

## ***L’Affaire Abou Daoud:* Some Problems of Extraditing an International Terrorist**

Abou Daoud, allegedly an accomplice in the murder of eleven athletes at the Olympic Games in Munich during September of 1972,<sup>1</sup> was arrested on Friday evening, January 7, 1977 in a left bank Paris hotel. Four days later Daoud was released and deported to Algeria after the French judiciary decided it lacked authority to hold him. Arab governments and the Palestine Liberation Organization (PLO) vigorously protested Daoud’s arrest. The Israeli government, the West German government, and the United States protested Daoud’s release even more vigorously.

Daoud’s quick release surprised Western countries which so often have been the targets of terrorist activities. His release was especially difficult to accept because the tactics used in his alleged crimes were highly offensive because the decision appeared to be based on political pressure and fear of reprisals for his arrest.

The French court’s decision cast doubt on the international community’s ability and willingness to deal firmly with terrorists. More precisely, since the decision was made by judicial authorities, it placed in question the legal community’s ability to deal with terrorism, even after the fact, through extradition treaties.

### **Background of the Court’s Decision<sup>2</sup>**

Accounts of Daoud’s entry into France, his arrest, and detention are conflicting. Some of the facts pose questions which cannot be answered until, and

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<sup>1</sup>Daoud is accused of coordinating the siege on the Olympic Village by telephone from a Munich hotel.

<sup>2</sup>This account is based on articles in: *The Economist*, January 15, 1977, at 43-44,46; *L’Express*, January 17-23, 1977, at 24-31; *Le Monde*, January 11, 1977, at 1,6; *Le Monde*, January 13, 1977, at 1,2,3; *Le Monde*, January 14, 1977, at 2; *New York Times*, January 10, 1977, at 1,8; *New York Times*, January 12, 1977, at 1; *The Times (London)*, January 12, 1977, at 1. Information was also obtained from the following *Ambassade de France* press releases (from the French Consulate, San

unless, more of the story is made known. But enough of the facts are available to discuss the legal problems involved in Daoud's release.

Equipped with an Iraqi passport under the name of Yousif Hanna Raji, Abou Daoud went to the French Embassy in Beirut on January 5 to apply for a French visa.<sup>3</sup> He was on his way to France as a member of a PLO delegation to attend the funeral of Mahmaoud Saleh, a PLO representative who was murdered in Paris on January 3.

Suspicious about the real identity of Yousif Hanna Raji were first raised on Friday, January 7. According to French Premier Raymond Barré, the French police first became suspicious of Raji's identity in the course of their investigation of Saleh's murder and confirmed these suspicions through inquiries of foreign police. But several press accounts claimed that the French and German police were told of Raji's true identity by Mossad, Israel's intelligence agency.<sup>4</sup> In any case, the Bavarian police informed the French national police at 6:30 p.m. on Friday that they were requesting a warrant for Daoud's arrest from the German judiciary. Apparently on this basis, the French police proceeded to arrest Daoud an hour later that evening.

On Friday evening after Daoud's arrest, the German Minister of Interior telephoned the French authorities indicating that an extradition request would be forthcoming. The German Minister of Interior confirmed his telephone call later Friday evening by sending a telegram to the French Minister of Interior saying that an extradition request would be sent on Saturday morning.<sup>5</sup> The French, however, received a German *arrest warrant*, not the extradition request, through Interpol<sup>6</sup> on Saturday morning.

On Monday afternoon, January 10,<sup>7</sup> the head of staff of the French Foreign

Francisco): Communiqué Issued by the French Ministry of Justice Concerning the Release of Abou Daoud, January 11, 1977 [hereinafter Ministry of Justice Press Release]; *Interview Accordée par Monsieur Barre à l'Agence-France Presse sur l'Affaire Abou Daoud*, January 13, 1977; Excerpts of a Press Conference by Valéry Giscard D'Estaing President of the French Republic as Reported by the Agence France-Presse, January 17, 1977 (hereinafter D'Estaing Press Release).

<sup>3</sup>Daoud apparently was well known in Beirut; his picture appeared in local papers regularly. It is curious, therefore, that the French authorities in Beirut did not know Daoud's true identity when he applied for the visa. The French government claims that their agents' failure to recognize Daoud was understandable given the chaotic state of affairs in Beirut during the civil war. One might think, on the other hand, that precisely because of the state of affairs in Beirut and the French interest in the Middle East in general, the French agents should have known of Daoud's true identity before he entered France.

<sup>4</sup>*L'Express*, January 17-23, 1977, at 28; *New York Times*, January 12, 1977, at 1.

<sup>5</sup>The text of the telegram follows: "I officially announce that the German authorities will send to the French authorities tomorrow morning the extradition request for M. Abou Daoud, alias Saad Wali, alias Raji Youssef." *Id.* [Author's transl.]

<sup>6</sup>International Criminal Police Organization. Interpol is a nongovernmental organization which coordinates and expedites the flow of information between national police authorities. For a general description of Interpol, see I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 202-227 (1971).

<sup>7</sup>It should be noted here that Daoud's arrest was not made public until Sunday, January 9.

Ministry, Mr. Ulrich, contacted the *chargé d'affaires* of the German Embassy in Paris,<sup>8</sup> to ask for some "clarifications on the matter." (Although this last phrase is Giscard d'Estaing's characterization of the communication,<sup>9</sup> it is not clear what "clarifications" the French Foreign Ministry sought.) The German Embassy official said he had no information or instructions. Ulrich, therefore, invited the German official to call him later, but Ulrich never received the return call.

On Monday, January 10, the French authorities also received an arrest warrant from Israel through Interpol. Apparently, this arrest warrant was issued for the same crimes in Munich for which the Germans had issued an arrest warrant.<sup>10</sup>

Abou Daoud was brought before the *chambre des mises en accusation* of the *Cour d'appel* of Paris on Tuesday morning, January 11. The three-judge panel decided that Daoud could not be kept under provisional arrest by the authority of the German arrest warrant because the request for provisional arrest through Interpol had not been confirmed at the same time through diplomatic channels, as required by the German-French Extradition Treaty; because his identity was not properly verified;<sup>11</sup> and because there was no extradition request. The court decided that Daoud could not be retained in custody under the Israeli request for provisional arrest because the crimes he was accused of committing took place outside of Israel and because Daoud was not an Israeli national. The court also decided that Daoud could not be kept under French law since it made no provision for his prosecution.<sup>12</sup>

After Daoud was released from provisional arrest, he was taken to Orly Airport where he was put on the next plane to Algeria. The French Minister of Interior decided to expel Daoud from France because he had entered the country under a false identity.<sup>13</sup>

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<sup>8</sup>The German Ambassador to France was not in Paris during this period.

<sup>9</sup>D'Estaing Press Release, *supra*, note 2.

<sup>10</sup>Ministry of Justice Press Release, *supra*, note 2.

<sup>11</sup>Daoud was tried under his alias of Yousif Hanna Raji. The German arrest warrant, however, asked for the extradition of Abou Daoud. This conflict in names, in all probability, could be the only problem in verifying Daoud's identity, since Daoud apparently was well known in the intelligence communities.

<sup>12</sup>The French court decision was not published at the date of this writing. However, the reasons for the decision were uniformly reported in various government press releases and in most newspapers. There is little ground to believe that the original decision would add much to an understanding of the case. Unlike American court decisions which detail their reasoning in relatively long decisions, French court decisions are generally very brief and state only the basic legal principles behind their decisions without elaboration.

<sup>13</sup>It is difficult to understand how Daoud could be expelled from France because he had false identity papers when his identity could not be verified properly at his trial only several hours earlier.

**The German Request for Provisional Arrest<sup>14</sup>**

Extradition from France to West Germany is regulated by the Extradition Convention between France and the Federal Republic of Germany<sup>15</sup> and the French Law of March 10, 1927.<sup>16</sup> The 1927 law governs all matters not regulated by treaty, but the treaty takes precedence when a matter is covered both by the treaty and the 1927 law.<sup>17</sup> The legal problems of major significance in the Daoud case are covered by the German-French Extradition Treaty, but some reference to the 1927 law is necessary.

Daoud was placed under provisional arrest pursuant to the terms of the German-French Extradition Treaty and he was released, according to the French court, for Germany's failure to comply with the terms of the treaty governing *provisional arrest*. It should be borne in mind, therefore, that there is a distinction, common to most extradition treaties, between a *request for provisional arrest* and a *request for extradition*. The request for provisional arrest generally can be made by the judicial or police authorities of the requesting state directly to their counterparts in the requested state without utilizing diplomatic channels. This procedure allows for quick apprehension of the individual sought. The extradition request, on the other hand, must be made through normal diplomatic channels and must be accompanied by various documents specified in the treaty. This procedure can take much longer than the request for provisional arrest and sometimes can allow the individual sought time to escape.

A further distinction is made in the German-French Treaty between the request for provisional arrest and the *diplomatic confirmation* of that request. Thus, there are three steps to the procedure: first, the request for provisional arrest made by the judicial authorities of the requesting state; second, the diplomatic confirmation of the request for provisional arrest; and, third, the extradition request which is the formal request from one government to another.

Daoud's provisional arrest was governed by Article 9 of the German-French Treaty. Article 9 provides for provisional arrest when it is feared that the in-

<sup>14</sup>For a general discussion of the extradition process, see I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971). S. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* (1966), contains a detailed description of the historical practice of extradition.

<sup>15</sup>*Convention d'extradition entre la France et la République Fédérale d'Allemagne*, November 29, 1951 in *Journal Officiel de la République Française* at 11524 (December 2, 1959); *Décret n° 59-1352*. (Hereinafter German-French Extradition Treaty.)

<sup>16</sup>Dalloz, C. PR. PEN. 355-61 (1975); HARVARD RESEARCH IN INTERNATIONAL LAW 365-370 (1935). This article is based on the Harvard Research translation of the Law of March 10, 1927.

<sup>17</sup>Law of March 10, 1927, *id.*, Art. 1, states:

In the absence of a treaty, the conditions, the procedure and the effects of extradition are determined by the provisions of the present law.

The present law applies as well to matters which are not regulated by treaties.

dividual sought will escape and requires that the request be made directly by the judicial authorities of the requesting state in a form which will leave written evidence of the request. It also requires in paragraph 3 that "(t)he request, at the same time, must be confirmed through diplomatic channels."<sup>18</sup>

The *chambre des mises en accusation* released Daoud because France did not receive diplomatic confirmation of the request for provisional arrest *at the same time* as the request from the judicial authorities. Two basic questions are presented by this decision: (1) did France receive diplomatic confirmation by the time of the hearing and, if not, (2) how long should France have waited to receive diplomatic confirmation?

(1) *Diplomatic Confirmation.* At the time of Daoud's hearing on Tuesday, January 11, the French police had received an arrest warrant through Interpol; the French Minister of Interior had received a telephone call and a telegram from the German Minister of Interior confirming Germany's intent to ask for Daoud's extradition; and the French Foreign Ministry chief of staff had requested further information from the *chargé d'affaires* of the German Embassy in Paris.

At first glance, these communications would appear sufficient to confirm Germany's request for provisional arrest. Article 9 of the treaty, however, specifically requires that the request for provisional arrest be confirmed through *diplomatic* channels. Any of the above communications may have been sufficient to *request* Daoud's arrest, but they were not sufficient to *confirm* that request.

Confirmation through diplomatic channels means that the communication of the confirmation must be made by those empowered to represent a state in its foreign relations. None of the German officials who communicated with the French authorities, except the embassy official who relayed no information, had the power necessary to represent Germany in its foreign relations. Only German Embassy officials in Paris or Foreign Ministry officials in Bonn would have had the requisite authority.

The requirement of diplomatic confirmation serves to protect the requested and the requesting states and the individual sought. In a federal nation like Germany—or like the United States—it protects the national government from

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<sup>18</sup>German-French Extradition Treaty, *supra*, note 15, Art. 9:

At the direct request of the judicial authorities of the requesting state, the individual sought shall be provisionally arrested when it is feared that he will escape from extradition or make the determination of the truth more difficult.

A simple notice to this effect serving as written evidence [*trace écrite*] or the material equivalent, of the existence of one of the documents indicated in the second paragraph of the preceding article will suffice.

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

The requesting state shall be informed of the provisional arrest or the reasons it cannot be carried out.

[Author's transl.]

being embarrassed or bound by *ultra vires* acts of state officials. Diplomatic confirmation also protects the requested state from taking actions based on information from minor officials of the requesting state who cannot legally bind the requesting state to a course of action in international affairs. Finally, diplomatic confirmation protects the rights of the individual sought; he can be deprived of his liberty for a substantial period of time only when those who have the actual power to request his extradition can confirm the request for his provisional arrest.<sup>19</sup>

Assuming the Germans had sufficient time to confirm their provisional arrest request, the French court had to release Daoud because it did not have diplomatic confirmation of the request. The jurisdictional basis for holding Daoud was provided in Article 9 of the German-French treaty. The power conferred by that article, however, is expressly predicated on the receipt of diplomatic confirmation. Lacking diplomatic confirmation, the French court also lacked the power to hold Daoud in custody under the provisions of the treaty.

(2) *Deadline for Receiving Diplomatic Confirmation.* The preceding discussion of diplomatic confirmation assures that the German authorities had adequate time to confirm the arrest request through diplomatic channels. The next logical question, of course, is: was Germany allowed sufficient time to communicate its diplomatic confirmation to France?

Article 9, paragraph 3 of the treaty provides that the provisional arrest request must be confirmed *at the same time* through diplomatic channels. France received the Interpol arrest warrant on Saturday morning, January 8 and Daoud's hearing was convened on Tuesday morning, January 11. The *chambre des mises en accusation* decided, in effect, that "at the same time" means the diplomatic confirmation must be received within at least three days.<sup>20</sup>

A brief summary of the French method of treaty interpretation is necessary before discussing the interpretation of Article 9, paragraph 3 of the treaty. It should be remembered that French courts exercise less latitude in interpreting treaties than American courts. In matters of public international law, as in this case, if the terms of the treaty are deemed to be clear and precise, the court is bound to apply the terms almost literally. If the terms are not clear and precise, the matter must be referred to the Foreign Ministry for an authoritative interpretation.<sup>21</sup>

<sup>19</sup>For a more thorough discussion of the rights of the accused, see Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 491-94 (1975).

<sup>20</sup>The extent to which the interpretation of the phrase "at the same time" was before the court is unclear. It is, however, the position of this writer that the court, as an arm of the French government, was under an international legal obligation to interpret this phrase in accordance with international law, despite any provisions of the domestic legal system to the contrary. See *infra*, at 29.

<sup>21</sup>DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 161-66 (1976).

These rules of interpretation reflect the basic notion in civil law countries that the judiciary's function is merely to apply the law as written by the legislature. In theory at least, the codes enacted by the legislature will be clear enough for any citizen to understand and will require no interpretation by the courts, only their application. This theory underlying the civil law codes prevents the judiciary from assuming primarily legislative functions.<sup>22</sup>

In treaty matters, the courts' reluctance to assume any interpretive function is in recognition of the supremacy of the executive and legislative branches in foreign affairs. Since only the executive, with legislative approval, can enter into treaties, the courts will not presume even to interpret the nature of the relationships which have been formed.

Inasmuch as the French court did not refer the phrase "at the same time" to the Foreign Ministry for interpretation, the court must have believed the phrase to be clear and precise. In this situation, applied literally, Article 9, paragraph 3 naturally would require that diplomatic confirmation follow almost immediately upon the provisional arrest request from the German judicial authorities and certainly within three days.

The French court interpretation of the phrase "at the same time," however, does not correspond to the context in which it appears; even less does it correspond to the purpose of the articles in the treaty allowing provisional arrest.<sup>23</sup> If Article 9 was meant to be literally interpreted, it might have required more simply that the provisional arrest request be made directly through diplomatic channels.

It is easier to understand Article 9 when read in the context of Articles 8 and 10 of the treaty. Article 10 is the only other part of the treaty which deals specifically with provisional arrest; it provides that the provisional arrest may be ended within twenty days of the arrest if certain documents mentioned in Article 8 have not been received by the requested state.<sup>24</sup> Article 8 deals mainly

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<sup>22</sup>For a general discussion of the judicial function in the civil law system, see MERRYMAN, *THE CIVIL LAW TRADITION* (1969); DEVRIES, *FOREIGN LAW AND THE AMERICAN LAWYER* (1969); and DEVRIES, *CIVIL LAW AND THE ANGLO-AMERICAN LAWYER* (1976).

<sup>23</sup>The Vienna Convention on the Law of Treaties, Article 31, paragraph 1 provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." U.N. Doc. A/CONF. 39/27, May 23, 1969; 63 AM. J. INT'L L. 885 (1969). The Vienna Convention is not in force and would not be binding in this case since it is not retroactive. Article 31, however, does state general principles of treaty interpretation which are applicable here.

<sup>24</sup>German-French Extradition Treaty, *supra*, note 15, Art. 10:

It shall be possible to end the provisional arrest if the requested government has not been given one of the documents mentioned in the second paragraph of Article 8 within twenty days after the arrest.

This delay will be extended by two months if the request comes from a judicial authority outside of Europe.

The release of the individual will not become an obstacle to arrest and extradition if the request for extradition arrives later.

[Author's transl.]

with the nature of the extradition request (not the provisional arrest request) and states that the extradition request shall be accompanied "either by a judgment or an enforceable order of sentence, by an arrest warrant, or by any other order having the same force and issued by the judicial authorities."<sup>25</sup> These latter documents are those which must be received within twenty days, according to Article 10, if the provisional arrest is to be maintained.

A plausible, literal interpretation of Articles 8 and 10 would yield essentially the following meaning: If the requested state receives a judgment, an arrest warrant, or an equivalent order, within twenty days of the arrest, it cannot release the individual sought, assuming the other bases of its jurisdiction have been met. If the requested state does not receive one of these documents, it *may* release the individual. Moreover, no time limit is set for receipt of the extradition request.

In this context, the French court's interpretation of the requirement that diplomatic confirmation be received at almost literally the same time as the request becomes questionable. According to the above interpretation, no time limit is set for receipt of the extradition request, and it is the only other diplomatically communicated information. Moreover, the arrest warrant, which need not be communicated through diplomatic channels, need not be transmitted for twenty days. It appears, even according to a literal interpretation, that a considerable length of time was intended to be allowed for diplomatic communication. If the treaty's authors allowed so much time for diplomatic, and even nondiplomatic communication, why would they expect diplomatic confirmation of the provisional arrest request at literally the same time as the request?

If the French court had more critically examined the context in which the phrase "at the same time" appears, it would have realized the improbability of its interpretation. And had the French court realized the problems of interpreting paragraph 3 of Article 9, it would have been compelled to ask for an interpretation from the Foreign Ministry, which hopefully would have been more consistent with the context and purpose of the treaty.

A more satisfactory construction of Article 9 results from a more natural in-

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<sup>25</sup>German-French Extradition Treaty, *id.*, Art. 8:

The extradition request shall be transmitted through diplomatic channels.

It shall be accompanied either by a judgment or an enforceable order of sentence, by an arrest warrant, or by any other order having the same force and issued by the judicial authorities. These documents must contain a precise indication of the acts for which they were issued and of the date when, and the place where, the acts were committed.

The documents mentioned above must be produced in the original or authenticated copy. To the extent possible, the civil status of the individual claimed, his nationality, and his description shall be indicated. A statement of the facts and a copy of the texts of the applicable laws shall be enclosed.

[Author's transl.]



terpretation of the context in which it appears and an examination of the purpose of the provisional arrest process. Although Article 10 of the treaty appears to require only that an arrest warrant or some similar document be received by the requested state within twenty days, it is more likely that it was intended to require that the extradition request and the supporting documents, such as the arrest warrant, be received within twenty days. The length of the provisional arrest more naturally depends on when the extradition request is received than on when a supporting document is received. In fact, both France and Germany interpreted the treaty to require the extradition request to be received within the twenty-day period.

Twenty days are allowed for diplomatic communication in the context of extradition treaties because such communication requires both legal and political judgment and decision-making. The public prosecutor and the judiciary of the requesting state must determine, first, whether there is sufficient evidence against the individual sought to warrant a trial. This decision must then be communicated to those responsible for foreign affairs and a political determination of whether to proceed with the extradition request must be made. In the political context, the nature of the crime, the status of the individual sought, and relations with the requested state may be factors to be considered before requesting extradition.

Diplomatic communication of an extradition request, if viewed as including the process of decision-making, can take a considerable length of time. Diplomatic confirmation of the request for provisional arrest, on the other hand, is a preliminary determination by the requesting state that extradition will be sought. It requires a consideration of some of the same factors as are considered before making a request for extradition, but in a shorter time. Diplomatic confirmation of a request for provisional arrest binds the requesting state to nothing but, depending on the nature of the crime and status of the individual sought, can have serious consequences for the requesting state—for example, the risk of terrorist activities in the Daoud case.

It is highly unlikely that even a preliminary determination of the legal and political factors involved in a request for extradition could be made at literally the same time as the request for provisional arrest. The request for provisional arrest need involve only the local police and judicial officials. Diplomatic confirmation of the request, however, must also involve national officials and decisions of a different nature. A reasonable period of time for confirmation through diplomatic channels, therefore, must be allowed after the request for provisional arrest.

Since the German-French Treaty requires that diplomatic confirmation of the request for provisional arrest be made *at the same time* and since this term cannot withstand literal interpretation, the meaning of this phrase remains a

problem. The treaty allows twenty days for the extradition request to be made and it, of course, must be made through diplomatic channels. As evidence of the amount of time allowed for diplomatic communication, this suggests that at least several days should be allowed for diplomatic confirmation of the request for provisional arrest.<sup>26</sup>

Viewed in the context of the Daoud case, three days is a relatively short time for diplomatic confirmation. Inevitable questions about the propriety of prosecuting Daoud must have arisen: such as whether the evidence against him was sufficient to go to trial;<sup>27</sup> whether the likelihood of conviction outweighed the risk of possible terrorist attempts to free him;<sup>28</sup> and the extent to which Germany wanted to place France in a position of having to determine whether the crimes in Munich were political, since France was not under a duty to extradite for political crimes.<sup>29</sup> Moreover, it must be recalled that Germany is a federal state, and intra-governmental communication is required. The Bavarian officials had to meet, make preliminary decisions about the extradition request, communicate those decisions to Bonn, and, then, Bonn had to go through the same process before communicating those decisions to the French authorities. This process easily could have taken more than three days, especially given the fact that it was done over a weekend. To have allowed the Germans several more days in which to confirm the request for provisional arrest certainly would not have defeated the purpose of the treaty and, in fact, may have been more in line with the objectives of the provisional arrest process.

A specific time limit within which diplomatic confirmation of the provisional arrest request must be received cannot be determined in the abstract given the terms of the German-French Treaty. The time limit, rather, must be determined on a case by case basis. This proposition is supported by the fact that it would have been a simple matter for the treaty's negotiators to have set a specific time limit, such as five days, had they desired to do so. The phrase "at the same time" indicates that rapid confirmation was the goal, but just how rapid it should be depends on many factors already discussed and, of course, on the right of the individual sought to a determination of his fate as soon as possible.

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<sup>26</sup>A spokesman for the German Ministry of Justice contended that the treaty allowed Germany twenty days in which to confirm the request for provisional arrest. *Bonn: ne pas assombrir les relations franco-allemandes*, Le Monde, January 14, 1977, at 2. The treaty allows twenty days for the arrival of the extradition request but obviously does not allow that much time for confirmation of the provisional arrest request.

<sup>27</sup>Since Daoud allegedly organized the Munich murders from behind the scenes in a Munich hotel, evidence of his participation may be circumstantial and controversial.

<sup>28</sup>Members of Black September once attempted to free Daoud from imprisonment in Jordan by holding five hostages in Khartoum. *L'Express*, January 17-23, 1977, at 26.

<sup>29</sup>Article 4 of the German-French Treaty provides that extradition need not be granted if the requested state considers the crime a political offense. See p. 31, *infra*, for further discussion.

Not only could more time have been allowed for diplomatic confirmation of the provisional arrest request in the circumstances of the Daoud case, but more time may have been required by past practice. German officials contended after Daoud's release that the court's decision did not reflect Germany's justifiable reliance on past practice.<sup>30</sup> Although the German officials did not indicate precisely in what respects the decision did not conform with that practice, it can be assumed fairly that they believed they had more time in which to confirm the provisional arrest request.

The Vienna Convention on the Law of Treaties<sup>31</sup> states in Article 31 that one of the factors which may be considered in the interpretation of a treaty is past practice, which can help to establish the interpretation the parties intended a particular term to have. If the German contention that the decision did not conform to past practice were confirmed, it would add even greater weight to the argument that the French should have allowed more time for the diplomatic confirmation of the arrest request.

*Pacta sunt servanda*—Every treaty is binding and must be performed in good faith<sup>32</sup>—is, perhaps, the principle of international law most damaging to the French government's position in the Daoud case. *Pacta sunt servanda* does not mean simply that a state must avoid defeating the purpose of a treaty. It also means that a state must act positively to perform the duties imposed by the treaty and to effectuate its purpose. The obvious purpose of the German-French Extradition Treaty is to allow the rendition of suspected criminals. One of the duties each party undertakes in this respect is to maintain individuals sought under provisional arrest until a request for extradition arrives.

As stated earlier, the Law of March 10, 1927<sup>33</sup> governs any matter not regulated by the treaty. Since the treaty does not regulate the timing of hearings, it is governed by the law of 1927. Article 14 of the 1927 law provides that a hearing will be held not later than eight days after the *chambre des mises en accusation* has received copies of two interrogations of the accused, which would have taken place at most two days after his arrest, and any other documents relevant to the extradition proceeding. It also provides that the government or the accused may request a delay of an additional eight days before the hearing.<sup>34</sup>

<sup>30</sup> *Bonn: ne pas assombrir les relations franco-allemandes*, Le Monde, January 14, 1977, at 2. A footnote to this article suggests that until the time of the hearing, even the French judicial authorities admitted that in practice the confirmation of the provisional arrest request did not need to be received until the end of the twenty-day period.

<sup>31</sup> *Supra*, note 23.

<sup>32</sup> Article 26 of the Vienna Convention on the Law of Treaties states the principle of *pacta sunt servanda* in almost the same language. *Supra*, note 23.

<sup>33</sup> *Supra*, note 16.

<sup>34</sup> Art. 14 of the Law of March 10, 1927, *id.*, states:

The *Chambre des mises en accusation* has laid before it without delay the mentioned *procès-*

Abou Daoud was arrested on Friday evening, January 7, and the hearing after which he was released was held three and a half days later on Tuesday morning, January 11. According to French laws, Daoud could have been held at least an additional four and a half days before his hearing. This might have been sufficient time for Germany to confirm its request for provisional arrest. Moreover, the French government could have requested an additional eight days before the hearing on Tuesday the 11th, thus allowing Germany still more time to send its confirmation. In all, the French government conceivably could have postponed the hearing for a total of 16 days.

It would have been a simple matter for the French to have requested a further eight days before the hearing to allow Germany a reasonable time in which to confirm their request for provisional arrest. In fact, it could be argued that the French government was under a good faith duty to request such an extension in order to effectuate the purpose of the treaty. This action would not have required the French government to perform an essentially German duty—the concept of *pacta sunt servanda* could not be stretched this far—but would have allowed Germany a reasonable time in which to perform its obligations.

In Daoud's case, the international importance of, and the German interest in, prosecuting Daoud was abundantly clear to the French government. Moreover, Daoud's crimes clearly fell among those for which France had undertaken a duty to extradite.<sup>35</sup> Especially under these circumstances, the French government should have taken at least minimal steps within its power to insure that Daoud remained under provisional arrest.<sup>36</sup>

### *French Executive Influence*

The French judiciary is traditionally independent of political influence. Since before the Revolution, the French generally have been more concerned with judicial interference in executive matters than they have been with executive interference in judicial matters. In the two centuries since the Revolution, the French judiciary has assumed a very different character from its counterparts in common law countries. Judges in France are viewed more as civil servants than as professionals exercising a high degree of independent

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*verbaux* [interrogations] and all other documents. The alien shall appear before it not later than eight days from the receipt of the documents. At the request of the representative of the State or of the person appearing, an additional period of eight days may be granted before the hearing.

<sup>35</sup>An accomplice to murder clearly would be among those whom France had a duty to extradite, notwithstanding that the offense might be considered a political crime. *Supra*, note 29.

<sup>36</sup>The French court also felt that Daoud's identity was insufficiently established. This point need not be discussed at length because it is reasonably clear that the French authorities had sufficient evidence to establish Daoud's identity if it were necessary. *See supra*, note 10 and note 13. It should also be noted that Article 8 of the German-French Treaty requires a description of the individual sought to accompany the extradition request, but not the provisional arrest request.

authority and do not command the high respect they generally do in, for example, the United States. And like other civil law countries, the role of the judge is to apply strictly the laws passed by the legislature; the French judge does not have the same latitude in interpretation that an American judge has.<sup>37</sup>

In extradition proceedings, French law provides, as do the laws of many other states, that the judiciary will first determine whether the individual sought may be extradited according to the treaty and applicable municipal laws. If the judiciary decides that the individual sought cannot be extradited, the process must end and the individual must be released. If the judiciary decides the individual can be extradited, however, then it still remains for the executive to decide whether to extradite or not.<sup>38</sup>

In the Daoud case, the French government was under pressure from numerous Arab governments not to extradite Daoud and it was under the opposite pressure from Western European and American governments. Clearly, the desire simply to avoid a governmental (i.e., political) decision must have been great. The simplest way out of that situation for the French government was for the judiciary to turn down the German request. To those who protested the decision, the government could simply reply that it was a judicial matter in which the executive could not interfere.

The refusal of the German request by the judiciary, rather than by the executive, was advantageous to the French in several respects. It allowed the French to continue to develop their role as a mediator in the Middle East conflict. The decision to release Daoud, of course, pleased the PLO and the Arab governments. And although Daoud's release caused Israel to recall temporarily its ambassador from Paris, his release on legal grounds avoided the ultimate political decision by the executive which surely would have enraged either the Arabs or the Israelis. On a short-term basis, the decision to release Daoud permitted France to proceed shortly thereafter with the sale of 200 Mirage jets to Egypt; and, in the long run, the decision may have helped solidify even vaster sales of goods and services in the Arab countries. The decision also assured a more fruitful trip for Giscard d'Estaing when he visited Saudi Arabia shortly after Daoud's release. Moreover, the decision precluded the possibility of any terrorist acts in France either to release Daoud or to avenge his extradition to Germany.

Notwithstanding the numerous reasons for the French government to have found the judicial decision the easiest way out of a very difficult situation, there is not direct evidence of executive interference in the judicial proceedings and there is only some circumstantial evidence of such interference. The most

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<sup>37</sup>For a general discussion, see MERRYMAN, *THE CIVIL LAW TRADITION* (1969).

<sup>38</sup>Art. 17 and 18 of the Law of March 10, 1927. *Supra*, note 16.

curious evidence of executive interference, or, at least, negligence, is the timing of the hearing.

As mentioned previously, the French court was not required to hear Daoud's case until eight days after it had received copies of two interrogations, which would have taken place at most two days after his arrest; and the French prosecutor could have postponed the hearing for an additional eight days. It is possible that the French executive either requested that the time of the hearing be advanced, or did not ask for an extension, in order to allow the court to release Daoud for lack of a diplomatic confirmation of the request for provisional arrest. In fact, one press report<sup>39</sup> suggested that the *chambre des mises en accusation* usually held hearings on extradition matters on Mondays and had advanced this case by six days to Tuesday because the prosecutor saw no reason to wait.<sup>40</sup> One can only speculate as to why the hearing was advanced and why an extension was not requested by the French government.<sup>41</sup>

### **The Israeli Request for Provisional Arrest**

On Monday evening, January 10, Israel requested Daoud's provisional arrest through Interpol. This request was for the same crimes in Munich as those for which the Germans had requested his extradition. On Tuesday morning the French court decided that Daoud could not be held under the Israeli request because there was no way in which Daoud could have been extradited to Israel, even if an extradition request had been forthcoming. Daoud could not be extradited to Israel, according to the French court, because the crimes were not committed in Israel and Daoud did not have Israeli citizenship.

The Israeli request for provisional arrest was governed by the Extradition Convention between France and the State of Israel<sup>42</sup> and the Law of March 10, 1927.<sup>43</sup> The Israeli request for provisional arrest, unlike the German request, must have been formally proper according to the terms of the treaty since the court based its decision on the impossibility of extraditing Daoud to Israel, rather than on a procedural failure in the arrest request. Article 10 of the French-Israeli Treaty states that the provisional arrest may be suspended at any time but that it cannot last longer than sixty days.<sup>44</sup> According to this arti-

<sup>39</sup>The Economist, January 15, 1977, at 43.

<sup>40</sup>It should be noted here that the prosecutor is an agent of the Minister of Justice and serves as a liaison between the executive and the judiciary. See N. Dunbar, *The French Magistracy*, TASMANIA U.L.R. 159 (1969).

<sup>41</sup>The prosecutor could not have appealed the decision after the trial. Law of March 10, 1927, Art. 16, *supra*, note 16.

<sup>42</sup>805 U.N.T.S. 251 (November 12, 1958). (Hereinafter French-Israeli Extradition Treaty.)

<sup>43</sup>*Supra*, note 16. Israel contended that the European Convention on the Suppression of Terrorism was also applicable. This treaty, however, had not been ratified. See *infra*, note 55.

<sup>44</sup>French-Israeli Extradition Treaty, *supra*, note 42, Art. 10:

Such a provisional arrest may be suspended at any time; it shall cease automatically if, within

cle, therefore, the French were allowed to release Daoud any time they determined that he could not be held legally under provisional arrest. This article does not require that the individual sought be held up to the full sixty days allowed as contended by Israel.

The French-Israeli Treaty is silent on the propriety of extraditing an individual who is not a national of the requesting or requested state and who is accused of committing a crime in a third state. Article 3 of the 1927 law, however, does deal directly with this issue and provides that an alien (a person who is not a national of either requested or requesting states) who commits a crime in a third state can be extradited only if the crime is punishable by the laws of the requested state.<sup>45</sup> Since Daoud is an alien to both France and Israel and the crimes were committed in Germany, he could have been extradited to Israel only if the murders in Munich could have been prosecuted under French law.

But French law would not have allowed Daoud to be prosecuted in France for the crimes in Munich. The laws which come the closest to allowing prosecution are those which allow the prosecution of an alien for crimes committed aboard an aircraft.<sup>46</sup> And for such a crime, there must be some connection with France, such as a French passenger or a French airplane. These laws, moreover, came into effect in July of 1975 and could not be applied retroactively.<sup>47</sup>

It was suggested in one press account that Israel was contemplating prosecuting Daoud for other crimes in addition to the Munich murders.<sup>48</sup> The French, however, were not aware of this at the time of the hearing since the warrant they received through Interpol only mentioned that Daoud was wanted for the Munich murders. At the time of the hearing, therefore, the French court could not hold Daoud under the Israeli request it had in hand since it was impossible to extradite him under that request and it could not hold him on the mere expectancy of receiving warrants for other crimes.

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a period of 60 days from the day of arrest, the requested state has not received the request for extradition accompanied by the documents described in Article 9.

<sup>45</sup>Law of March 10, 1927, *supra*, note 16, Art. 3:

[E]xtradition is granted only if the offense which is the basis of the request has been committed:

Either within the territory of the requesting State by a subject of that State or an alien;

Or outside of its territory by a subject of that State;

Or outside of its territory by a person, an alien to that State, when the offense is one of the number of those which the French law authorizes prosecution in France, even though they have been committed by an alien abroad.

<sup>46</sup>Dalloz, C. PR. PEN., Arts. 689-96 (1975).

<sup>47</sup>Dalloz, C. PEN., Art. 4 (1975).

<sup>48</sup>The Economist, January 15, 1977, at 46. Among these crimes were the shooting of an Israeli diplomat in Brussels on September 10, 1972 and the seizure of the Israeli Embassy in Bangkok on December 18, 1972.

## Conclusion

The inescapable conclusion is that the French handled Daoud's extradition case poorly. The French court's interpretation of Article 9 of the German-French Treaty, although literally correct, failed to consider the significance of the difference between the request for provisional arrest, which allows the quick apprehension of the individual sought, and the diplomatic confirmation of that request, which requires sufficient time to make preliminary legal and political decisions.<sup>49</sup> Even if one assumes that the court's interpretation of Article 9 was correct, it is very difficult to excuse the French prosecutor's failure to seek a stay of the proceedings for an additional eight days under Article 14 of the Law of March 10, 1927.

On the other hand, the French court and prosecutor did not act inconsistently with domestic law; and in this sense, the Daoud decision was perfectly valid in the domestic system. If, however, one takes the position that international law creates paramount obligations binding on states and that a state cannot plead the provisions of its domestic law which are contrary to international law as a defense to international legal obligations, then it is at least arguable that the French action violated international law.<sup>50</sup> For, the French executive violated an international legal duty to perform its treaty obligations in good faith (*pacta sunt servanda*),<sup>51</sup> and the court disregarded international legal canons of treaty interpretation.<sup>52</sup> It follows that as both the judiciary and the executive are simply arms of the state, and equally subject to the rules of international law, and again, since international legal principles, such as *pacta sunt servanda*, preempt national law,<sup>53</sup> the French government acted in violation of international law.

Given the nature of the French political position in the Middle East and given the timing of the hearing, it is difficult to believe there was no pressure from the government, even if only indirect, to release Daoud. It is interesting to note that although Daoud entered France with a false passport and a false visa, he was immediately deported from France after the proceedings. Had Daoud been held on false identity charges, Article 10 of the German-French

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<sup>49</sup>In civil law countries, a court decision creates no binding precedent. If a case like Daoud's arose again in France, the court would be free to make a different interpretation of Article 9 of the German-French Treaty.

<sup>50</sup>See Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 HAGUE RECUEIL I, 70-80, Vol. II (1957).

<sup>51</sup>*Pacta sunt servanda* is a fundamental principle of international law and it is generally recognized as a peremptory norm. For a definition of a peremptory norm, see Vienna Convention on the Law of Treaties, Art. 53, *supra*, note 23.

<sup>52</sup>Rules of treaty interpretation remain controversial. But it is considered here that treaty terms must be interpreted to have their ordinary meaning *in their context and according to their purpose*. *Supra*, note 23.

<sup>53</sup>*E.g.*, see Vienna Convention on the Law of Treaties, *id.*, Art. 27; *cf.*, Article 63 of the Vienna Convention.



Treaty at least would have allowed Germany to make a rapid decision to submit a request for extradition.<sup>54</sup> Daoud's earlier release would not have prejudiced a later request for extradition.

The international legal reactions to terrorism have been slow, but there is some hope that problems like those in the Daoud case will be avoided in the future. The European Convention on the Suppression of Terrorism<sup>55</sup> adopted by the Committee of Ministers of the Council of Europe in November of 1976 contains provisions which would help to circumvent two potential problems. First, it provides that each contracting state will take such measures as are necessary to establish its jurisdiction to prosecute terrorist acts in cases where it does not extradite an individual.<sup>56</sup> Second, it provides that certain types of crimes commonly committed by terrorists will not be considered political offenses for extradition purposes.<sup>57</sup>

French criminal laws, like many others, do not generally provide for the exercise of jurisdiction over crimes committed abroad. Assuming the European Convention on Terrorism were to be ratified by the French government, the latter would come under an obligation to establish laws which would permit the extraterritorial reach of French criminal laws for terrorist crimes. And in a case such as Daoud's, the French government would be under a duty to prosecute if it did not extradite. Unfortunately, the French government could not have prosecuted Daoud even if the treaty had been in force because the treaty could not be applied retroactively.

Most extradition treaties contain a loophole for the requested state not to extradite if it considers the offense a political crime, but the European Convention on Terrorism would not allow this exception for certain types of ter-

<sup>54</sup>For the text of Art. 10, see *supra*, note 24.

<sup>55</sup>15 INT'L LEGAL MATERIALS 1272 (1976). As mentioned in note 43, *supra*, the European Convention on Terrorism which was opened for ratification on January 27, 1977, is not yet in effect. Both France and Germany are signatories.

<sup>56</sup>European Convention on the Suppression of Terrorism, *id.*, Art. 6:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over an offense mentioned in Article 1 in the case where the suspected offender is present in its territory and it does not extradite him after receiving a request from a Contracting State whose jurisdiction is based on a rule of jurisdiction existing equally in the law of the requested State.

<sup>57</sup>European Convention on the Suppression of Terrorism, *id.*, Art. 1:

For the purposes of extradition between Contracting States, none of the following offenses shall be regarded as political offenses or as an offense connected with a political offense or as an offense inspired by political motives:

- c. a serious offense involving an attack against life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offense involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offense involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.

rorist activities, such as the taking of hostages. It is difficult to know whether the French government would have considered Daoud's crimes "political" since the Law of March 10, 1927 merely speaks of nonextradition for crimes of a political character and the treaty provides no further guidance.<sup>58</sup>

No workable definition of a political crime has ever been suggested and, in practice, the reasons for classifying a crime as political are so diverse as to defy categorization.<sup>59</sup> But a fair test might be to weigh the political motivation for the crime, and the likelihood of political persecution if the request were granted, against its gravity and the means used to perpetrate it. Applying this test to the Daoud case, one would be unlikely to find his alleged crimes political. Although there were strong political motives for the crimes, whether right or wrong, they are far outweighed by the gravity of the crimes and the means used to perpetrate them. Kidnapping and murder of innocent civilians is intolerable when committed near the center of the political controversy, even in a state of war, but they are even more odious when done far from the actual conflict where no actual, direct political effect is likely. And there was little likelihood that Daoud would be politically persecuted in Germany. It must be admitted, however, that such a test would be no better than those charged with applying it.

There is a strong need for additional multipartite treaties like the European Convention on the Suppression of Terrorism. Such treaties could go far towards eliminating substantive problems in the extradition of terrorists. But even these treaties will be useless if they are not enforced in good faith by national authorities.

Finally, it must be mentioned that although the German-French Extradition Treaty could have worked in the Daoud case had it been interpreted properly and applied in good faith, it is not a model of clarity. Efforts to update the timeworn concepts of extradition treaties to meet the exigencies of the times must be made.

In Daoud's case, however, it was not just the treaty which allowed the release of a confessed international terrorist—for, as noted, the treaty was not all that deficient—it was the French government, as well. Unfortunately, those French officials charged with executing the German-French Extradition Treaty either failed to recognize, or chose to ignore, fundamental international legal duties. Certainly, much can be done to improve the international response to terrorism, but only when government officials perform their treaty obligations in elementary good faith, will the efforts to counteract terrorism become effective.

<sup>58</sup>Law of March 10, 1927, *supra*, note 16, Art. 5.

<sup>59</sup>For a general discussion of political offenses, see S. BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 179-92 (1966) and I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 166-93 (1971).