Vanderbilt Journal of Transnational Law

Volume 19
Issue 1 *Winter 1986*

Article 3

1986

Terrorism, Extradition, and FSIA Relief: The Letelier Case

Eric H. Singer

TERRORISM, EXTRADITION, AND FSIA RELIEF: THE LETELIER CASE

*Eric H. Singer**

TABLE OF CONTENTS

I. INTRODUCTION

The 1976 car-bombing of former Chilean foreign minister Orlando Letelier and his American aide, Ronnie Moffitt, in Washington, D.C. has been called a "monstrous"[1] crime and "the most heinous terrorist act ever carried out in the United States."[2] After two years of intensive investigation by the Justice Department, the FBI, and the United States Attorney's office, United States officials believed that the assassination was ordered, if not by Chilean dictator Augusto Pinochet himself, then by his friend and trusted adviser, General Manuel Contreras. Contreras headed

---

* M.A., Yale University, 1985; doctoral candidate in political science, Columbia University.

1. Statement by Judge Barrington D. Parker, Wash. Post, March 24, 1979, p. A11.

2. *United States Economic Sanctions Against Chile, House Committee on Foreign Affairs*, 97th Congress, 1st Sess. 73 (1982) (statement of Michael Tigar, attorney for Isabel Letelier and Michael Moffitt).

Chile's secret police, the *Direccion de Intelligencia Nacional* (DINA).[3] Contreras apparently authorized his chief of operations, Colonel Pedro Espinoza, to enlist two DINA agents, Armando Fernandez and expatriate American Michael Vernon Townley, to follow Letelier and assassinate him. Townley subsequently recruited several anti-Castro exiles to help him assemble, plant, and detonate the car bomb.[4] Later evidence indicated that Townley orchestrated a similar car-bombing in Buenos Aires in 1974 that killed General Carlos Prats Gonzales, former Commander-In-Chief of the Chilean Armed Forces, and his wife.[5]

As United States officials investigated Letelier's assassination, they requested Chile's permission to question Townley. After the United States had applied considerable pressure and Chile had signed a secret agreement with United States prosecutors,[6] the Chileans deported Townley to the United States in April 1978. After being arrested, Townley turned "state's evidence" in a plea

---

3. For Chile analysts, the suspected involvement of the Pinochet regime in Letelier's murder was unsurprising. Letelier had distinguished himself as a leader of anti-junta Chilean exile forces, and by 1976 he posed a credible threat to Pinochet. Once Foreign Minister, Defense Minister and Ambassador to the United States under Marxist President Salvador Allende, Letelier had been banished by Pinochet in 1973 and when released a year later, chose to seek political asylum in the United States. At his post at the leftist Institute for Policy Studies in Washington, D.C., Letelier campaigned against human rights violations in his native country and lobbied to block aid to Chile. At the trial of the five Cubans involved in the Letelier assassination, Senator George McGovern testified that conversations he held with Letelier in 1975 led him, in part, to vote for the 1976 legislation cutting off military assistance and sales to Chile. Relus ter Bek, a leading Dutch Social Democrat, testified that in 1976 Letelier made several trips to the Netherlands where he succeeded in convincing the Stevin group, a large Dutch industrial concern, to abandon its proposed $62.5 million investment package in Chile. N.Y. Times, Jan. 17, 1979, at A7.

4. Complete accounts of the Letelier assassination and investigation can be found in JOHN DINGES & SAUL LANDAU, ASSASSINATION ON EMBASSY ROW (1980) and in TAYLOR BRANCH & EUGENE M. PROPPER, LABYRINTH (1982).

5. N.Y. Times, March 8, 1979, at A3.

6. The agreement, signed by Chilean Deputy Interior Minister Enrique Montero and United States Attorney E. Lawrence Barcella (for Earl J. Silbert) on April 7, 1978, included the following:

> 1. That information obtained through the Letelier investigation with respect to actions by Chilean Nationals in the United States may be used to investigate and prosecute violations of law in the United States;
>
> 2. That there will be no other use of this information by the United States and it will be conveyed only to the Government of Chile to be used by its investigators for possible prosecutions. . . .

bargaining arrangement.[7] In September 1978, the State Department requested the formal extradition of Contreras, Espinoza, and Fernandez. In August a federal grand jury had indicted the three Chileans, along with the Cubans, for the Letelier assassination. The Chilean Supreme Court twice refused to comply with the extradition request. The Court also refused to order a trial for the three in Chile. (In July 1983, a United States federal magistrate rejected Argentina's bid to extradite Townley for his role in the 1974 Buenos Aires car-bombing.)

The cases involving Orlando Letelier and Michael Townley raise a number of questions about extradition and state-sponsored terrorism. As shown by the United States' failure to obtain the three Chilean requestees (and Argentina's failure to obtain Townley), extradition is an unreliable and thus inadequate means to cope with state-sponsored terrorism. To deter such conduct may call for greater inventiveness in identifying and implementing effective sanctions. The Foreign Sovereign Immunities Act (FSIA) seemingly offers an alternative to extradition and a remedy for acts of state-sponsored terrorism under its noncommercial torts exception. This remedy, however, is uncertain in light of recent court decisions. The executive and Congress should reexamine the FSIA regarding political terrorism. (Additionally, because lawyers sought to block Michael Townley's extradition to Argentina in part on "humanitarian" grounds, the "humanitarian exception" to extradition is considered. This Note argues that legislating such an exception is undesirable.)

II. EXTRADITION

A. Normal Procedures

Extradition is the means by which one country surrenders an individual to another country that has charged him with, or convicted him of, a crime. Most often countries use bilateral or multilateral extradition treaties.[8] These treaties enumerate the of-

7. Townley agreed to plead guilty to charges of conspiracy to murder Letelier and to supply information to United States prosecutors about the plot to kill Letelier in exchange for a reduced prison sentence and a new identity. N.Y. Times, April 28, 1978, at A4.

8. When the United States is the requested party, it may extradite only by treaty. 18 U.S.C. § 3181 (1982).

fenses for which countries will grant extradition;[9] they bar extradition for "political offenses"[10] and for offenses where the respective statute of limitations has run;[11] and they exempt nationals from extradition and subject them to local prosecution if nationality is the cause of their nonextradition.[12] Extradition requests relating to persons not yet convicted of a crime must contain the necessary evidence to justify an arrest and trial of the person in the requested country.[13] In such cases, the requesting party must show evidence.[14]

In the United States and other states, municipal statutes control international extradition. Ordinarily, a judge or magistrate holds a hearing to decide the requesting state's case for extradition.[15] The hearing is not a trial on the merits. A United States magistrate, for example, must determine whether an extradition treaty is in force between the United States and the requesting

---

9. *E.g.*, Treaty on Extradition between the United States of America and the Republic of Argentina, Jan. 21, 1972, art. 2, 23 U.S.T. 3501, T.I.A.S. No. 7510. However, Extradition Treaty with Italy, October 13, 1983, United States-Italy, art. II(1), S. Treaty Doc. No. 39, 98th Cong., 2nd Sess. (1984), simply requires that for extradition the offense be punishable in both Italy and the United States by a minimum of one year imprisonment. No list of offenses is enumerated. Extradition Treaty between the United States of America and the United Mexican States, May 4, 1978, art. 2(3), 31 U.S.T. 5059, T.I.A.S. No. 9656, also provides for this double criminality *in abstracto.*

10. In fact, each of the United States' 96 bilateral extradition treaties has a political offense exception.

11. *E.g.*, Extradition Treaty between the United States of America and Great Britain and Northern Ireland, Dec. 22, 1931, art. 5, 47 Stat. 2122, T.S. 849, 163 L.N.T.S. 59.

12. *E.g.*, Extradition Treaty between the United States of America and the Kingdom of Norway, June 9, 1977, art. 4, 31 U.S.T. 5619, T.I.A.S. No. 9697; also, see Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, signed at Washington, Feb. 2, 1971, art. 5, 27 U.S.T. 3949, T.I.A.S. No. 8413. However, Convention on Extradition between the Government of the United States of America and the Government of the State of Israel, art. 4, Dec. 10, 1962, 14 U.S.T. 1707, T.I.A.S. No. 5476, does not exempt nationals of either State from extradition.

13. *E.g.*, Treaty on Extradition between the United States of America and Canada, Dec. 3, 1971, art. 9(3), 27 U.S.T. 983, T.I.A.S. No. 8237.

14. *E.g.*, Treaty between the United States and Chile Providing for the Extradition of Criminals, April 17, 1900, art. 1, 32 Stat. 1850, T.S. 407; Treaty on Extradition between the United States of America and Australia, art. VI, May 8, 1976, 27 U.S.T. 957, T.I.A.S. No. 8234.

15. *See* 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 943 (1968).

state; whether the person before him is the individual for whom extradition is sought; whether there is probable cause to believe the offense occurred and the defendant committed an extraditable offense; and whether the political offense exception or other exceptions apply.[16] A Chilean magistrate must also verify the identity of the accused and determine whether the offense is extraditable. To recommend extradition, however, the magistrate must also establish, according to article 647(3) of the Code of Criminal Procedure, whether the accused committed the offense.[17] This requirement, more rigorous than establishing "probable cause," mirrors the stringent standard of proof needed for an accused (*inculpado*) to stand trial in Chile.[18] These evidentiary standards are indirectly recognized in article 1 of the 1902 extradition treaty between the United States and Chile.[19]

B. American Extradition Efforts

On May 9, 1979, Judge Israel Borquez, head of the Chilean Supreme Court, formally denied the extradition of Contreras, Espinoza, and Fernandez. An appeal to the full chamber of the Chilean Supreme Court produced the same result, as well as a declaration that there was insufficient evidence to warrant an investigation of the Letelier assassination in Chile. Although Letelier's murder was clearly political assassination, the Court never applied the "political offense" exception, the grounds that have defeated many bids to extradite terrorists. Rather, the Court dis-

16. *Id.* at 944-45.

17. *Id.*

18. According to Article 274 of the Chilean Code of Criminal Procedure, in order to declare an *inculpado* a *processado* or *reo* (one who is committed for trial), the existence of the crime must be proven and there must be "well-grounded presumptions" that the *inculpado* participated in the crime as author, accomplice, or accessory. Although these presumptions are not meant to constitute full proof, according to Article 488 of the Chilean Code of Criminal Procedure, they must be: (1) based on actual and proven facts and not on other presumptions, whether legal or juridical; (2) numerous and serious; (3) precise, such that one presumption could not lead to several conclusions; (4) direct, such that they lead logically and naturally to the fact deduced from them; and (5) in agreement with one another, so that the facts are interrelated and so that all lead, without any counterindication whatsoever, to the same conclusion that the fact in question existed. *Codigo de Procedimiento Penal*, Libro II, 89, 131 (1970).

19. *See supra* note 14.

missed all evidence that the United States prosecutors obtained from Michael Townley as inadmissible, since Chilean law did not recognize the plea bargain. The Supreme Court ruled that "Townley's confession . . . was the result of promises and coercion prohibited by Chilean Law of Criminal Procedure and, consequently . . . has no probative value. This is what the Chilean courts must examine in conformity with Article 647(3) of that law and Article 1 of the 1902 Extradition Treaty between Chile and the United States."[20] From such a position, the Court concluded that the remaining evidence in the extradition request was insufficient.

The Chilean court's presumably predictable denial of extradition has led some observers to criticize the United States extradition request as naive or insincere. Dinges and Landau, for example, charge United States officials with accepting the fiction of the Chilean judiciary's independence and with believing "that the DINA assassins were somehow separate from the Chilean government — as if . . . Fernadez, Espinoza, and Contreras has committed the crime as individuals not subject to [General] Pinochet's command."[21] They also suggest that the request was governed by national security considerations, notwithstanding United States determination to proceed with the extradition request:[22]

> The Letelier assassination placed the United States on the horns of a dilemma: solving the murder carried with it the real threat of discrediting and possibly dethroning Pinochet. . . . The Carter administration was confronted inexorably with the choice between punishing the Chilean government for perpetrating an act of international terrorism and protecting Pinochet.[23]

---

20. Decision of the Full Chamber of the Chilean Supreme Court Extradition (unofficial translation, United States Department of State) 34.

21. DINGES & LANDAU, *supra* note 4, at 391.

22. Asked before filing for extradition if a trial of the three in Chile would suffice, Attorney General Griffin Bell responded, "It wouldn't be acceptable to me. We are talking about our own internal affairs." NEWSWEEK, Aug. 14, 1978, p.31. When Contreras's lawyers threatened to release damaging information about the State Department and the CIA if the United States went ahead with extradition, Deputy Assistant Secretary of State Frank McNeil defied the threat with expletives. BRANCH & PROPPER, *supra* note 4, at 584. In addition, following Judge Borquez's initial decision, United States Ambassador to Chile George Landau privately threatened Chilean officials with diplomatic sanctions and restrictions on United States private bank loans if Chile did not extradite the three Chilean intelligence officers on appeal. These threats were not carried out.

23. DINGES & LANDAU, *supra* note 4, at 392.

Pursuing extradition, in this view, allowed the United States to escape the supposed dilemma: a grant of extradition would have been a welcome, if unexpected, result, while a denial would enable the United States to present itself as the aggrieved party, as it did, but without having to jeopardize bilateral relations.[24]

These criticisms are useful — naivete or political expedience may indeed motivate an extradition request — but in this case they are exaggerated, according to those who handled the extradition request. Some United States officials did believe in the possibility of an independent, and presumably favorable ruling by the Chilean Supreme Court, especially since Pinochet had tried to distance himself from Contreras, had professed a desire to cooperate with the United States, and had already surrendered Townley.[25] One prominent United States official was less hopeful from

---

24. In fact, at meetings after the Chilean Supreme Court decision of October 1979, virtually all United States officials present opposed sanctions affecting their respective agency or departmental interests in Chile. (A brief exception was a decision by the State Department Legal Adviser to denounce the 1902 United States-Chile extradition treaty — a decision later rescinded.) BRANCH & PROPPER, at *supra* note 4, at 593-94; 598-600. Then on Nov. 30, 1979, in response to the Chilean Supreme Court rulings and Chile's ineffective, and apparently insincere, two-year Letelier investigation, President Carter did authorize a series of sanctions against Chile to "make clear, both to the Government of Chile and to others throughout the world, that such acts of terrorism cannot be tolerated." The measures included (1) a 25% reduction in the number of United States Government personnel in Chile; (2) termination of the foreign military sales pipeline to Chile; (3) elimination of the military group stationed at the United States Embassy in Santiago; (4) suspension of Export-Import financing for Chile; and (5) imposition of a hold on further investment guarantees by the Overseas Private Investment Corporation (OPIC). In 1980, the Administration also voted in the World Bank against a water supply project loan to Chile and denied LAN-Chile's request for landing rights in Los Angeles. DEP'T ST. BULL., Jan. 1980 at 65-66 and Sept. 1980 at 73-74. However, it should be noted that most of the sanctions authorized, like those threatened following the initial extradition denial (see *supra* note 22), either were never carried out, or served to formalize existing policy. No United States embassy official in Santiago was recalled, for example, and those considered for recall included mapmakers from the United States Geodesic Survey and AID officials who no longer had a program in Chile. As to formalizing existing policy, the United States Export-Import Bank and OPIC loan guarantees had been dormant since at least 1977. France and Israel already had replaced the United States as Chile's military supplier. Wash. Post, Jan. 2, 1980, at A1.

25. After the extradition request was filed, these calculations became less tenable. Ambassador Francis McNeil, former Deputy Assistant Secretary of

the start. According to him, "There was no way he [Pinochet] would let Contreras go."[26] If surrendered, Contreras could have, as he threatened, come forward with politically fatal information about the Chilean leader.[27] In addition, Contreras' surrender would have alienated large segments of the military who agreed with the DINA chief's philosophy and tactics. Pinochet's authority would then have been severely diminished and the unity of the armed forces, a critical component of his power base, jeopardized. State Department officials believed the application of sanctions or threats in place of extradition was fruitless, if not counter-productive. Extradition, therefore, became simply "better than not doing anything."[28] United States prosecutors likewise urged against visiting sanctions upon Chile. They felt obliged to exhaust legal remedies first and then gather international support for sanctions later on if necessary. They also hoped an extradition hearing would at least prompt a trial of the three Chileans in Chile.[29]

One commentator has suggested the United States could have — or should have — obtained the three Chilean suspects in the same way as it did Michael Townley.[30] In response to extreme political pressure, particularly by the United States Ambassador to Chile, Townley was produced, questioned, and deported. The two countries bypassed extradition procedures. Townley's surren-

---

State for Inter-American Affairs, has said, "I made a mistake, I and others." But McNeil asserted that he never harbored "any naive, Christian hope" that the Chileans would be extradited. Telephone interview with Francis McNeil, Ambassador (Jan. 6, 1986).

26. Interview with Viron Vaky, former Assistant Secretary of State for Inter-American Affairs, Washington, D.C. (Dec. 18, 1985).

27. It was rumored that Contreras had shipped DINA's file on the Letelier assassination to Germany, to be released for publication if he was extradited. Angell, *Chile After Five Years of Military Rule*, 76 CURRENT HIST. 58, 59 (1979).

28. Vaky interview, *supra* note 26.

29. Telephone interview with E. Lawrence Barcella, United States Attorney (Jan. 6, 1986).

30. This seems to be the view of former Washington Post correspondent Charles Krause, or that of his sources. Two weeks after Judge Borquez's denial, Krause concluded, "It appears the Administration bungled the extradition request from the beginning." Krause wrote, "Had the Administration thought that Chile's Supreme Court would not—or could not—decide the extradition case independently and fairly, it should never have put the matter before the court in the first place. Instead it should have gone directly to Gen. Augusto Pinochet . . . ." Wash. Post, May 21, 1979, at A23.

der, however, may reflect not simply an enormous exertion of unilateral pressure, but shared expectations that a national such as Townley, employed by an allied foreign intelligence service and wanted for a crime in his homeland, will be abandoned by that intelligence service. Expectations about the irregular rendition or extradition, of native, high-level intelligence officials, such as the Chilean DINA agents, are surely different.[31] Indeed, a State Department statement that followed the Chilean Supreme Court's decision and that announced sanctions against Chile criticized not that government's refusal to extradite, but "Chile's deplorable conduct in this affair, and in particular its refusal to conduct a full and fair investigation of this crisis."[32]

---

31. Consider the Rainbow Warrior incident between France and New Zealand as a reflection of these expectations. On July 10, 1985, the *Rainbow Warrior*, the flagship of the environmental group Greenpeace that was to lead a protest flotilla against French nuclear testing at Mururora atoll, was blown up in Auckland harbor, New Zealand by two bombs attached to its hull. One crew member, a Portuguese-born photographer, was killed in the attack. New Zealand authorities quickly detained Maj. Alain Mafart and Capt. Dominique Prieur, two French intelligence officers who helped prepare the attack, and French press reports linked the attack to the French secret service, the *Direction Gênérale de Sécurité Extérieure.*

Two months later, after considerable scandal, France's Socialist government admitted responsibility for the attack on the *Rainbow Warrior.* Meanwhile, in November 1985, Mafart and Prieur pleaded guilty to the reduced charge of manslaughter and began to serve their ten-year jail sentences in New Zealand. France subsequently pressed for the release of the two intelligence officers and even began to block wool and food imports from New Zealand. The French government argued that Mafart and Prieur had only carried out military orders. Recently, however, New Zealand has agreed to release the two agents provided they live for three years at the French military garrison on Hao atoll. France, in turn, will lift its trade restrictions against New Zealand and pay the government there $7 million in damages. According to the agreement, Mafart and Prieur, whose families may come to live with them at the garrison, will be allowed to leave the atoll during or before their three-year "tour" only with the permission of both France and New Zealand. New Zealand's Prime Minister, who had likened the sinking of the *Rainbow Warrior* to an act of international terrorism and who said the two agents would serve all or part of their sentences in New Zealand, called the arrangement "an appropriate outcome, be it unexpected." N.Y. Times, July 8, 1986, at A1.

32. DEP'T ST. BULL. 66 (1980).

III. Prospects for the FSIA as a Partial Remedy for Victims of State-Sponsored Terrorism

A. *Letelier v. Republic of Chile*: Rights Created

Despite the failure of extradition, survivors of Letelier and Moffitt did obtain significant legal relief. In August 1978, the survivors brought a wrongful death action in the United States District Court for the District of Columbia against Chile, its secret police (*Centro Nacional de Intelligencia*, formerly DINA), and the individual defendants.[33] Jurisdiction to sue was asserted under section 1605(a)(5) of the Foreign Sovereign Immunities Act,[34] a section detailing the exceptions to sovereign immunity for noncommercial torts.[35] In November 1980, the district court

---

33. The cause of action included (1) conspiracy to deprive decedents of their constitutional rights to equal protection of the law and freedom of speech, press, association, and petition, in violation of 42 U.S.C. § 1985 (1982); (2) assault and battery causing death; (3) negligent transportation and detonation of explosives; (4) assassination in violation of international law; (5) assault upon an internationally protected person in violation of 18 U.S.C. § 112 (1982). Letelier v. Republic of Chile, 488 F. Supp. 665, 666 (D.D.C. 1980).

34. 28 U.S.C. §§ 1330, 1602-1611 (1982). The Foreign Sovereign Immunities Act of 1976 (the FSIA or the Act) codified the "restrictive theory" of sovereign immunity embraced by the State Department in the "Tate Letter" [Letter of Acting Legal Adviser Jack B. Tate to Department of Justice, May 19, 1952, 26 Dep't St. Bull. 984 (1952)]. That letter distinguished between a foreign sovereign's public activities—for which the sovereign could claim immunity from judicial jurisdiction—and its commercial activities—for which it could not make such a claim. The decades previous to the Act's passage witnessed uneven, unpredictable applications of the restrictive theory in the United States, in part due to executive involvement in immunity determinations. Notably, under the Act, United States courts alone make sovereign immunity determinations, guided only by the conditions specified in the Act. The Act also establishes procedures to serve process on a foreign state and prescribes the conditions under which the property of a foreign state, or that of its agencies or instrumentalities, can be made subject to execution. *See generally* Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 Yale Stud. in World Publ. Ord. 1 (1976); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543 (1977).

35. 28 U.S.C. §§ 1330, 1605(a)(5) (1982) holds the following:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> . . . .
>
> (5) not otherwise encompassed in paragraph (2) above, in which money

awarded the families five million dollars in damages.[36] This was the first time jurisdiction over a foreign state had been established under 1605(a)(5) of the FSIA. *Letelier v. Republic of Chile* proved to be a landmark case with unanticipated results as a means to address state-sponsored terrorism.

The focus of the case was Chile's contention that the district court lacked the required subject matter jurisdiction both under the FSIA and the "act of state" doctrine.[37] The Chileans refused to communicate their arguments to the court directly and instead submitted them in a diplomatic note.[38] Though a default judgment had already been entered against Chile for its failure to appear in person, the court nevertheless chose to take up the question of subject matter jurisdiction.

In its note, Chile denied any involvement in the Letelier killing. Chile asserted that even if the country had been involved, the

---

damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

36. Letelier v. Republic of Chile, 502 F. Supp. 259 (D.D.C. 1980).

37. The "act of state" is a judge-made rule derived from English law whereby United States courts have refrained from considering the validity or legality of public acts of a foreign state done within that state's territory. First enunciated in the United States in *Underhill v. Hernandez*, 168 U.S. 250 (1897), the act of state doctrine fundamentally seeks to preserve the separation of powers and international comity. *See generally*, Conant, *The Act of State Doctrine and Its Exceptions: An Introduction*, 12 VAND. J. TRANSNAT'L L. 259 (1979); Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976). The FSIA, which deals solely with the issue of immunity from jurisdiction, does not pretend to impinge upon possible applications of the act of state doctrine. However, it is possible that within an immunity determination an alleged act of state could enter into question, as in fact it did in *Letelier v. Republic of Chile. See infra* note 45 and accompanying text. On such occasions, the FSIA would seem to require that immunity determination be made without reference to the act of state doctrine.

38. Note No. 180 From the Embassy of Chile to the Department of State (Aug. 14, 1979), and accompanying Annex.

court had no subject matter jurisdiction "in that it was entitled to immunity under the Act [FSIA], which does not cover political assassinations because of their public, governmental character."[39] Chile, citing House and Senate reports regarding the FSIA, stated that the exception in section 1605(a)(5) referred to private torts such as automobile accidents. The court, however, emphasized to Chile the "plain language" and "plain meaning" of the exemption by stating the following:

> Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as "private," thereby engrafting onto the statute, as the Republic of Chile would have the Court do, the requirement that the character be judicially analyzed to determine whether it was of the type heretofore denoted as *jure gestionis* or should be classified as *jure imperii*.[40]

The court added that the Senate and the House "committees made it quite clear that the Act is cast *in general terms* as applying to *all tort actions* for money damages so as to provide recompense for the victim of a traffic accident or *other noncommercial tort*."[41] Any extra-statutory interpretation was foreclosed to the court because the "bill . . . sets forth the *sole and exclusive* standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. . . ."[42]

Though Chile did not address the issue, the court next considered whether section 1605(a)(5)(A), the exemption for claims based on discretionary acts, applied. The court noted that subsection (A) mirrored a similar exemption in the Federal Torts Claim Act, and that in a case involving the Torts Claim Act, the United States Supreme Court defined a discretionary act as "one in which 'there is room for policy judgment and decision.' "[43] The

---

39. 488 F. Supp. at 671.

40. *Id.*

41. 488 F. Supp. at 672 (quoting, with emphasis, H.R. REP. No. 1487, 94th Cong., 2d Sess. 20-21 (1976) [hereinafter cited as HOUSE REPORT], *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6619-20, and S. REP. No. 1310, 94th Cong. 2d Sess. 20-21 (1976).

42. 488 F. Supp. at 672 (quoting, with emphasis, HOUSE REPORT, *supra* note 41, at 12, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6610.

43. 488 F. Supp. at 673 (quoting Dalehite v. United States, 346 U.S. 15, 36 (1953).

court ruled, however, that such an exemption did not bar the Letelier suit. The court stated the following:

> [T]here is no discretion to commit, or to have one's officers or agents commit an illegal act. . . . Whatever policy options may exist for a foreign country, it has no "discretion" to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law.[44]

Chile's final argument was that even if the court would establish subject matter jurisdiction under the FSIA, the "act of state" doctrine prevented any judicial review of the alleged governmental acts, preparatory to the assassination, that took place in Chile and not in the United States. The court responded that the effect of the tort was in Washington, D.C., not Chile, and that the location of the injury precluded any application of the "act of state" doctrine.[45]

As one commentator stated, "[t]he district court in *Letelier* faced a relatively clean slate in construing the application of the noncommercial torts exception."[46] The way the court wrote upon the slate has had a number of favorable implications for world public order. First, the court's reading and application of section 1605(a)(5) suggests that a foreign state may be sued in the United States for damages arising from politically motivated tortious acts. The court, directly addressing the possibility of a political exception to the section, refused to recognize one.[47] Second, the court began to define the "discretionary function" limitation on

---

44. 488 F. Supp. at 673.

45. *Id.* at 673-74. Recent court decisions have looked beyond the statute's plain language and required both injury and tort to occur in the United States territory to assert jurisdiction. *See* Matter of Sedco, Inc., 543 F. Supp. 561 (S.D. Tex. 1982), *vacated in part on other grounds,* 610 F. Supp. 306 (S.D. Tex. 1984); Olsen v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984), *cert. denied* 105 S. Ct. 295 (1984); Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1984), *cert. denied* 105 S. Ct. 247 (1984). Oft-cited support by the courts for such a departure is the Act's legislative history, which states that "the tortious act or omission must occur within the jurisdiction of the United States." HOUSE REPORT, *supra* note 40, at 21, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6619.

46. Note, *The Letelier Case: Foreign Sovereign Liability for Acts of Political Assassination,* 21 VA. J. INT'L L. 251, 259 (1981).

47. 488 F. Supp. at 671-72.

liability by excluding acts of political assassination and terrorism.[48] Unfortunately, the court left open the exact legal standard for discretionary acts.[49]

Third, the court's decision, coming amid a political and diplomatic crisis between the United States and Chile, affirmed the change in the national constitutive process that Congress intended the FSIA to effect: A municipal court acted as the sole forum for making sovereign immunity decisions. Congress was prescribing, and the court was applying, standards of immunity — a task that the State Department, because of its institutional bias, had previously handled inconsistently.[50] The State Department did not even file a suggestion of interest in *Letelier*. Fourth, the *Letelier* decision could help deter kidnapping, bombings, and similar conduct by foreign nations and their intelligence agencies on United States soil through punishing the terrorists. Finally, *Letelier v. Republic of Chile* provided the relatives of victims of foreign-inspired offenses a forum in which to seek relief. Theoretically, other victims of offenses can use section 1605(a)(5) if they meet its requirements. *Letelier* thus represents a gain for international human rights law.[51]

B. *Letelier v. Republic of Chile*: A Remedy Denied

Though *Letelier v. Republic of Chile* awarded damages to the families of the assassination victims,[52] the FSIA provides no sure way of satisfying the judgment. After waiting a year during which Chile could comply with the award, the survivors moved to serve the judgment in federal district court for the Southern District of New York against Chile's wholly state-owned airline, Chilean National Airline (LAN).[53] The airline's facilities and personnel helped the Chilean intelligence (DINA)[54] agents to carry out the assassination.[55] The survivors asserted jurisdiction to collect

48. *Id.* at 673.
49. Note, *supra* note 46, at 264. *See* 488 F. Supp. at 673.
50. Weber, *supra* note 34, at 13, 38-42.
51. *See* Note, *supra* note 46, at 264-65.
52. 502 F. Supp. 259 (D.D.C. 1980).
53. 567 F. Supp. 1490, 1492-93 (S.D.N.Y. 1983).
54. Direccion de Intelligencia Nacional. *Id.* at 1492.
55. For more background on LAN's role, see U.S. Congress, House, *Alleged Violations of U.S. Aviation Laws and Regulations by LAN Chile Airlines*, Committee on Government Operations, 96th Congress, 2nd Sess. (1980).

under FSIA's section 1610(a)(2), which permits execution upon the "property in the United States of a foreign state . . . if . . . the property is or was used for the commercial activity upon which the claim is based. . . ."[56] In July 1983, the district court, having deemed LAN subject to execution based on Chile's abuse of LAN's corporate form,[57] concluded that LAN's conduct in the assassination effort did, in fact, constitute the "commercial activity upon which the claim [was] based."[58] On appeal, however, the Second Circuit reversed, concluding that "under the circumstances at issue in this case Congress did in fact create a right without a remedy."[59] Ultimately, *Letelier* seems to provide testimony to the view that the FSIA is more generous than necessary under international law in providing immunity from execution.[60]

The Second Circuit concluded that LAN, as a juridical entity distinct from Chile, could not be held accountable for the debt of its sovereign parent.[61] This "presumption of separateness" to which LAN was entitled—established by the Supreme Court in *Bancec*[62] and implied in the FSIA's legislative history[63]—had not been overcome, as the district court found, by Chile's use of the airline facilities and personnel to help perpetrate the Letelier assassination. The court stated the following:

> In our view this is not the sort of "abuse" that overcomes the presumption of separateness established by *Bancec*. Joint participation in a tort is not the "classic" abuse of corporate form to which the Supreme Court referred. . . .None of [the] facts shows that Chile ignored LAN's separate [juridical] status. Indeed, they simply demonstrate that Michael Townley was able to enlist the cooperation of certain LAN pilots and officials with whom he had a preexisting social relationship in pursuing his sinister goal. There was no finding that LAN's separate status was established to shield its owners from liability for their torts or that Chile ignored ordinary

---

56. 28 U.S.C. § 1610(a)(2) (1982). 567 F. Supp. at 1498.

57. 567 F. Supp. at 1494-96.

58. *See* 567 F. Supp. at 1500-03.

59. 748 F.2d 790, 798 (2d Cir. 1984).

60. *See* Weber, *supra* note 34, at 22-24.

61. 748 F.2d at 790.

62. First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec), 462 U.S. 611, 626-27 (1983); 748 F.2d at 794.

63. 748 F.2d at 793-74 (quoting HOUSE REPORT, *supra* note 41, at 29-30, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6628-29).

corporate formalities.[64]

Ordinarily, the court would have remanded for further evidentiary hearings on Chile's abuse of LAN's corporate form. But even if the presumption of LAN's separate juridical existence could be overcome, the court went on to argue that section 1610(a)(2), the commercial activities exception to execution immunity, would prohibit the attachment of LAN's assets. The court noted the apparent contradiction of "tort" creditors such as Letelier and Moffitt trying to collect under such an exception. The court stated, "If the district court in the District of Columbia lifted jurisdictional immunity based on its finding that the activities complained of were tortious, not commercial, it is inconsistent for this court to lift execution immunity based on a finding that the activities were commercial."[65]

In addition, the court found that the FSIA required inquiry into the "essential nature,"[66] not just certain aspects, of an activity to determine if the activity were commercial for purposes of execution.[67] In essence, LAN's activities could not be considered commercial. The court of appeals acknowledged that "[c]arriage of passengers and packages [was] an activity in which a private person could engage,"[68] and thus suggestive of commercial activity. The court, however, following the decision in *Arango*,[69] charged that LAN's alleged role in transporting and assisting Townley would be unlawful activity and thus not commercial. Such noncommercial activity formed the basis of the plaintiffs' claim.[70]

Finally, the court of appeals stated that if section 1610(a)(2) deprived the creditors of a remedy, the absence of a remedy conformed to the international community's preference for broad immunity from execution upon state property. Congress took that preference into account when drafting the FSIA, particularly section 1610(a)(2).[71] A final footnote suggested, with some skepti-

---

64. 748 F.2d at 794.

65. *Id.* at 795.

66. *Id.* at 796 (quoting HOUSE REPORT, *supra* note 41, at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615).

67. 748 F.2d at 796.

68. *Id.* at 797.

69. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980).

70. 748 F.2d at 797-98.

71. *Id.* at 798.

cism, the following "other remedies": Chile could decide to honor the judgment or the United States could file the judgment before an international tribunal.[72]

The implications of the Second Circuit's decision in *Letelier* are ominous. Following *Letelier*, participation by a national airline (or by any other entity "the property of a foreign state") in a political assassination on United States soil could not be commercial activity. Consequently, no matter how "abused" by its sovereign parent, this property would remain insulated from executions. One cannot, however, accuse the court of misapplying section 1610(a)(2) or of failing to have read the exception "more flexibly."

Letelier does not imply that the FSIA bars a remedy for acts of state-sponsored terrorism against which FSIA judgments have already been entered. The appellate court limited itself to section 1610(a)(2). Other execution immunity exceptions in the FSIA could provide a remedy.[73] Still, the availability of any exception

---

72. *Id.* at 799 n.4.

73. Collection may be possible, for example, under § 1610(a)(5) of the FSIA, which allows execution upon property of a foreign state if "the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment." Most states, of course, do not have "terrorism insurance." However, counsel for plaintiffs in *Letelier v. Republic of Chile* has written:

> [T]he pleader can provide for every contingency by drafting the complaint artfully. Bombings, shootings, harassment, and coercive conduct involve international infliction of harm upon the plaintiff, but the conduct often creates a reckless or negligent risk of harm to others than the intended victim. A complaint drafted to include allegations of such reckless or negligent conduct would enhance the plaintiff's chances to collect if, as is sometimes the case, the foreign state has an insurance policy that broadly insures its agents for nonintentional torts, in the pattern of any standard liability policy.

Tigar, *The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from Letelier v. Chile*, MICH. Y.B. INT'L LEGAL STUD. 421, 437-38 (1982). Also, § 1610(b)(2) of the FSIA, dealing with the property of a foreign state's agencies and instrumentalities involved in commercial activities in the United States, restricts execution immunity more than § 1610(a)(20) does. Section 1610(b)(2) allows for execution against "*any* property in the United States . . . if — . . . the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2),(3), or (5), . . . *regardless of whether the property is or was used for the activity upon which the claim is*

to judgment creditors in such cases as *Letelier* is so dubious that Congress may wish to reconsider this aspect of the FSIA.

The appellate court's remarks that section 1610(a)(2) has an international legal basis are also unfortunate. Section 1610(a)(2) hardly reflects state practice in the field of execution immunity. While international law appears to permit execution of judgments against state property used for commercial purposes,[74] section 1610(a)(2) may exceed minimum standards by withdrawing immunity on the condition that the property be used for *the commercial activity which gave rise to the claim.*[75] The appellate court's assertions will limit, if not completely stifle, the much-needed debate about the FSIA's execution provisions.

IV. ARGENTINA'S EXTRADITION REQUEST FOR TOWNLEY: SHOULD THERE BE A HUMANITARIAN EXCEPTION?

In May 1983 Argentina filed an extradition request for Michael Vernon Townley, long suspected of having orchestrated a car bombing in Buenos Aires in 1974 in which former Chilean general Carlos Prats Gonzalez and his wife were killed. The United States cooperated with the request, and arrested Townley after his shortened United States prison term.

On July 25, however, federal magistrate W. Harris Grimsley rejected the request, barring Townley's return to Argentina to face separate murder charges. Grimsley ruled, in effect, that the arguments of the Justice Department on behalf of Argentina failed to convince him of probable cause "*independent* of statements he

---

based (emphasis added). However, precisely because of its greater restrictiveness, this exception would seem to discourage a foreign sovereign who is bent on assassinating a United States-based refugee only from employing an agency or instrumentality in the deed, not necessarily from going forward with the deed itself.

74. *See, e.g.*, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 reporter's note (1965) and Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INT'L L. 220, 241-43.

75. One commentator writes: "The Foreign Sovereign Immunities Act of 1976 appears not only to be consonant with but also to go beyond the minimum immunity from execution required by international law. . . . [E]ight states — Austria, Belgium, pre-W[orld] W[ar] II Czechoslovakia, Egypt, Italy, the Netherlands, Singapore, and Switzerland — . . . have not created exceptions for property unrelated to the judgement being executed. . . ." WEBER, *supra* note 34, at 22-23.

[Townley] had given in 1978 . . . when he reached his plea bargain in the *Letelier* case." This plea bargain provided Townley with "immunity from further prosecution." The plea bargain did not, of course, explicitly protect Townley against extradition. But, Magistrate Grimsley said, "it would be 'unfair' and 'complete hypocrisy' for the [United States] to permit a foreign nation to use information Townley supplied prosecutors in reaching the plea bargain. . . . The magistrate said his decision was based on 'a sovereign nation giving its word.' "[76]

One argument advanced by lawyers seeking to bar Townley's extradition was that Argentina's embattled political system could not protect their client from Chileans or Argentines who wanted to kill him.[77] Although this argument was never addressed by the court, it raises a critical debate about international criminal procedure.

Humanitarian claims[78] such as the ones Townley's defense lawyers raised are not mentioned in the United States-Argentine Extradition Treaty of 1972,[79] or, for that matter, in most United

---

76. Wash. Post, July 26, 1983 at A1. An argument raised by defense lawyers, but unaddressed by the court, was that United States cooperation with the Argentine extradition request was prohibited according to the Silbert-Montero agreement signed before Townley's expulsion from Chile in 1978. *Supra* note 6. A strict reading of the agreement seems to invalidate that argument. The information ban in the agreement seemed to limit itself to "actions by Chilean nationals in the United States." The agreement said nothing of information about actions of Townley, an American national, outside the United States. Thus, the agreement may not have precluded United States obligations to abide by its extradition treaty with Argentina. The alleged crimes for which Townley was requested took place *in Argentina.* In addition, Silbert-Montero is not an executive agreement and has no force of law.

77. N.Y. Times, May 16, 1983, at A6.

78. Anderson specifies three types of humanitarian claims: (1) that "the trial in the requesting state will be or was unfair;" (2) "that the awaiting punishment will be excessive or cruel;" and (3) "that the requesting country will be unable to or does not intend to protect the requested person from assassination attempts." Anderson, *Protecting the Rights of the Requested Person in Extradition Proceedings: An Argument for a Humanitarian Exception,* in MICH. Y.B. OF INT'L LEGAL STUD. 153, 154 (1983).

79. *See supra* note 9. But art. 8 of the United States-Argentine extradition treaty requires a pledge from the requesting state that the death penalty will not be used for an offense for which the death penalty cannot be imposed in the requested state. *Id.* at 3511. Also, art. 6 allows the requested country to ask the requesting country to withdraw its extradition request for a person under 18 years of age with permanent residence in the requested country if "the compe-

States extradition treaties with other countries.[80] Nor have humanitarian exceptions been recognized or dealt with by United States courts in extradition proceedings. The 1901 case of *Neeley v. Henkel*[81] articulates the courts' stance on this matter. The Supreme Court stated that United States Constitutional provisions "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country."[82] Part of the basis of the courts' position lay in the absence of any municipal mandate to review the conditions of punishment and legal processes of the requesting state.[83] But the traditional position of non-inquiry principally reflected the judiciary's deference to the executive's foreign affairs power.[84] Many extradition cases have international and diplomatic overtones; judicial application of humanitarian standards could risk condemning the criminal justice system of the requesting state and damage or exacerbate relations between requested and requesting party.

In light of the principle of non-inquiry, the courts have usually reserved humanitarian judgments for the executive, who exercises ultimate discretion in surrendering relators found extraditable.[85] Yet the Department of State, several scholars have contended,[86]

---

tent authorities of that country determine that extradition would prejudice the social readjustment and rehabilitation of that person." *Id.* at 3509.

80. *But see* Convention on Extradition, Oct. 24, 1961, United States-Sweden, art. V, Para. 6, 14 U.S.T. 1845, T.I.A.S. No. 5496, which prohibits extradition "[i]f in the specific case it is found to be obviously incompatible with the requirements of humane treatment, because of, for example, the youth or health of the person sought, taking into account also the nature of the offense and the interests of the requesting State."

81. Neeley v. Henkel, 180 U.S. 109 (1901).

82. *Id.* at 122.

83. *See* 18 U.S.C. § 3184 (1982), which codifies the magistrate's obligations in United States extradition hearings.

84. *See, e.g.*, Escobedo v. United States, 623 F.2d 1098 (5th Cir. 1980), *cert. denied*, 449 U.S. 1036 (1980), in which the court held that the relators' claim — that they would face torture and possible death in a Mexican prison — was outside its jurisdiction. The court, *id.* at 1107, quoted from *Sindone v. Grant*, 419 F.2d 167, 174 (2d Cir. 1980): "[T]he degree of risk to . . . life from extradition is an issue that properly falls within the exclusive purview of the executive branch." *See also* Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972).

85. *See* 18 U.S.C. § 3186 (1982). For a discussion of the origins of executive discretion, see C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 531-34 (1974).

86. *See, e.g.*, Anderson, *supra* note 78, at 160-62. *See also* BASSIOUNI, *supra*

has never considered itself empowered to review and invoke humanitarian claims. Rather, it has seen itself bound by treaty obligations (which do not include humanitarian exceptions); any discretion it has exercised has involved treaty-interpretation. The result is that today "there is the serious possibility that a bona fide claim of unfair treatment would not receive adequate consideration by either the judicial or executive branch."[87]

The Townley case seemed to raise this very possibility. In Argentina's commitment to rid itself of military politics and rightist ideology, and in light of its historically competitive and strained relationship with Chile, Michael Townley, if extradited, could have faced unfair treatment or have been given insufficient police protection. Townley's albeit tenous claim might have gone overlooked by both the judiciary and the executive, the latter perhaps eager not to offend Argentina's new democracy. Thus, however noxious his crimes, Townley's humanitarian plea does prompt questions about the lack of institutionalized extradition procedures that protect human rights—in this case, the rights of the accused.

Anderson has asserted that "although recent humanitarian claims by relators may not have warranted an application of the exception, that does not invalidate the need for its incorporation into the extradition procedure."[88] One means of incorporation would be to write a humanitarian exception into the United States municipal extradition statute. The argument favoring such a change is that the judiciary, less subject than the executive to foreign policy pressures, is better qualified than the executive to assess humanitarian claims.[89] Although the courts seem to be the appropriate forum in which to resolve humanitarian questions, however, their competence in examining and evaluating the legal-politico conditions relating to humanitarian claims cannot be taken for granted. The courts could conduct primary research into each relator's claim only at great expense and delay—costs which may defeat justice and encourage states to engage in more

---

note 85, at 533. *See generally* Note, *Executive Discretion in Extradition,* 62 COLUM. L. REV. 1313 (1962).

87. Anderson, *supra* note 78, at 153-54.

88. *Id.* at 164 (footnote omitted).

89. This argument is made by Wise, *Some Problems of Extradition,* 15 WAYNE L. REV. 709, 722-23 (1969) and by I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 197 (1971).

abusive forms of apprehending fugitive offenders. Also, judicial applications of the humanitarian exceptions could become as politicized and uncertain as applications of the political offense exception, and presumably a denial on humanitarian grounds would be as non-appealable as any other denial by a United States extradition magistrate.[90]

Another alternative, adding humanitarian exceptions to extradition treaties themselves, could produce the same costs created by a revision of the federal extradition statute. However, it may be possible to incorporate into those treaties an exception for cruel and unusual punishment.[91]

A final alternative could be to formulate a multilateral (or regional) convention on extradition that provides for the imposition of minimal criminal procedural standards and other humanitarian safeguards or establishes a mechanism for handling humanitarian claims.[92] Accomplishing the latter might involve giving the judiciaries of signatory states permission to forward humanitarian claims to a larger body, e.g., an Inter-American Court for Human Rights, for an advisory opinion. Such an impartial mechanism could shield both judiciary and executive of a requested state from the onus of potentially embarrassing extradition denials and also diffuse bilateral tensions arising from a particular extradition case that involves a bona fide humanitarian claim.

One might argue, however, that all these means of incorpora-

---

90. *See In re* Mackin, 668 F.2d 122, 125-30 (2d Cir. 1981).

91. A number of multilateral conventions and human rights declarations already protect against such treatment. Instituting "extradite or prosecute" obligations in such cases into extradition treaties may be practicable. *See* BASSIOUNI, *supra* note 85, at 463-466.

92. This suggestion is derived from Lillich, *Model American Convention on the Prevention and Punishment of Serious Forms of Violence*, 77 AM. J. INT'L L. 662 (1983) (the Convention is reprinted at 664). Article 1 enumerates the several offenses which are encompassed by the Model Convention. *Id.* at 664-65. Article 9 reads:

> Upon receipt of a request for extradition for an offense included in Article 1, a Contracting State may refer the matter to the Inter-American Court of Human Rights pursuant to Article 64 of the American Convention on Human Rights for an advisory opinion as to whether granting the request for extradition would violate the provisions of this Convention. In like manner, a Contracting Party, which has made a request for extradition for an offense included in Article 1, may refer the matter to the Inter-American Court for an advisory opinion.

Id. at 667.

tion are costly and impracticable and that the current system of non-inquiry and discretion in United States extradition procedure can reconcile human rights with international criminal justice. In dramatic humanitarian cases—and, indeed, in undramatic ones—the executive and the judiciary have the capacity to prove sympathetic and flexible.[93] For the fugitive whose humanitarian claim may overlap a "political offense" claim, the political offense exception still remains. For extraditable nationals of a requested state who fear harsh prison treatment in the requesting state, prisoner exchange programs may be the answer. In addition, the lack of an institutionalized humanitarian exception may serve in a small way to deter crime, signaling to potentially fugitive offenders there is one less escape route from extradition. As it now

---

93. For example, when Venezuela requested the extradition of former dictator Perez Jimenez from the United States, Perez Jimenez claimed he would not receive a fair trial. Only after the Venezuelan ambassador to the United States guaranteed "to protect the right of an accused to full and effective defense," the right to counsel, and to a speedy trial did then-Secretary of State Dean Rusk allow his extradition. 49 DEP'T ST. BULL. No. 1262, at 364, 365-67 (1963). In some cases the Department of State has justified a denial of extradition on treaty grounds when there may have been a humanitarian basis for denial. *See, e.g.*, Jhirad v. Ferrandina, 362 F. Supp. 1057 (S.D.N.Y. 1973) (denial of habeas corpus petition in extradition proceeding), *rev'd and remanded*, 486 F.2d 442 (2d Cir. 1973), *on remand*, 401 F. Supp. 1215 (S.D.N.Y. 1975) (petition again denied), *aff'd*, 536 F.2d 478 (2d Cir. 1976), *cert. denied* 429 U.S. 833 (1976).

Just as the Secretary of State has denied extradition in would-be humanitarian cases on treaty grounds, so have the courts sometimes denied it on different grounds. *See* discussions of *Ex parte Fudera, Ex parte LaMantia*, and *In re Mylonas* in BASSIOUNI, *supra* note 85, at 528-29. Finally, a court expressed some disenchantment with the principle of strict noninquiry in the *Gallina* dictum. In *Gallina v. Fraser*, a 1960 case, the relator had been tried and convicted in absentia in Italy for armed robbery. Before the court of appeals Gallina contended that if extradited to Italy, he would go directly to prison without retrial and would be unable "to face his accusers or to conduct any defense." 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). Judge Waterman affirmed the denial by the district court of a writ of habeas corpus, but stated:

> [W]e have discovered no case authorizing a federal court, in a habeas corpus proceeding challenging extradition from the United States to a foreign nation, to inquire into the procedures which await the relator upon extradition. . . . Nevertheless, we confess to some disquiet at this result. We can imagine situations when the relator, upon extradition, would be subject to procedures or punishment so antipathetic to a federal court's sense of decency to require re-examination of the principle set out above.

278 F.2d at 78, 79.

stands, the extradition regime is struggling to provide simplicity, order, and mutual trust. Introducing humanitarian exceptions may threaten these values; implementing them may be one problem the law, a blunt instrument, should avoid.

V. CONCLUSION

The Letelier incident reminds us that having a state extradite officers of its own intelligence service for an act of transnational terror simply may be too much to ask. Unless the officers acted independently or are "disposable," they will not be treated as international criminals and surrendered. Rather, they will be regarded as loyal agents of the state whose extradition would demoralize other agents and would admit of state responsibility. Even "ordinary" terrorists receive the protection that intelligence and other officials acting under the color of the state implicitly enjoy, and sometimes receive it most explicitly.[94] As extradition abounds with procedural and substantive loopholes, courts will find a way, as the Chilean Supreme Court did, to block both extradition and local prosecution.

Why, then, bother to request extradition in cases of state-sponsored terrorism where the evidence is overwhelmingly indicting and where it would defy credulity to believe the requested state would risk the consequences of extradition? Practitioners of foreign policy confronting such situations may come to decide that extradition is the only course of action. They may also reason that exhausting extradition procedures first will enable them to make a better case for sanctions later. These arguments are made and applied with certain risks, however. First, submitting an extradition request doomed to rejection perverts the extradition process at least as much as the requested state's refusal does — appearances to the contrary. Second, international and internal support for effective sanctions following an expected extradition denial may not be forthcoming. Indeed, support may be demobilized: a state's calls for punitive action, in explicit condemnation

94. In rejecting the United States' extradition request for PLO leader Mohammed Abbas, who was suspected of masterminding the 1985 hijacking of the Italian cruise ship *Achille Lauro*, Yugoslavia, through its Foreign Minister, said: "Mohammed Abbas is a member of the Palestine Liberation Organization, which Yugoslavia recognizes as the only legitimate representative of the Palestine people, and as such he enjoys diplomatic immunity." Wash. Post, Oct. 18, 1985, at A3, col. 3.

of an extradition process that state freely chose to engage, tend to lose their resonance. Third, to seek extradition continuously in these cases encourages the exportation of political violence. Deterring state-sponsored terrorism requires more than the imperfect threat of extradition; it requires the capability and the willingness to take meaningful, permissible reprisales.[95] Otherwise, preventing attacks like the one on Letelier will depend almost exclusively on counterterrorist intelligence.

The FSIA, through its little-known noncommercial torts exception, could aid deterrence against foreign state terror on United States territory. Under U.S.C. § 1609(a)(5), a state could be sued for acts of political assassination if plaintiffs can succeed in com-

---

95. Their effectiveness notwithstanding, economic and diplomatic sanctions and international legal claims could be brought to bear against a responsible state. *See* Murphy, *State Self-Help and Problems of Public International law*, in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 565 (A. Evans and J. Murphy eds. 1978).

Armed reprisals, permitted under customary international law, are commonly believed to be prohibited under modern international law. *See* I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 281 (1963); 12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 148-16 (1971). Also, the U.N. Security Council has condemned armed reprisals generally as "incompatible with the purposes and principles of the United Nations." S.C. Res. 188 (1964). Further, according to the Declaration on Principles of Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, "[s]tates have a duty to refrain from acts of reprisals involving the use of force." G.A./Res. 2625, U.N. GAOR Supp. (No. 28) at 122, U.N. Doc. A/8028 (1970).

Nevertheless, this norm seems to have eroded somewhat — as indicated by state practice and by some Security Council decisions — and scholars have argued for a limited rehabilitation of armed reprisals. See R. LILLICH, R. FALK, *The Beirut Raid, and the International Law of Retaliation*, 63 AM. J. INT'L L. 440 (1969); *Forcible Self-Help under International Law*, 22 NAVAL WAR C. REV. 59; R.Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT'L L. 595 (1972). Contemporary international terrorism, which is often encouraged or directed by states and overwhelmingly involves repeated hit-and-run attacks against the nationals of liberal states, has put the absolute prohibition against reprisals under enormous strain. In this contract — one state's reprisals may be another's self-defense. On last April's U.S. raid on Tripoli and Benghazi in response to Libya's role in attacks on U.S. personnel and installations, for example, see Sofaer, *Terrorism and the Law* 64 FOREIGN AFF. 919 (Summer, 1986). In-depth studies of this and similar "retaliatory" raids or strikes will shed much light on states' normative expectations regarding cross-border coercion in response to terrorist attacks.

piling sufficient evidence of the state's involvement. This possibility may not thwart certain states, such as Libya, from policing and even killing dissident exiles in the United States, but it would cause other states to pause before ordering an assassination. If the FSIA allowed for execution of a judgment against a broader range of commercial property owned by a foreign state in the United States, then the leaders of such states might think twice. Then, too, persons who have been awarded a judgment under 1605(a)(5) but barred by current execution provisions from collecting the judgment, would be provided with a complete remedy.