terrorism at the United Nations*, 1 TRM 71 (1977). For the latter, terrorism is a justifiable means by which to redress political inequality; it is an acceptable form of random political revolution.

⁷ For a historical account of the political exception, see Carbonneau, *The Political Offense Exception to Extradition and Transnational Terrorists: Old Doctrine Reformulated and New Norms Created* [hereinafter cited as *The Political Offense Exception*], 1 A.S.I.L.S. INT'L L.J. 1, 1-10 (1977).

⁸ See Hoveyda, *The Problem of International Terrorism at the United Nations*, 1 TRM 71 (1977); Lillich & Carbonneau, *The 1976 Terrorism Amendment to the Foreign Assistance Act of 1961*, 2 J. INT'L L. & ECON. 223 (1977); Wilkinson, *Proposals for Government and International Responses to Terrorism*, 5 TRM 161 (1981).

⁹ Loi du 10 mars 1927 relative à l'extradition des étrangers, see, e.g., arts. 2, 18, 1927, Journal Officiel de la République Française [J.O.] 2874, 2880, 1927 Recueil Dalloz, *Périodique et Critique* [D.P. IV] 265. See also Travers, *La loi française d'extradition du 10 mars 1927*, 57 JOURNAL DU DROIT INTERNATIONAL [J. DU DR. INT'L] 595 (1927).

¹⁰ See Carbonneau, *The Political Offense Exception*, *supra* note 7; Carbonneau, *The Provisional Arrest and Subsequent Release of Abu Daoud by French Authorities* [hereinafter cited as *Abu Daoud*], 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* [hereinafter cited as *Extradition and International Terrorism*], 12 INT'L LAW. 813 (1978); Carbonneau, *Terrorist Acts—Crimes or Political Infractions? An Appraisal of Recent French Extradition Cases* [hereinafter cited as *Terrorist Acts*], 3 HASTINGS INT'L & COMP. L. REV. 265 (1980). For a general survey of extradition under French law, see Y. CHAUVEY, *L'EXTRADITION* (1981).

¹¹ See *supra* note 10, for a list of articles that have focused on the decisions of the Paris Cour d'appel.

¹² See *supra* text accompanying notes 5-7. To parse a well-known phrase—one country's criminal terrorist is another country's freedom fighter and political hero. What one juridical and political culture will perceive as wanton destruction—unjustified and barbaric criminal conduct—may be, in the perception of another culture, a necessary and laudable act of reprisal and vindication, redressing long-standing inequities.

In my view, however, the need to repress crime mandates that some limitations be imposed upon this type of open-ended reasoning. Semantic difficulties should not degenerate into futile casuistic debates which cloud the pressing need to elaborate a doctrinal framework by which to deal with the legal implications of terrorism. Political aspirations and cultural perceptions—no matter how different—need to be maintained within the bounds of civilization. In many instances, acts of terrorism are wanton acts of violence and destruction directed at innocent targets and victims in the name of some ideological cause which seeks to undo existing political, economic, and social structures. The European Convention on the Suppression of Terrorism provides an enumeration of paradigmatic terrorist acts. European Convention on the Suppression of Terrorism, *opened for signature*, Jan. 27, 1977, Europ. T.S. No. 90, 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). The fundamental lawlessness of these acts, despite any coloration given to them by the motivation of the actors, is their chief defining characteristic.

¹³ See *The Political Offense Exception*, *supra* note 7, at 5-10.

¹⁴ *Id.* at 5.

¹⁵ See *id.* at 10-33.

¹⁶ *Id.* at 8-9. This doctrine is known as the Belgian "attentat clause."

¹⁷ *Id.* at 11-16. This doctrine is known as the Anglo-American test.

¹⁸ *Id.* at 17-22. This doctrine was known as the French objective test.

¹⁹ *Id.* at 23-31. This doctrine was known as the Swiss predominance test.

²⁰ *Id.* at 13, 27.

²¹ See *supra* notes 13-14 and accompanying text.

²² See *id.* See also Fleming, *Propaganda by the Deed: Terrorism and Anarchist Theory in Late Nineteenth-Century Europe*, 4 TRM 1 (1980).

²³ The French system of writing and reporting judicial opinions also has an impact upon how the relevant data is interpreted and analyzed. In the area of extradition (as in other areas of the law), the French opinions are reported only in a selective fashion and sometimes reprinted only in extract form in the case reporters. Also, French judicial opinions, in addition to their formulaic style, are characteristically brief and succinct; unlike their American analogues, the French judges do not engage in an extensive process of reasoning. Finally, French courts rule as a unitary public body—there are no dissenting opinions in French court cases. See, e.g., O. KAHN-FREUND, C. LEVY & B. RUDDEN, *A SOURCE-BOOK ON FRENCH LAW* 275 (2d ed. 1979).

²⁴ The traditional view is that courts decide cases by referring to the Civil or other relevant Code and to other applicable statutory materials and are not bound by the previous decisions of other courts ruling in similar cases. In a word, the courts in a civilian system are bound to do justice in an individual case by reference to the legal principles and rules contained in the codified and statutory law. See, e.g., H. DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* 243 (1976); AMOS & WALTON, *INTRODUCTION TO FRENCH LAW* 9-12 (2d ed. 1963).

²⁵ The still-reigning view is that *stare decisis* is unknown in civilian jurisdictions. It is quite evident that, were this interpretation of the systemic features of the French civilian system taken as seriously as it appears to be meant, it would have a considerable impact upon the elaboration of a coherent and consistent French view of what is meant by a political offense.

The relevant jurisprudence—in theory at least—could be cast into a total *ad hoc* doctrinal disarray.

²⁶ See, e.g., O. KAHN-FREUND, C. LEVY, & B. RUDDEN, *supra* note 23, at 284; see generally E. FAYS, LA COUR DE CASSATION (1970). Although this system of supervision, at times, can become procedurally very complicated and, given the amount of litigation, must be fairly limited, it does have the effect of maintaining a quite high degree of consistency and predictability in the various areas of the private civil and criminal law. See, e.g., AMOS & WALTON, *supra* note 24, at 8-9.

²⁷ Loi du 10 mars 1927, arts. 16-17, 1927 J.O. 2874, 1927 Recueil périodique et critique [D.P. IV] 265.

²⁸ *Id.*

²⁹ French judges are civil servants subject to transfer to undesirable locations and appellate judges are subject to promotion. See, e.g., H. DEVRIES, *supra* note 24, at 85-89.

³⁰ See, e.g., Y. CHAUVEY, *supra* note 10, at 99.

³¹ See, e.g., H. DEVRIES, *supra* note 24, at 70, 187.

³² *Id.* See generally CENTRE NATIONAL DE LA RECHERCHE SCIENTIFIQUE, LE CONSEIL D'ETAT 1799-1974; J. SWEENEY, C. OLIVER, N. LEECH, THE INTERNATIONAL LEGAL SYSTEM 311-313 (2d ed. 1981).

³³ See *supra* note 28 and accompanying text.

³⁴ See *id.*

³⁵ See *supra* text accompanying notes 30-32.

³⁶ Loi du 10 mars 1927, arts. 16-18, 1927 J.O. 2874, 1927 D.P. IV 265.

³⁷ *Id.*

³⁸ 1926 J.O. 1734 (Senate debates of Dec. 10, 1926); see also Travers, *supra* note 9, at 601-02, 609-10.

³⁹ To students of the law, the concept of political offense presents a classically irresolvable problem of where to draw the line and how to establish meaningful distinctions. Its definition presents the same difficulty as defining what is meant by a political question which is not justiciable, see, e.g., G. GUNTHER, CONSTITUTIONAL LAW 1619 (9th ed. 1975), or how far the scope of a sovereign immunity defense is to extend, see e.g., *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P. 2d 457, 11 Cal. Rptr. 89 (Sup. Ct. Cal. 1961); *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (Ct. App. N.Y. 1960). Perhaps a more telling analogy could be made to the question of negligence in tort law. There the courts have devised a number of analytical methodologies by which to define the negligent character of an act. Although doctrinal explanations of negligence vary considerably in quality, one sometimes has the impression that the doctrine is merely a garb in which to clothe (and hide) a certain policy determination. See, e.g., *The English Law of Products Liability*, in THE HARMONIZATION OF EUROPEAN LAW (P. Herzog, ed. 1982) (forthcoming). In this light, judicial decision-making smacks of the arbitrary and *ad hoc*—results are reached despite the limitations of doctrine.

For Cardozo, in many cases, negligence is a question of the foreseeable consequences of conduct and foreseeable plaintiffs; the scope of the duty, if it exists, is determined by the foreseeability of the injury. See, e.g., *Adams v. Bullock*, 227 N.Y. 208, 125 N.E. 93 (Ct. App. N.Y. 1919). Other judges and courts have argued that the definition of negligence is a factor of substantial risk creation: does the defendant's activity present so great a risk of harm that he must bear the liability for the injuries that flow from his conduct. See, e.g., *Bolton v. Stone*, [1951] A.C. 850. The remote chance of the injury occurring and the seriousness of the actual injury are additional considerations in this negligence-risk equation. See *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940); *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

In assessing the value of competing interests, the courts sometimes have explicitly invoked the talisman of public policy: it is in the best interest of society that this conduct be characterized as negligent to protect the defenseless and to compensate the injured. See, e.g., *Chicago, Burlington & Quincy R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N.W. 880 (1902). The

definition of negligence, a legal wrong, becomes estranged from the notion of wrongfulness and becomes synonymous with the insurance principle and an economic analysis of risk and cost distribution in society. *See generally* G. WHITE, *TORT LAW IN AMERICA* (1980). Often, a torts determination masquerades as a negligence analysis only to become a strict liability Cinderella in the holding and result.

As in the negligence area, the goal of the political offense exception is to isolate and describe the doctrinal framework in which, and methodology by which, the political or non-political character of an act is determined. This so-called liability calculus, obviously, will be influenced to some extent by variations in the factual circumstances of the cases and the existing political context in which the cases are decided; a principled doctrinal formula, however, should emerge, although one wonders whether the same or similar words will have the same meaning in each individual case.

To pursue the analogy to the law of negligence still further, it seems that a number of negligence-like factors will enter into the consideration of the political character of a given act. For example, the French courts may look at the consequences of the act and reason that the substantial risk created by the act to innocent victims minimizes, if not eliminates, the political coloration of the act. Also, they may take into account the actor's probable state of mind during the commission of the offense and weigh that factor on its own merits or in relation to a set of objective criteria. Whatever calculus is used, there remains the possibility, as in negligence cases, that the selection and application of doctrine will be determined by considerations outside of the record. The courts may not legislate, but they might act as spokesmen for an executive branch policy in the cloak of judicial neutrality.

On the one hand, there is an evident need for a stable and generally applicable legal doctrine: the law should be predictable and consistent. The courts need to be perceived as neutral arbiters of these questions, although one wonders whether the application of the political offense exception can ever be divorced entirely from political considerations. On the other hand, there is a not inconsiderable amount of pressure upon the courts to reach viable, pragmatic, and politically palatable decisions.

⁴⁰ Judgment of Apr. 14, 1975, Cour d'appel, Paris (unpublished). *See* E. Mc DOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 168 (1975) for a discussion of the facts and holding.

⁴¹ Judgment of Jan. 11, 1977, Cour d'appel, Paris, 1977 Recueil Dalloz-Sirey Information Rapides [D.S.I.R.] 352, 1977 Gazette du Palais [Gaz. du Palais] 105.

⁴² Judgment of Nov. 7, 1979, Cour d'appel, Paris (unpublished) *reprinted in* Appendix, this volume.

⁴³ Judgment of Oct. 17, 1979, Cour d'appel, Paris (unpublished), *reprinted in* Appendix, this volume.

⁴⁴ These cases already have received fairly extensive commentary and analysis. *See supra* note 10. For present purposes, it suffices to restate the basic premise of these cases, considering primarily their doctrinal result. The *Cour d'appel* of Paris ruled in all these cases and all were decided during the administration of Valéry Giscard D'Estaing.

⁴⁵ *Supra*, note 40.

⁴⁶ *See* E. Mc DOWELL, *supra* note 40, at 168.

⁴⁷ *Id.*

⁴⁸ 1977 D.S.I.R. 352, 1977 Gaz. du Palais 105. *See also* 104 J. DU DR. INT'L 843 (1977); *Terrorist Acts*, *supra* note 10, at 284 n.108 and accompanying text.

⁴⁹ 1977 D.S.I.R. 353. *See also* *Abu Daoud*, *supra* note 10; *Affaire Abu Daoud*, 23 ANNUAIRE FRANÇAISE DE DROIT INTERNATIONAL [ANN. FR. DE DR. INT'L] 1046 (1977); 22 ANN. FR. DE DR. INT'L 936 (1976) (containing a report and assessment of the Abu Daoud opinion).

⁵⁰ *See Abu Daoud*, *supra* note 10, at 500-13.

⁵¹ *See supra*, note 49.

52 *Id.*

53 *See, e.g., The Political Offense Exception, supra* note 7, at 17-22.

54 *See id.* at 18-22.

55 *Discours et déclarations du Président de la République Française*, documents supplied by the French Information Agency (*la documentation française*): Doc. No. 36024—Interview Given by Mr. Valéry Giscard d'Estaing to the Italian Television Network (TG1) During the Franco-Italian Talks in Rome on Friday, January 23, 1981; Doc. No. 20318—Interview Given by Mr. Valéry Giscard d'Estaing to the German Magazine "Der Spiegel" on the Situation in Europe at the Presidential Palace on December 18, 1978; Doc. No. 19190—Press Conference of Mr. Valéry Giscard d'Estaing After the Meeting of the European Council in Copenhagen on Saturday, April 8, 1978; Doc. No. 19179—Interview Given by Mr. Valéry Giscard d'Estaing to the French Television Network (TF1) During the European Summit Meeting in Copenhagen on Saturday, April 8, 1978; Doc. Nos. 14769, 14775, 14776 & 14777—Television Interview of Mr. Valéry Giscard d'Estaing with Four Journalists on Wednesday, December 14, 1977. These various documents consist of declarations of the former French President regarding terrorism and the need for police and judicial cooperation among European nations. The remarks center upon the need for the creation of a European Judicial Area, the French willingness to cooperate in these matters, and the denial of any infringement upon liberty interests by this new form of international cooperation.

The French Information Agency also supplied a number of newspaper reports detailing the ebb and flow of the French attempt to establish a European Judicial Area. These reports, taken primarily from *Le Monde* during 1979 and 1980, emphasize the relationship between the 1977 European Convention on the Suppression of Terrorism and a similar convention done on December 4, 1979 in Dublin and the French proposal. While the proposal had the support of the West German and Italian Governments, the project never materialized due to a lack of consensus among member-States.

See also Charpentier, *Vers Un Espace Judiciaire Européen*, ANN. FR. DE DR. INT'L 927 (1978); Terré, *L'Espace Judiciaire Européen*, [1980] REV. EUR. 61; Vallé, *A Propos De La Décision Du Conseil Constitutionnel Du 17 juillet 1980*, 26 ANN. FR. DE DR. INT'L 202 (1980); Wilkinson, *Proposals for Government and International Responses to Terrorism, supra* note 6, at 180-86. *See generally, New European Tactics on Terrorists Net 22 in France*, N.Y. Times, April 2, 1980 at A3, col. 4.

56 Judgment of Nov. 16, 1977, Cour d'appel, Paris (unpublished), *reprinted in* Appendix, this volume.

57 Judgments of July 9, 1980, Cour d'appel, Paris (unpublished) (Concerning the extradition of Ingrid Barabass and Sieglinde Hofman), *reprinted in* Appendix, this volume.

58 *See supra* note 43.

59 *See supra* note 42. Again, these rulings have received fairly extensive commentary in the literature, and need be looked at only briefly for purposes of the present analysis. *See supra*, note 10. For a discussion of the West German government's responses to terrorism *see* Note, *Anti-Terrorism: The West German Approach*, 3 FORDHAM INT'L L. FORUM 167 (1980).

60 *See* *Extradition and Transnational Terrorism, supra* note 10, at 813.

61 *Id.*

62 *Id.* at 822.

63 *Id.* at 820-21.

64 *Id.* *See also* *Affaire Croissant*, 24 ANN. FR. DE DR. INT'L 1130 (1978).

65 *Id.* at 821-22.

66 *See* Judgment of July 7, 1978, Conseil d'Etat, Paris, 1978 Recueil des décisions du Conseil d'Etat [Lebon] 292. *See also* *Terrorist Acts, supra* note 8, at 289-91.

67 *See* *Terrorist Acts, supra* note 10, at 289-91.

68 This is the so-called *force de la chose jugée*. *See supra* notes 30-38 and accompanying text.

69 *See generally* P. HERZOG CIVIL PROCEDURE IN FRANCE 413-14 (1967).

- 70 See *Extradition*, 24 ANN. FR. DE DR. INT'L 1074 (1978).
- 71 *Id.* at 1076.
- 72 *Id.* at 1074.
- 73 *Id.*
- 74 *Id.*
- 75 See *supra* note 32.
- 76 Judgment of July 27, 1979, Conseil d'Etat, Paris, 1979 Lebon 333.
- 77 See *Extradition*, *supra* note 70, at 1074, 1076.
- 78 *Id.*
- 79 *Id.* at 1074-77.
- 80 Judgment of December 20, 1978, Cour d'appel, Paris (unpublished), Appendix, this volume.
- 81 The "Black Rescue" (Secours Noir). *Id.* See also 1980 D.S. Jur. at 449 (conclusions of M. Labetoulle, Commissaire du Government).
- 82 Appendix, this volume.
- 83 *Id.*
- 84 *Id.* (author's translation).
- 85 Judgments of July 9, 1980, Cour d'appel, Paris (unpublished) (concerning the extraditions of Ingrid Barabass and Sieglinde Hofman), *reprinted* in Appendix, this volume. See also *Le Monde*, May 8, 1980, at 13, col. 1; *id.*; May 9, 1980, at 13, col. 2; *id.*, June 11, 1980 at 12, col. 1; *id.*, June 27, 1980, at 10, col. 5.
- 86 *Id.*
- 87 *Id.* The warrants alleged that the fugitives belonged to separate terrorist groups (Barabass to the "June 2 Movement" and Hofmann to the "Red Army Faction"), but contended that they had both participated in the kidnappings.
- 88 *Id.* What is required of the requesting state in this context is stated in the provisions of the applicable extradition treaty: for example, that the charge for which extradition is sought is an extraditable offense under the treaty, that the extradition request be made pursuant to a validly drawn arrest warrant and through appropriate diplomatic channels.
- 89 Judgment of Nov. 16, 1977, Cour d'appel, Paris (unpublished), *reprinted* in Appendix, this volume. See generally *supra* notes 56-62 and accompanying text.
- 90 Judgment of Dec. 13, 1978, Cour d'appel, Aix-en-Provence (unpublished), *reprinted* in Appendix, this volume.
- 91 *Id.*
- 92 *Id.*
- 93 Judgment of July 3, 1967, Cour d'appel, Paris, *Juris. Classeur periodique, la semaine juridique* [J.C.P.] II, No. 15274. See also *The Political Offense Exception*, *supra* note 7, at 20-21.
- 94 See *supra* text accompanying notes 36-38.
- 95 *Id.*
- 96 See, e.g., *Abu Daoud*, *supra* note 10, at 503.
- 97 See *supra* notes 37, 38. See also *Terrorist Acts*, *supra* note 10, at 291-96.
- 98 See *supra* notes 42-43.
- 99 Judgment of June 7, 1978, Cour d'appel, Paris (unpublished) (concerning the extradition of Antonio Bellavita), *reprinted* in Appendix, this volume.
- 100 See *supra* text accompanying notes 80-88.
- 101 See *supra* note 99.
- 102 See *supra* notes 42-43.
- 103 See *The Political Offense Exception*, *supra* note 7, at 10.
- 104 Judgment of _____, 1980, Cour d'appel, Paris (unpublished). See *Le Monde*, Dec. 16, 1980, at 12, col. 3. The charges against Pinna also included drug trafficking. The court postponed consideration of the extradition request for Pinna's wife. Both Pinna and Bianco

were wanted for charges relating to a robbery committed in France before they were apprehended, allegedly perpetrated to finance left-wing groups in Europe. Depending upon what action the French Government takes on this matter, the extraditees could be tried before the *Cour de sûreté de l'Etat* on the robbery charge before being extradited. The robbery was committed in Condé-sur-l'Escant and involved some sixteen million francs. *See id. See also id.*, Oct. 10, 1980, at 12, col. 4.

105 Judgment of Sept. 5, 1980, Cour d'appel, Aix-en-Provence (unpublished). *See also* Le Monde, Sept. 2, 1980, at 9, col. 1; *id.*, Sept. 21, 1980, at 11, col. 2; *id.*, Sept. 6, 1980, at 10, col. 1; *id.*, Sept. 7-8, 1980 at 16, col. 2 (reviewing the history of the case, reporting the extradition proceedings, and analyzing the extradition decision).

106 Le Monde, Sept. 2, 1980, at 9, col. 1.

107 *Id.*

108 *Id.*, Sept. 7-8, 1980, at 16, col. 2 (author's translation).

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

113 *Id.* (author's translation).

114 *See id.*

115 *Id.*

116 Loi du 10 mars 1927, art. 5(2), [1927] J.O. 2874, 2880, 1927 D.P. IV 265, 266-67.

117 *See Terrorist Acts*, *supra* note 10, at 275-97.

118 *See supra* note 55 and accompanying text.

119 Judgment of June 24, 1977, Conseil d'Etat, Paris, 1977 Lebon 290, 1977 D.S. Jur. 699; *see also Terrorist Acts*, *supra* note 8, at 279-97 (discussing the decision in the context of other recent French extradition cases); 105 J. DU DR. INT'L 73, 76 (1978) (criticizing the decision on two grounds: (1) that it is inconsistent with the terms of France's 1877 extradition treaty with Spain, and (2) that it goes too far in finding an underlying political purpose in the Spanish request for extradition); 24 ANN. FR. DE DR. INT'L 1074 (1978) (discussing the same two issues more neutrally).

120 1977 D.S. Jur. at 695 (conclusions de M. Gerevois, commissaire du Government).

121 1977 D.S. Jur. at 699 (conclusions de M. Genevois).

122 1977 Lebon at 290. *See also* 1977 D.S. Jur. at 699 (conclusions de M. Genevois).

123 1977 Lebon at 290, 1977 D.S. Jur. at 695-699.

124 Judgment by May 30, 1979, Cour d'appel, Paris (unpublished), *reprinted in* Appendix, this volume.

125 *Id.*

126 *Id.*

127 *Id.*

128 *See supra* text accompanying notes 48-52.

129 Judgments of April 6 and May 15, 1979, Cour d'appel, Aix-en-Provence (unpublished), *reprinted in* Appendix, this volume.

130 Judgments of April 6 and May 16, 1979, Cour d'appel, Aix-en-Provence (unpublished), *reprinted in* Appendix, this volume.

131 *See supra* notes 129-130.

132 *Id.*

133 The abbreviation refers to the Basque phrase "Euscadi Ta Axcatasuna," meaning "Homeland, Basque, Liberty." It designates a group seeking autonomy of the Basque region from Spain—a group which often employs terrorist tactics.

134 *See supra* notes 129, 130.

135 Although the earlier *Henin* and *de Palma* cases exhibited a fairly liberal application of

the notion of political offense, they were exceptional in the evolving French jurisprudence—attesting more to the demise of the *Gatti* objective offense approach than anything else. See *Terrorist Acts*, *supra* note 10, at 277-80.

136 Judgment of July 8, 1981; Cour d'appel, Pau (unpublished). See also *Le Monde*, July 10, 1981, at 29, col. 1 (describing how the decision, coming in the midst of Franco-Spanish efforts to reach an agreement concerning antiterrorist cooperation, has complicated relations between the two countries).

137 *Le Monde*, July 10, 1981, at 29, col. 1.

138 See *supra* note 136.

139 Judgment of June 3, 1981, Cour d'appel, Paris (unpublished). See also *Le Monde*, June 5, 1981, at 14, col. 2; *id.*, June 9, 1981, at 8, col. 4; *id.*, June 10, 1981, at 1, col. 6, 7, col. 1; *id.*, July 2, 1981, at 6, col. 2; *id.*, July 5-6, at 3, col. 5; *id.*, July 8, 1981, at 4, col. 1 (emphasizing the political repercussions of the government's decision not to extradite Linanza).

140 See *Le Monde*, June 5, 1981, at 14, col. 2.

141 Judgment of June 3, 1981, *supra* note 129.

142 See *Le Monde* articles, *supra* note 129.

143 *Id.*, July 5-6, 1981, at 3, col. 5.

144 For an assessment of Franco-Spanish relations in these extradition matters and on the Basque question, see *Le Monde*, July 2, 1981, at 6, col. 2; July 4, 1981, at 1, col. 1; July 5-6, 1981, at 3, col. 5; July 21, 1981, at 1, col. 6; July 22, 1981, at 26, col. 5; July 30, 1981, at 7, col. 1; July 31, 1981, at 6, col. 3. For an editorial comment on the French extradition situation, see Lewis, *Hot and Cold Terrorists*, N.Y. Times, May 29, 1981, at A27, col. 1. For a statement at the M. Herard Administration's policy on extradition, see *Le Monde*, July 10, 1981, at _____ (in which Mr. Robert Badinter, the new Minister of Justice, declared that France "must remain a territory of asylum" but not a "refuge for those whose acts or ideologies are radically contrary to the ideals of liberty"). For a critical assessment of the French position in these matters by international experts, see *Le Matin*, *Terrorisme en Europe: La France en accusation* (available from La Documentation Française).

145 See, e.g., *The Political Offense Exception*, *supra* note 7 at 11-16; Comment, *Unraveling the Gordian Knot: The United States Law of Extradition and the Political Offender Exception*, 3 FORDHAM INT'L L. FORUM 141 (1981).

146 Yet, the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-11 (1976) and 28 U.S.C. §§ 1391, 1441) may indicate increased faith in the judiciary: the Act places sovereign immunities decisions solely with the courts and ends their acquiescence to executive determination in this area. See Von Mehren, *The Foreign Sovereign Immunities Act of 1976* 17 COLUM. J. TRANSN'TL L. 32, 65-66 (1978).

147 Treaty of Extradition, Sept. 14, 1979, United States-Columbia, — U.S.T. —, T.I.A.S. No. —; Treaty of Extradition, June 24, 1980, United States-Netherlands, — U.S.T. —, T.I.A.S. No. —.

148 See N.Y. Times, Dec. 29, 1981, at 24, col. 1.