

# The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from *Letelier v. Chile*

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## INTRODUCTION: THE UNITED STATES AS REFUGE

On September 21, 1976, members of the Cuban Nationalist Movement (CNM), acting at the direction of the Chilean secret police agency DINA, detonated a bomb in the automobile of Orlando Letelier, formerly ambassador of the Salvador Allende government to the United States. Ambassador Letelier and Ronni Karpen Moffitt, his associate at the Transnational Institute for Policy Studies, were killed. Michael Moffitt, riding in the car, was injured.<sup>1</sup>

The bombing was designed to silence Letelier, an able and vigorous opponent of the military junta in Chile who had lived in the United States with his wife and family. He had been ambassador to the United States under President Salvador Allende, and upon returning to Chile early in 1973, was foreign minister and later defense minister. After the military coup in September 1973, he was jailed by the junta. Upon his release after a year in junta detention, he became, from exile, one of the most eloquent and effective campaigners against the junta.

Michael Townley, the American-born DINA agent who was commissioned to plan the attack and to hire the Cubans, had been involved in other assassinations and attempted assassinations of anti-Pinochet figures who had sought refuge in other countries.

The assassination was ordered by DINA head Manuel Contreras Sepulveda, with the concurrence of Chilean President Pinochet. The plan was carried forward by DINA officers Pedro Espinoza Bravo and Armando

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Fernandez Larios. Townley actually made the deal with CNM members for their participation, drawing on an earlier DINA connection with anti-Castro terrorist organizations in the United States. Townley tracked Letelier in Washington, D.C., for days before the killing, prepared the explosive device, and then left town. CNM members Alvin Ross Diaz, Virgilio Paz Romero, and Guillermo Novo Sampol detonated the device.

I have, since the day after the murders, served as counsel to the Letelier and Moffitt families, and much of this article is based upon the legal and factual research that led to filing a civil suit against the Republic of Chile and the individuals responsible for the deaths. This case went to judgment on November 5, 1980, resulting in an award of compensatory and punitive damages totalling \$4.9 million. In this essay, I ask what it tells us about the international legal order, and what remedies exist for acts of international terrorism that have an impact on the United States.

The pursuit of refugees into countries of exile is no new phenomenon. The political tumults of mid-19th century Europe sent countless people fleeing the vengeance of victorious reactionary governments.<sup>2</sup> England was a popular gathering spot, having determined that it would not extradite for political offenses. England had, to some refugee leaders, an "old-established reputation . . . as the safest asylum for refugees of all parties and of all countries,"<sup>3</sup> despite sporadic efforts to enforce statutory authority for the expulsion of aliens whose presence was embarrassing. The exiles in London found themselves hounded by the secret police of their countries, operating apparently from the sanctity of diplomatic premises. There is even some indication that the British Government cooperated in these surveillance efforts.<sup>4</sup>

These events are not without modern parallels. In one case, the Federal Bureau of Investigation, in order to enhance the stature of an FBI double agent in the eyes of the Polish Government, passed information through the agent about Polish applicants for political asylum in the United States. Apparently, the FBI also handed on information about an attorney for the applicants, a United States citizen, as well. The confidentiality of information concerning Nicaraguan and Haitian refugees has also been breached.<sup>5</sup> Lacunae in the Privacy Act and regulations under it may make such disclosures lawful,<sup>6</sup> but they certainly serve the interest of foreign governments bent upon following their subjects' activities in the United States—for whatever purpose. For this reason, the United Nations High Commissioner for Refugees regards confidentiality as important in the refugee process.<sup>7</sup>

Nor do these disclosures provide the only cause for concern. A Senate committee conducted an investigation from 1977 to 1980 into the activities of foreign secret police agencies in the United States.<sup>8</sup> The "Koreagate"<sup>9</sup> inquiry also involved, to a lesser extent, the United States operations of the Korean Central Intelligence Agency (KCIA). The House Committee on

Government Operations has investigated the cooperation between DINA (the Chilean secret police) and LAN Chile Airlines (the Chilean flag carrier) in the Letelier-Moffitt murders and in other DINA activities outside Chile.<sup>10</sup>

The Senate committee's findings were the most far-reaching and startling. The secret police agencies of Israel (Mossad), Chile (DINA, later CNI), Iran (SAVAK), South Korea (KCIA), Yugoslavia (UDBA), and other countries have for years operated in the United States with the knowledge of American authorities. Some of these agencies are, to be sure, the step-children of the Central Intelligence Agency, having been sponsored, financed, trained, and assisted by the CIA.<sup>11</sup> This relationship provides a motive, though not a justification, for permitting them to act on American soil.

The events leading to the Letelier-Moffitt murders provide an interesting and—in its broad outlines—typical example of a secret police operation directed at a dissident in exile. Cuban nationalist organizations had for years been trained, equipped, and supported as a matter of American policy. These organizations continued to function without formal CIA support after the United States abandoned the notion of toppling the Castro government by overt military operations. Acting under rubrics such as Omega 7, Brigade 2506, and the Cuban Nationalist Movement (CNM), but with an overlap of personnel and equipment, anti-Castro terrorists continue to commit bombings and assassinations directed at Cuban and Eastern European property and diplomatic personnel in the United States. They have also sought alliances with others of like mind.

CNM personnel and equipment were used by DINA agent Townley to kill Letelier and Moffitt under an established cooperation arrangement which had, prior to September 1976, involved trading of explosives, DINA provision of detonation devices, and the use of LAN Chile facilities to transport these items. Indeed, there is evidence that a pattern of cooperation in tracking down Chilean exiles was agreed upon between DINA agents and Cuban nationalists in 1974 and 1975 in Miami. The Pinochet government also attempted, in preparing for the Letelier murder, to enlist the aid of Paraguayan officials.

The Letelier-Moffitt murders raise two questions for international lawyers: First, what is the extent of American judicial power over terrorists who pursue refugees across international boundaries? And second, if the power exists, what theories of recovery are available? In turning to consider these questions, I place them firmly in the context of the Letelier-Moffitt murders. I do not apologize for doing so; as lawyers we are all the better able to see clearly the making and applying of a norm if we keep firmly in mind the human suffering we are seeking to redress and the human consequences of our actions. One's attitude towards American foreign

policy in the Third World no doubt influences one's view of particular proposals about the role of courts and lawyers in creating and enforcing norms of behavior towards refugees: I certainly confess my own bias. One must, in any case, acknowledge that the proposals one makes involve something more than a technical adjustment of this or that substantive or procedural rule.

## JURISDICTION

### Civil Versus Criminal Remedies

The investigative resources of government are formidable. The federal government's pursuit of the Letelier-Moffitt matter resulted in one DINA agent's plea of guilty to conspiracy to murder, and the trial of three CNM members.<sup>12</sup> The criminal process does not repay the financial harm to the survivors of Letelier and Moffitt. Nor has it brought to justice those who bore principal responsibility for planning the murders and for designing and maintaining the apparatus of terror which brought them about. To gain power over assassins and plotters who have gone to ground back in their own countries, the criminal process must ultimately rely upon extradition or expulsion, creatures of, respectively, the judicial and executive branches of the foreign state. Extradition of the Chilean authors of the Letelier-Moffitt murders failed,<sup>13</sup> the Chilean Supreme Court being servant to the junta. But government's power to summon witnesses before a grand jury is mirrored by individuals' rights under civil discovery procedures, and the rights of governmental and private parties to obtain information abroad are nearly equal, at least as a matter of formal rules.<sup>14</sup> Admittedly, government has more resources, and a panoply of political and diplomatic sanctions denied to private individuals, but the federal government was from the first reluctant to pursue the Letelier investigation wherever it might lead, fearful perhaps of what it might find.<sup>15</sup> A civil suit emerged as the available remedy.

### Civil Jurisdiction Under the Foreign Sovereign Immunities Act: Background

The Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>16</sup> the jurisdictional means joining the Republic of Chile in the Letelier-Moffitt case, was hardly unheralded. An earlier version had failed of passage in 1973 because, as State Department Legal Advisor Monroe Leigh put it, "segments of the private bar had not been fully consulted as it turned out."<sup>17</sup> The FSIA, as finally enacted, has been described by its authors and by courts construing it as, in its substantive definitions of foreign sovereign immunity, merely

codifying a "restrictive" view which the State Department had adopted definitively in 1952.<sup>18</sup>

I suggest, however, that the Act follows as well from two equally, perhaps more, significant developments in international law. The first is the increasing recognition that states and their servants have affirmative obligations to respect the political, social, and economic "human" rights of individuals and that this obligation is created by international as well as municipal law. Second, and as a corollary, there is an increasing sense that individuals as well as states have rights under international law, enforceable at their own instance with neither the necessity that a state act as sponsor-litigant nor the risk that diplomatic considerations will have a formal role in a tribunal's decision to accept or decline jurisdiction.

### *Developing Concepts of State Responsibility*

Two trends have marked the growth of state responsibility. First, states have increasingly become involved in commercial ventures of various types. In doing so, they shed the mantle of sovereignty and become subject to the myriad rules which govern the world of commerce. The law has recognized this transition in the familiar *jure imperii-jure gestionis* distinction, which determines, based on the activity in question, whether or not a state is entitled to immunity.<sup>19</sup>

The second trend is, in my view, far more significant. The rules of international law were until recently the creature of the great powers, and indeed of the great capitalist powers. Since the first world war, and at an accelerating rate since the second world war, new nations and new social systems have appeared in the international community. In the capitalist powers, movements for social change have altered state policy to compel recognition of "human rights," defined with increasing breadth to include not only civil rights to freedom of speech and press and to due process of law, but also the right of self-determination, of freedom from racial discrimination, and even to basic economic and social security.<sup>20</sup>

Other sources spawn broadened human rights. Since the Covenant of the League of Nations, there has been a growing consensus that aggressive war violates international law.<sup>21</sup> The Nuremburg Charter and the opinion of the Tribunal set forth principles of law dealing with war crimes against the peace, and genocide.<sup>22</sup> The Universal Declaration on Human Rights, despite the sharp dispute over the mandatory character of provisions relating to social and economic rights, has had a great influence in creating international law based upon custom.<sup>23</sup> This work has been carried forward in many reports and resolutions of the United Nations General Assembly.<sup>24</sup> Throughout this process, the increasing voice of Third World countries with socialist or "mixed" economies, has been of great importance.

These trends broaden the obligations of states and create potential bases of liability not recognized in pre-twentieth century international law. The FSIA, by codifying a restrictive view of sovereign immunity, establishes a broadly-based judicial jurisdiction so that governments may be forced to defend on the merits their failures to fulfill these newly-developed obligations.

*Individuals as Beneficiaries of International Law*

G.I. Tunkin, the USSR's leading international law scholar, has written:<sup>25</sup>

The principle of respect for basic human rights has become one of the most important principles of international law. *A new branch of international law is emerging which defines the duties of states to ensure the basic rights and freedoms to all peoples, irrespective of race, language, religion, or sex. . . .*

International law has intruded into an area which was considered to relate to the domestic jurisdiction of states and in which specific features of the different social systems are manifested very prominently and strongly. *However, this "intrusion" of the regulatory influence of international law into the domain of human rights does not mean that human rights are directly regulated by international law nor that they have ceased basically to be the domestic affair of a state.*

To which one might reply: It all depends on what you mean by "basically." There are signs that state autonomy is eroding, that individuals are recognized as subjects of international law, and that one may assert rights as against one's own sovereign in courts not ultimately responsible to that sovereign.<sup>26</sup> The European Convention on Human Rights<sup>27</sup> is a step towards putting that principle to work; it permits citizens of signatory states to bring treaty violations to an international tribunal after municipal remedies are exhausted. The Convention has not been wholly successful in practice, but its existence and operation have lent currency to the idea that the fundamental human rights evidenced in United Nations documents since 1945 are more than precatory admonitions to member states. The Convention provides one basis for inferring, at a minimum, that there is a body of customary international law respecting human rights.

American legislation and diplomatic action in the recent past, though far from uniform on this score, has stressed the duty of states to respect certain basic rights.<sup>28</sup> To be sure, some of this is big power posturing, telling smaller powers what to do. But much of it reflects the growing consensus that what goes on behind a state's borders is somebody else's business.

Of course, in the *Letelier* case, the Chilean Government had invaded the territory of the United States in order to commit a terrorist act, so questions of the regime's right to govern within its own borders may seem inapposite. In fact, the matter was not so simple, as I discuss below.<sup>29</sup> Nonethe-

less, the importance of an international climate of opinion favorable to human rights cannot be understated in assessing both the provenance and the proper interpretation of the FSIA.

### Analysis of the Foreign Sovereign Immunities Act

By the time the FSIA was passed, the United States had joined the majority of other capitalist states<sup>30</sup> in adopting the “restrictive” view of sovereign immunity, and had not departed from the tenor of the so-called “Tate letter,” a restatement of American practice issued in 1952 by the then-legal advisor of the Department of State.<sup>31</sup> By 1976, a number of states had codified the restrictive view in one way or another, and other countries have joined the list since that time.<sup>32</sup>

The Act commanded almost universal support from those who testified about it during the legislative process: representatives from departments of government and the private international law bar, as well as legal scholars. For various reasons, the witnesses agreed that the Act’s most important feature—judicializing immunity determinations—was at least wise and in all probability essential to the perceived legitimacy of such decisions.<sup>33</sup>

Prior to 1976, a foreign state sued in United States courts would hie itself to the State Department and ask for an immunity letter. If the State Department acted favorably, the letter would have the practical effect of ending the lawsuit. To be sure, the Supreme Court’s decision that such letters should be honored was a *judicial* determination based upon criteria for judicial deference developed in a series of foreign affairs cases. But such wholesale deference came to look very like surrender, particularly because the State Department’s conduct was oft-times redolent of backroom politics: the department’s decision to issue or withhold an immunity determination was not always based upon a strict reading of the Tate letter. The department regarded its function as partaking more of “political powers”—in Marshall’s words<sup>34</sup>—than of any quasi-judicial duty. It was difficult to see why litigants with presumably valid claims, often amounting to great sums, should live at the mercy of the diplomatic considerations which the State Department felt bound to honor.

Under the Act, the court—a federal court if the foreign state wants it that way—makes the immunity determination, looking only to the standards set out in the Act and, in theory at least, not to its own or somebody else’s view of how nice or nasty the state-defendant’s government is.

The Act codifies a number of exceptions to a general principle of immunity, provides a procedure for serving process on a foreign state, and defines the assets that may be the subject of execution to satisfy judgment. A new section of 28 U.S.C., section 1330 confers jurisdiction on United

States district courts to hear all suits cognizable under the FSIA. A new section, 28 U.S.C. § 1441(d), permits removal to federal court of any civil action against a foreign state, reflecting a by now settled notion that international law questions, even procedural ones, are inherently federal in nature.

Section 1608(e) provides that:

No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

This proof requirement is the same imposed on a litigant suing the United States in the event the latter defaults, and the Act thus respects an important notion of international comity: that a foreign sovereign should be treated no more harshly than the United States in our courts.

*Background for Suit on Behalf of Refugees: Section 1605*

The most important provisions of the FSIA for pursued refugees are sections 1605(a)(2) and (5), denying immunity in cases:

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . .

(5) not otherwise encompassed in paragraph (2) above, in which money 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 of any official or employee of that foreign state while acting within the scope of his office or employment; except 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.

Although only the provisions of section 1605(a)(5), regarding personal injury or property damage in the United States, seem apposite to refugee concerns, section 1605(a)(2), the “commercial activity” nonimmunity provision, also is relevant. Consider the following facts: Chile’s state-



owned flag airline is LAN Chile. LAN Chile facilities and personnel were regularly used by the Chilean secret police, formerly DINA, to carry personnel and materiel for use in foreign terrorist operations. The House Committee on Government Operations has reported that LAN Chile personnel and facilities were used extensively in the planning and carrying out of the Letelier assassinations.<sup>35</sup>

Arguably, the Letelier-Moffitt murder is "based on" a commercial activity, that is, LAN Chile's activity in the United States. The House Committee did not find that LAN Chile personnel knew the purpose of the false name travels, nor the contents of packages of explosive and explosive paraphernalia. Such knowledge might be necessary in order to fasten liability on LAN Chile if it were joined as a party-defendant. Whether or not this is so, LAN Chile's *activity* could provide a jurisdictional basis for suing the Republic of Chile itself. Certainly the connection may establish a basis for execution on LAN Chile property in the United States.

Regardless of one's view of section 1605(a)(2), section 1605(a)(5) indisputably permits suit of a foreign government whose minions have pursued a refugee to U.S. shores. A recent article, questioning this conclusion, states:<sup>36</sup>

At the outset, it is useful to remind ourselves that new laws, once adopted, frequently are put to uses of which their authors never even dreamed, and this Act is no exception. On August 8, 1978, for example, Isabel Morel de Letelier, the widow of Chile's ambassador to the United States (and later foreign minister) under President Salvador Allende, brought suit in the U.S. District Court for the District of Columbia against the Republic of Chile. . . .

Quoting the legislative history, the authors say of subsection 1605(a)(5):<sup>37</sup> "Its inclusion in the Act, according to the section-by-section analysis accompanying its submission to Congress, was directed primarily at the problem of traffic accidents." The authors misunderstood both the plain language of the Act and its legislative history. The quoted passage of the House Report reads, in its full context:<sup>38</sup> "Section 1605(a)(5) is directed primarily at the problem of traffic accidents *but is cast in general terms* as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2). . . ." So much for uses of which the legislators "never dreamed."

Further, the language of section 1605(a)(5) does not require that the tortious act or omission occur in the United States. The geographical restriction refers not to the place of the act, but to the place where "personal injury or death, or damage to or loss of property . . ." occurred. This is

apparent from the placement of the geographical limitation in the subsection, as defining what goes before.

This reading of the FSIA gives a refugee pursued in the United States a broadly drawn civil remedy for all manner of harassing, intimidating, or violent conduct directed at him by his erstwhile sovereign. For example, the Letelier-Moffitt murders were planned in general terms in Chile. Agents were then dispatched to the United States to make contact with Cuban exiles who worked with the DINA agents to rig the explosive device. The Cubans performed the actual detonation, while the DINA agent in charge waited in Miami for the news. When the call came, the agent, Michael Vernon Townley, boarded a LAN Chile flight under a false name and flew back to report that the mission was accomplished.

The CNM members are therefore liable for what they did in the District of Columbia. Townley and Armando Fernandez Larios are liable for their acts in the United States, and for the preparatory acts in Chile. The Letelier and Moffitt families also, obtaining personal jurisdiction under the District's long-arm statute, sued DINA officials who, while never leaving Chile, ordered the murder and helped plan it. The Republic of Chile, based on the acts of its agents and servants, is liable for all acts causing death and injury in the United States, regardless of whether a particular act took place in Chile or in this country.

The language of section 1605(a)(5) makes clear as well that a foreign sovereign would be liable if its agents sent a letter bomb to a refugee from abroad, and the bomb exploded causing death or injury. In such a case, no act or omission need have occurred in the United States; it would be enough that the prohibited consequences occurred here. There is certainly nothing offensive to notions of due process in an assertion of jurisdiction in such a case, particularly because a persuasive argument for liability would undoubtedly involve foreseeable consequences of a tortious act performed outside the United States. Most courts are agreed that conduct which is foreseeably the basis of harm may be the basis for suit where the harm occurred, without doing violence to the due process clause.<sup>39</sup>

Some limits contain the tort jurisdiction conferred by the Act. The exclusions of section 1605(a)(5)(B) mirror those contained in section 2680(h) of the Federal Tort Claims Act,<sup>40</sup> prior to the 1974 amendment of that subsection. While "interference with contract rights" may not be the basis for a tort action, the same conduct may sound in contract and be the basis for proceeding under other subsections of section 1605.<sup>41</sup>

The requirement of section 1605(a)(5) that the official or employee whose conduct is the predicate for respondeat superior liability of the sovereign have acted "within the scope of his office or employment" restates familiar agency principles in the law of tort, as well as echoing a concept fundamental to the Federal Tort Claims Act.<sup>42</sup> In the Letelier-

Moffitt case, the evidence established that the defendant Chilean officials, Townley and the CNM hit-men were "servants" of the Republic of Chile, acting within "the scope of [their] employment," as those concepts are well-established in United States law.<sup>43</sup> The question may also be approached by analogy to the police misconduct "scope of employment" cases. The courts reason that sending a policeman out on the streets armed with dangerous weapons and regarding him as "always on duty" creates an automatic basis of liability for the municipality, at least as to nondiscretionary acts.<sup>44</sup>

In short, the question of respondeat superior status is one of proof, posing few theoretical problems. When, as in *Letelier-Moffitt*, the foreign sovereign and all the individual defendants default, the "scope of employment" allegation may be deemed admitted as to the individuals. The statutory requirement that proof be adduced to establish liability even if the foreign sovereign defaults may present some difficulties, which are addressed below.<sup>45</sup>

#### *Discretionary Act*

Although it is a part of section 1605(a)(5), the discretionary act exception is worthy of separate consideration. The exception poses subtle and difficult problems in the international context. Again, the cognate Federal Tort Claims Act provisions provide some guidance, as Judge Joyce Hens Green has held in her opinion in *Letelier*.<sup>46</sup> The exception also affords foreign states the same treatment as is given the United States Government in its own courts.

Turning again to the police analogy, the courts have generally held the day-to-day activities of police and law enforcement officials not to be "discretionary" so as to immunize the municipality from tort liability. The District of Columbia Circuit asks in each case whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct.<sup>47</sup> Police actions, even if authorized at high levels, are usually found not to be discretionary actions. In a Tort Claims Act case, *Downs v. United States*,<sup>48</sup> the court adopted a balancing test: "Does the value of protecting the individual tortiously injured outweigh the danger of less effective law enforcement because of imposing such tort liability?"<sup>49</sup> The court concluded that an FBI agent's handling of a hijacking incident leading to the killing of two hostages did not fall within the "discretionary act" exemption. Courts are moving to the view that the decision to establish a program policy, or set of regulations is discretionary under the Federal Tort Claims Act, but choices on how to enforce a policy or administer a program are not.<sup>50</sup>

Applying this test, the planning and execution of the *Letelier-Moffitt* assassinations were actions of Chile's agents as police officers, albeit mem-

bers of a secret police force. All of Chile's agents except the Cubans were officers or agents of DINA. The killings were typical of DINA's activities under the leadership of Manuel Contreras Sepulveda, as DINA is demonstrably responsible for the killing or attempted killing of exiled Chilean leaders in Argentina, Mexico, and Italy.<sup>51</sup> Chile's agents were executing policy, not formulating it. They were carrying out clearly-defined duties assigned them.

Judge Green, responding to Chile's attempts to invoke the "discretionary act" exemption, adopted a slightly different view:<sup>52</sup>

While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly involving policy judgment and decision and thus exempt as a discretionary act . . . , that exception is not applicable to bar this suit. As has been recognized, there 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. . . .

Whatever the details of one's analysis, a foreign sovereign cannot escape liability by claiming in effect that it has a policy of terrorizing its citizens in foreign countries, nor by saying that the conduct of high government officials will necessarily be drawn into question if the suit is permitted to go forward. While it is certainly true that a foreign sovereign making economic or political decisions within its own country, whether relating to the control of its national territory, its citizens, or its natural resources, enjoys a considerable, though not absolute, immunity from questions, this immunity does not extend to conduct which injures or kills beyond its borders.

#### *Act of State*

Chile sent Judge Joyce Hens Green a diplomatic note protesting jurisdiction, invoking the "act of state" doctrine, which calls for judicial abstention from inquiry into acts of foreign governments carried out in their own territory.<sup>53</sup> This effort at evasion had some plausibility because of the Supreme Court majority's analysis in *Alfred Dunhill of London, Inc. v. Republic of Cuba*,<sup>54</sup> drawing analogies between sovereign immunity and the act of state doctrine. Judge Green cut through the act of state tangle thus:<sup>55</sup>

Although the acts allegedly undertaken directly by the Republic of Chile to obtain the death of Orlando Letelier may well have been carried out entirely within that country, that circumstance alone will not allow it to absolve itself

under the act of state doctrine if the actions of its alleged agents resulted in tortious injury in this country. To hold otherwise would totally emasculate the purpose and effectiveness of the Foreign Sovereign Immunities Act by permitting a foreign state to reimpose the so recently supplanted framework of sovereign immunity as defined prior to the Act "through the back door, under the guise of the act of state doctrine."

Every Supreme Court decision deferring to an "act of state" has involved actions begun and completed entirely abroad without extraterritorial results. This much is clear from the reaffirmance in *Dunhill* of the rule that transnational deference is due only to acts of a foreign sovereign within its own territory.<sup>56</sup>

As for a supposed analogy between the act of state doctrine and foreign sovereign immunity, which takes up much of the majority opinion in *Dunhill*,<sup>57</sup> the FSIA does away with all basis for it; Congress has struck the balance, put the political branch out of the sovereign immunity business, made the FSIA the sole basis for making such choices, and put the power to decide entirely in the hands of the judicial branch. That determination, says Judge Green, cannot be evaded through a "back door" open to act of state arguments. The act of state doctrine gives no immunity to transnational terrorism.

Analyzed unclad in inapt analogy, the doctrine is seen as well to have other significant exceptions: the Supreme Court has left open the question whether certain foreign acts may be so odious as to be denied recognition.<sup>58</sup> Foreign jurisdictions recognize that *ordre public* and *fraude à la loi* may be grounds for denying effect to a foreign decree or act.<sup>59</sup> The forum court would certainly be justified in concluding that forum notions of *ordre public* are offended by immunizing international terror. And the Second Circuit recently affirmed that the conduct of a foreign official in violation of the law of nations could not be defended by showing it to have been the accepted practice in the state where it occurred.<sup>60</sup>

### *Problems of Service and Pleading*

Section 1608 gives the pleader many options concerning service: if the fractious foreign state will not be served by consent, cannot be served under a treaty, and will not be timely served if the mails are used, the State Department's facilities are made available. Regulations issued under the statute make the litigant's task easier.<sup>61</sup>

When, as in *Letelier*, the foreign state does not submit to the court's jurisdiction, additional problems arise. Federal Rule of Civil Procedure 12(b)(1) contemplates that the defense of lack of jurisdiction over the subject matter shall be made in the defendant's first responsive pleading, whether that be an answer or a motion to dismiss. Federal courts are,

however, of limited jurisdiction, and Rule 12(h)(3) may be read to permit lack of jurisdiction to be raised by "suggestion." Chile made two such "suggestions" in *Letelier*, without otherwise appearing in the action.<sup>62</sup> Plaintiff's motion to strike the second of these, a lengthy pleading sent as a diplomatic note to the State Department by the Republic of Chile and forwarded by the department to the clerk of the court, was denied.<sup>63</sup> Plaintiffs' answering motion was premised upon the fact that the note was in fact a pleading, required to be signed under Federal Rule of Civil Procedure 11. The district judge treated the note as a "suggestion" of the absence of jurisdiction, and proceeded to re-evaluate the question and reach a decision based upon Chile's submissions and without regard to an earlier entry of default against Chile under Federal Rule of Civil Procedure 55(a).

Where the foreign state takes the unusual step of appearing only by diplomatic protest, the wisdom of Judge Green's approach is manifest. While a valid decision on jurisdiction might be reached by finding that the foreign state was playing "fast and loose" and was therefore not entitled to air the jurisdictional claim, Judge Green, by deciding the question on the merits, established that the issue of jurisdiction has actually been litigated and determined; the court's judgment is thus insulated from collateral attack.<sup>64</sup>

### *Defaults*

Defaults have been rare under the Act, and the analogous case law provides few guideposts for the plaintiff. The proof requirement of section 1608(e), quoted above, requires reference to the Federal Rules of Civil Procedure. The House Report says of section 1608(e):<sup>65</sup>

This is the same requirement applicable to default judgments against the U.S. Government under rule 55(e), F.R.Civ.P. In determining whether the claimant has established his claim or right to relief, it is expected the courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign states.

Rule 55(e) has been characterized as requiring "sufficient evidence,"<sup>66</sup> that evidence be "adequately presented,"<sup>67</sup> and in a leading case, that the plaintiff "demonstrate that there is some basis on which he is entitled on the merits of his claim to judgment."<sup>68</sup>

These generalizations hardly advance analysis beyond the statutory standard. At best, the rule could be rephrased as requiring the court to find, in its discretion, that there is some evidentiary basis for the essential elements of the plaintiff's claim before a default judgment can be entered. This "some basis" standard may be viewed as analogous to a "probable cause" requirement.

In *Letelier*, Chile's default did not foreclose all avenues of fact-finding. The plaintiffs took third-party discovery against agencies of the federal government, deposed a government investigator, researched the congressional materials, interviewed witnesses from Chile, and even sought admissions and sworn answers from DINA agent Townley. On Townley's refusal to respond, the requests for admission were deemed by the court to have been admitted. Plaintiffs' counsel was even briefed as to certain important matters by the secret service of a foreign state. And of course, the live testimony of witnesses was available on the issue of damages. Such materials, it may be argued, amply bear the "indiciae of reliability" sufficient to "afford the trier of fact a satisfactory basis for evaluating the truth."<sup>69</sup>

A defaulting sovereign can hardly claim the identical evidentiary standard that would have applied had it appeared to defend. The legislative history makes explicit that courts are expected to take into account the extent to which the plaintiff's case depends on discovery against the foreign state. Chile, in its diplomatic note, had stated that it would not allow itself to be questioned about this matter. Moreover, the legislative history of the Act refers to Federal Rule of Civil Procedure 37, which provides sanctions for failure to make discovery; this citation calls into play the doctrine of *Societe Internationale v. Rogers*<sup>70</sup> and its progeny: A litigant who will not provide information required by the rules and who otherwise refused to cooperate must expect the court to indulge some presumptions against it as to the underlying facts.

If indeed the defaulting state's obduracy is to influence the standard applied to "evidence satisfactory" under section 1608(e), plaintiffs should have little difficulty meeting their burden. It is just that this be so; *qui tacet videt consentire* is the legal maxim, and the rule of law is served by making clear that foreign states will suffer the consequences of not playing by the rules.

Plaintiffs should, however, consider whether their evidence meets a higher standard than simply "probable cause;" if it does, so much the better. The Letelier-Moffitt plaintiffs had the record in the criminal case, *United States v. Juan Manuel Contreras Sepulveda, et al.*<sup>71</sup> The evidence had been adduced under oath and subject to vigorous cross-examination, and therefore bore "indiciae of reliability," though the only defendants tried were the three captured CNM members. In the analogous case of *United States v. Knox*,<sup>72</sup> an action to recover money, allegedly the proceeds of the sale of stolen government property, the court entered a default judgment based upon the record in a related criminal case.

Hearsay declarations may be admitted under the "evolving expansive exceptions" of Federal Rules of Evidence 803(24) and 804(b)(5),<sup>73</sup> or where someone has confessed, as Townley had, as declarations against penal

interest.<sup>74</sup> Government reports of various kinds may be admissible—these being civil cases—under Federal Rule of Evidence 803(8).<sup>75</sup>

### *Collectibility of Judgments*

Prior to the FSIA, the United States courts took a latitudinous view of foreign state immunity from execution. The statutory reform in sections 1609-11 was welcomed by the profession, the general view being “what use is the right to sue if you can’t collect?”

Section 1609 establishes a general rule of immunity, and section 1610 lists exceptions to the general rule, somewhat narrowly for “foreign states” and more broadly for agencies and instrumentalities of foreign states. Section 1611 lists the “exceptions to the exceptions,” and in general puts foreign currency reserves and military goods beyond the reach of execution under almost all circumstances. Section 1610(a)(4)(B) puts diplomatic premises out of reach.

In addressing the problem of collection, one turns first, therefore, to exceptions to immunity enumerated in section 1610(a):

- (1) express or implied waiver;
- (2) the property [sought to be executed upon] is or was used for the commercial activity upon which the claim is based;
- (3) the property was taken in violation of international law and the judgment is *in rem*;
- (4) the property is the subject of an *in rem* judgment relating to succession or gift;
- (5) the conduct sued upon is covered by a policy of liability insurance.

For our purposes, the first, third, and fifth provisions are obviously the most important.

The provision on waiver, according to the House Report,

is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(a)(1) of the bill. A foreign state *may have waived its immunity from execution, inter alia, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings, leading to judgment or to execution.* As in section 1605(a)(1), a waiver on behalf of an agency or instrumentality of a foreign state may be made either by the agency or instrumentality or by the foreign state itself.<sup>76</sup>

One example of an express waiver is the foreign flag air carrier waiver of immunity with respect to certain matters, a regulatory condition of obtaining landing rights in the United States.<sup>77</sup>

If the Report’s view is sustained by the courts, a general appearance by



the foreign state without raising the defense of immunity, being sufficient to confer jurisdiction under section 1605, would also subject the foreign state to attachment in aid of execution. Such plenary implicit waivers will probably be rare, and some distinguished judges have warned against an expansive attitude towards implicit waiver.<sup>78</sup> Judge Weinstein of the Eastern District of New York suggests that commercial activity should under almost no circumstance be considered to evidence waiver, and cites the legislative history in support of his view.<sup>79</sup>

Section 1610(a)(2) sounds rather like the jurisdictional provision in section 1605(a)(2), but the two provisions are by no means coterminous. Rather, section 1610(a)(2) is broader, as suggested by the House Report, which says that "activities encompassed by Section 1605(a)(2)" are "included," but goes on to list other uses of section 1610(a)(2).<sup>80</sup> The Report also contains the following interesting comment:<sup>81</sup>

The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state.

This language imports a kind of "veil-piercing" standard, permitting the plaintiff to argue that property held by entity *A* should for purposes of execution be considered that of entity *B* or even of the foreign state itself; it should be read together with section 1603, which defines "foreign state" to include for almost all statutory purposes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."

Section 1610(a)(2) should permit execution on the property of a state-owned corporation whose facilities and personnel were used as a cover for the tortious conduct of foreign state agents. The corporation itself might not be liable, because of ignorance that it was being so used, or at least because of the difficulty of a plaintiff proving knowledge. But the statute as literally read permits execution on the corporation's property because its activity is in some real sense the "basis" of the plaintiff's claim. In such a situation, recalling the LAN Chile-DINA connection, it seems fair to disregard the nominal separation between the entity called Chile and the entity called LAN Chile, and the legislative history supports doing just that.

Rarely will a foreign state insure against the sort of pursuit of refugees which was the subject of the Letelier-Moffitt case and section 1610(a)(5) therefore seems unhelpful. However, the 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. So while it is true that terrorism insurance is more likely to be carried by those who fear they will be victims than by those who are intending to be perpetrators, this does not end the matter.

### *Collection Without Execution*

A foreign state which suffers a judgment for an act of terror and refuses to pay it deserves the condemnation of other states and of international organizations. An enlightened foreign policy would use diplomatic pressure to compel payment. Congressional appropriations for aid might properly be conditioned on payment, or might even provide for an offset. International monetary authorities might be urged to lend a voice in support of a foreign state meeting its obligations to the plaintiffs.

The transnational validity of a judgment rendered by a court of the United States might also be a route to collection. The international recognition of judgments—international “full faith and credit”—is a well-settled principle of international law,<sup>82</sup> subject in the case of judgments against a foreign state to local municipal immunity provisions as well as to the recognized *fraude à la loi* and *ordre public* exceptions.<sup>83</sup> If the foreign state in which suit is brought on the judgment has a more liberal rule than the United States on execution, collection is obviously easier. Too, suing on the United States judgment and obtaining a foreign judgment as well may increase the diplomatic pressure on the offending state. These are matters more of strategy than of formal legal rules, but adherence to international law is often secured by means other than formal.

## THE BASES OF FOREIGN STATE LIABILITY

No purpose is served by listing the garden-variety torts which may be committed by the agents of a foreign state bent on pursuing its subject into a country of refuge. Subject only to the specific exclusions of section 1605 (a)(5)(B), these are the bases of claims upon which relief may be granted to refugee plaintiffs. However, other theories of liability may be available; the innovative lawyer and the politically-motivated client will probably agree they should be put forward. In the Letelier-Moffitt case, two nontraditional tort claims were asserted, each of which may be paradigmatic: violation of a statutory duty, and tortious conduct in violation of the laws of nations.

### Implication of Private Civil Cause of Action from Criminal Statute

It is commonly said that a criminal statute provides a standard for all reasonable members of the community, and that actions in violation of a criminal statute are *per se* negligent.<sup>84</sup> In the federal courts, these hornbook principles must be viewed in light of *Cort v. Ash*<sup>85</sup> and the cases which follow it, including *Cannon v. University of Chicago*.<sup>86</sup> The Supreme Court requires that four questions be asked in seeking a private remedy implied in a statute not expressly providing for one:

- (1) Is plaintiff one of the persons in the class for whose special benefit the statute was enacted?
- (2) Was the legislative intent in enacting the statute to create such a remedy?
- (3) Is implication of a private remedy consistent with the underlying purposes of the legislative scheme?
- (4) Is the cause of action traditionally relegated to state law and so inappropriate to base solely on federal law?<sup>87</sup>

The Supreme Court has indicated that the "right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."<sup>88</sup> The Court has usually inferred a cause of action if the statutory language conferred a right directly on a class of persons construed to include the plaintiffs, civil rights statutes being one prime example. In *Letelier* the operative statute was 18 U.S.C. § 1116:

(a) Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title, except that any such person who is found guilty of murder in the first degree shall be sentenced to imprisonment for life. . . .

(3) Foreign official means—

(A) . . . Ambassador, Foreign Minister . . . or any person who has previously served in such capacity. . . .

This section has its own conspiracy provision, 18 U.S.C. § 1117.

Orlando Letelier was, according to statutory definition, a "foreign official." The Act for the Protection of Foreign Officials and Official Guests of the United States,<sup>89</sup> of which sections 1116 and 1117 were a part, was enacted for the express purpose of providing the federal government with authority to protect foreign officials and official guests against violations

of their persons and property. Congress was anxious to deter increasing "acts of physical violence against members of the diplomatic corps and other foreign officials and official guests in our community. . . ." <sup>90</sup> The immediate occasion of this legislation was the murder of Israeli athletes by Palestinian terrorists in Munich at the 1972 Olympics. Congress clarified that it intended to protect "the rights of visiting artist, academic and scientific groups, and other groups and individuals who ought not to be beyond the pale of Federal concern." <sup>91</sup> In a 1976 amendment to this legislation, "internationally protected persons" were added as a class of individuals specially protected by the federal government against terrorist acts. The amendment implements two international conventions, one sponsored by the United Nations and one by the Organization of American States, to both of which the United States was signatory. <sup>92</sup> Moreover, the jurisdictional statute, the FSIA, has taken the executive branch out of immunity determinations; the principles of plaintiffs' choice and judicial decision are to rule. It is therefore consistent to permit private redress of the public wrong occasioned by violation of criminal statutes.

Finally, federal and not state courts are the proper forums within which to conduct litigation of most international questions, and especially of alleged terrorist actions against foreign officials. In fact, the inappropriateness of leaving such prosecutions to state law enforcement officials was precisely the reason for enacting the protective legislation, a judgment reinforced by the removal provision of the FSIA itself.

### **Implication of Private Civil Cause of Action from International Custom**

International custom has long been held one of the primary sources of international law. The seminal case of *The Paquete Habana* <sup>93</sup> held that coast-wise fishing vessels, when unarmed and pursuing their calling, are exempt from capture as prizes of war. The Supreme Court, although it found no express treaty or public act to guide it, reached this decision by finding that the "customs and usages of civilized nations" <sup>94</sup> allowed fishermen of all nations to go about their business without military interference.

It is now beyond dispute that federal courts have the authority to determine and apply international custom, and that it is part of the "laws" of the United States which may be interpreted and applied at the suit of private individuals. <sup>95</sup>

No sovereign nation tolerates the assassination of foreign government officials on its soil. A number of international covenants and declarations evidence this international custom of condemning terrorist acts directed at representatives of foreign governments residing in other nations, including the International Covenant on Economic, Social and Cultural Rights, the

International Covenant of Civil Rights, the Pact of San Jose of November 22, 1969 (the American Convention on Human Rights), and the General Assembly Declaration of Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.<sup>96</sup>

The documents are standards embodying the sense of decency and humanity of civilized nations that terrorist acts should be condemned: in short, custom. The executive branch of the United States Government has joined in this condemnation by signing many of these conventions, and Chile has signed the two covenants and the Pact of San Jose.

In determining whether the law of nations defines a tort, the list of conventions and United Nations actions is suggestive and not definitive. However, treatise after treatise, case after case, treaty after treaty condemn the sort of terrorism which has stalked refugees fleeing oppression.<sup>97</sup> The sources of international law are more various and more recondite than the sources of municipal law, at least in Western countries.<sup>98</sup> The pursuit of refugees may be regarded as violating one of the most important principles of the post-World War II legal order: the prohibition on the use or threat of force except in certain narrowly-defined cases.<sup>99</sup> This principle has indeed been elaborated by a committee of the General Assembly to include territorial incursions, acts of reprisal, and terrorism,<sup>100</sup> all elements of the conduct at issue in *Letelier*.

## CONCLUSION

The Letelier-Moffitt murders are certainly a reproach to those who planned the destabilization of the Allende government, and who cooperated with the military chieftains and their secret police before and after the September 1973 coup; so to observe is, however, only to point out one more instance of a consistent and often tragic error of American postwar policy towards leftist and reform movements in the Third World. American policy decisions fomenting or encouraging repressive regimes are bound to "bring home" serious consequences. "Educate a crow and it will pluck out your eyes," goes the old Spanish proverb.

Why have foreign secret police agencies been permitted to operate within our borders? These agencies are the stepchildren of the CIA. They are the emissaries of friendly foreign governments, or at least of governments we do not wish to risk offending. Reasons of state.

Given that there is precious little motivation for the American Government to drive these intruders out, or even effectively to curtail their activities, the Foreign Sovereign Immunities Act is of particular value.

Irrespective of the direction and strength of the political winds, the plaintiff is entitled to bring a claim into the public forum and litigate it.

The two most powerful words in our language, when uttered by a claimant for justice, are these: I accuse. I accuse, though the "official version" of events does not support me. I accuse, though "reasons of state" seek to cloak the matter in fustian prose or in flat denial. Here is the larger significance of the Act: it promises a remedy, but guarantees a forum. And the powerful and compelling claims for justice which may be aired in such a forum can be, as the past teaches us, very like Diderot's "strange god":<sup>101</sup>

The rule of Nature and of my Trinity, against which the gates of Hell shall not prevail, . . . establishes itself very quietly. The strange god settles himself humbly on the altar beside the god of the country. Little by little he establishes himself firmly. Then one fine morning he gives his neighbor a shove with his elbow and—crash!—the idol lies upon the ground.

## NOTES

<sup>1</sup> The factual background to the Letelier-Moffitt murders is available from two readily accessible public sources. S. LANDAU & J. DINGES, *ASSASSINATION ON EMBASSY ROW* (1980), is the only good book on the matter. It contains historical background on the Salvador Allende government in Chile, its 1976 forcible overthrow in a CIA-supported military coup, and the junta's persecution of former Allende officials and supporters. The book, a product of three years' research, also details the events leading to the murders. Judge Joyce Hens Green's opinions in *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); No. 78-1477 (D.D.C., filed Nov. 5, 1980) summarize the relevant facts. The transcript of record and exhibits introduced by plaintiffs in *Letelier* have obviously been available to me. However, unless otherwise noted, all factual references in this article to events relating to the murders are verifiable from the Landau-Dinges book or the cited opinions. See also *United States v. Novo Sampol*, No. 79-1541 (D.C. Cir., Sept. 15, 1980) reversing the convictions of some of the killers because of the trial court's admission of impermissible testimony and denial of a separate trial.

<sup>2</sup> 10 K. MARX & F. ENGELS, *COLLECTED WORKS* 378-91 (1978). Marx was one such refugee and active in a number of exile organizations. The cited materials include letters, articles, and even accounting records of exile groups.

<sup>3</sup> *Id.* at 384.

<sup>4</sup> *Id.* at 380.

<sup>5</sup> Wash. Post, Oct. 18, 1980, § A at 1, cols. 4-5, § A, at 17, cols. 1-6.

<sup>6</sup> The Privacy Act defines "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence," and is intended, unlike the Freedom of Information Act, to exclude foreign nationals and resident aliens. 5 U.S.C. § 552a(a)(2)(1974); SENATE COMM. ON GOVERNMENT OPERATIONS AND HOUSE COMM. ON GOVERNMENT OPERATIONS, SUBCOMM. ON GOVERNMENT INFORMATION AND INDIVIDUAL RIGHTS, *LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974*, S. 3418 (Pub. L. No. 93-579) 232 (1976); *Raven v. Panama Canal Co.*, 583 F.2d 169 (5th Cir. 1978), cert. denied, 440 U.S. 980 (1979) (Panamanian citizen not an "individual" within the meaning of the Privacy Act, and thus not entitled to disclosure). Regulations under the Privacy Act are scattered throughout the Code of Federal Regulations. A list, agency by

agency, appears in the 1981 Edition of *Litigation Under the Federal Freedom of Information Act and Privacy Act* pp. 61-62 (C. Marwick ed. 1980)(seminar handbook published by the Center for National Security Studies).

<sup>7</sup> See articles cited note 5 *supra*.

<sup>8</sup> The committee's report is extensively quoted and summarized in *Wash. Post*, Aug 9, 1979, § A, at 1, cols. 1, 4. The committee's report has never been officially released, but its contents have been leaked to the press and others from several sources.

<sup>9</sup> HOUSE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, KOREAN INFLUENCE INVESTIGATION, H.R. REP. NO. 1817, 95th Cong., 2d Sess. (1978).

<sup>10</sup> HOUSE COMMITTEE OF GOVERNMENT OPERATIONS, NINETEENTH REPORT: ALLEGED VIOLATIONS OF U.S. AVIATION LAWS AND REGULATIONS BY LAN CHILE AIRLINES, H.R. REP. 1157, 96th Cong., 2d Sess. (1980).

<sup>11</sup> See sources cited at notes 8-9, *supra*, on CIA activity in South America. See also LANDAU & DINGES, *supra* note 1.

<sup>12</sup> These facts are set forth in *United States v. Novo Sampol*, No. 79-1541, slip op. at 4 (D.C. Cir., Sept. 15, 1980).

<sup>13</sup> Decision No. 21,422 (Sup. Ct. of Chile, Oct. 1, 1979), remanding Case No. 192-78 (2d Military Court of Santiago).

<sup>14</sup> Civil discovery procedures afford the litigant the full range of compulsory process, and the scope of sanctions available under FED. R. CIV. P. 37 is broad, including dismissal against a refractory plaintiff and default against a defendant. See generally *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) (dismissal of complaint not justified where there was a good faith effort made to produce documents). Discovery abroad is governed by 28 U.S.C. §§ 1781-83 (subpoenas abroad and letters rogatory). A court also has the common law power to issue a *commission sub mutuae*. See *Volkswagenwerk, A.G. v. Superior Court*, 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973)(discovery orders annulled where such orders invade German sovereign rights and might require enforcement against property and persons not subject to the court's jurisdiction). See also *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (in force in the United States as of Oct. 7, 1972), which gives greater flexibility to civil litigants in some instances than would be available to a government agency in a criminal matter seeking information abroad through the use of formal procedures.

<sup>15</sup> The *Letelier* complaint was filed in August 1978. One instance of a divergence between the government view of the facts and the plaintiffs' view was the government's refusal to credit evidence that President Pinochet of Chile was personally involved in the decision to assassinate Letelier. Plaintiffs adduced evidence, both direct and circumstantial, of Pinochet's involvement, in the trial of their case.

<sup>16</sup> Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2892 (codified at 28 U.S.C. §§ 1330, 1602-11, and amending 28 U.S.C. §§ 1391, 1441 (1976)).

<sup>17</sup> *Hearings Before the Sub. Comm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary on H.R. 11315, Jurisdiction of U.S. Courts in Suits Against Foreign States*, 94th Cong., 2d Sess. 24 (1976)(testimony of Monroe Leigh) [hereinafter cited as *Hearings*].

<sup>18</sup> The "restrictive theory" was formally adopted by the State Department in Letter of Acting Legal Adviser Jack B. Tate to Department of Justice, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952), which became known as the "Tate letter." See generally testimony of Monroe Leigh and Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, *Hearings, supra* note 17, at 24-37.

<sup>19</sup> Examples of state involvement in commercial ventures abound: state-owned trading companies, flag air carriers, cultural missions, and so on. Some of the activities which give rise to liability in the modern world are described by Mr. Ristau, *supra* note 18, at 29-37. As to the *jure imperii-jure gestionis* distinction, see, e.g., Von Mehren, *The Foreign Sovereign Immunities Act*

of 1976, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Letelier, 488 F. Supp. at 670, Republic of Mexico v. Hoffman, 324 U.S. 30, 40-41 (1945) (Frankfurter, J. concurring) (boat owned by sovereign state immune from suit where declaration of sovereign ownership is presented to foreign service branch).

<sup>20</sup> In the United States, this movement is reflected in civil rights, labor, social welfare and social security legislation, and in the recognition—halting and hesitant at times—of constitutional rights to the fair and impartial administration of these regimes of public benefit. See generally THE RIGHTS OF AMERICANS (Dorsen ed. 1970), a collection of essays which gives a general perspective. In other capitalist countries, such as France, Italy, and Great Britain, the continuing redefinition of human rights has come about with the support of the parliamentary socialist parties and trade union movements. One need not debate whether these principles are a "particular" as opposed to "general" international law, nor theorize about whether a state can be bound without its express or implied consent, nor wonder whether these developing principles can be found in a sort of natural law *ius cogens*. Events in the international community have led to expressions by capitalist and socialist powers alike containing a consensual view of human rights in the international community. At least this consensus, when found to exist by a competent tribunal in an appropriate case, may be imposed upon the parties as a binding norm.

<sup>21</sup> See generally W. BISHOP, INTERNATIONAL LAW ch. 10 (3d ed. 1971), for a collection of materials from the League Covenant, the Kellogg-Briand Pact, the United Nations Charter and other sources. For a different perspective, see G. TUNKIN, THEORY OF INTERNATIONAL LAW chs. 17-18 (W. Butler trans. 1974) a leading work by the foremost Soviet international law theoretician. Few doubt that international law binds states not to commit aggressive war, and otherwise regulates state military action. Dispute arises over particular applications of the rules. The controversy over the United States intervention in Vietnam well illustrates the sorts of consensus and controversy of which I speak. Professor Richard Falk's admirable collection of materials in the three volumes of THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968, 1970, 1972) treats these issues in a relevant context.

<sup>22</sup> See Treaty of London, Aug. 8, 1945, 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279; Nurnberg Tribunal Judgments, 6 F.R.D. 69 (1946). See also TUNKIN, *supra* note 21, at 396-425.

<sup>23</sup> See TUNKIN, *supra* note 21, at 79-83. Excerpts form the Declaration, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), and other related documents are contained in BISHOP, *supra* note 21, at 465-88. That these are related pronouncements may form part of "custom" and thereby create binding norms of international law is agreed by Tunkin in Chapter 5 (with some reservations not here relevant), as well as by Western authorities. See, e.g., R. FALK, SON MY: WAR CRIMES AND INTERNATIONAL RESPONSIBILITY, 3 THE VIETNAM WAR AND INTERNATIONAL LAW 327 (R. Falk ed. 1972). International custom is part of international law which in turn is the "law of the land." See The Paquete Habana, 175 U.S. 677 (1900); United States v. Rauscher, 119 U.S. 407 (1886)(customary international law to be applied absent extradition treaty).

<sup>24</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights & the International Covenant on Civil Rights, opened for signature December 16, 1966 G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316, reprinted in International Bill of Human Rights, U.N. Doc. OPI/598 (1978); Pact of San José (the American Convention of Human Rights) November 22, 1969, OAS Official Records, OEA/Ser. K/XVI/1.1, reprinted in ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS (1978), 7-8 app. VIII; Declaration of Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131, 20 U.S. GAOR Supp. (No. 14), U.N. Doc. A/RES 2131 (1965). See also TUNKIN, *supra* note 21, at 79-83.

<sup>25</sup> TUNKIN, *supra* note 21, at 81-82 (emphasis added).

<sup>26</sup> Assertion of one's rights under international law in the courts of the offending sover-



eign does not disturb the notion that ultimately human rights are a state's own business, though the legal principles announced in such suits may be applied in other contexts.

<sup>27</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The Council of Europe annually publishes a *Yearbook of the European Convention on Human Rights*. My impression that the Convention has not been wholly successful rests upon observation of the lengthy process which leads to a judgment, upon the relatively modest set of rights guaranteed, and upon the considerable deference given by the tribunal to state's positions. The "official" view is stated in A. ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1962). My views have been shaped in interviews with attorneys and administrators in London and Strasbourg.

<sup>28</sup> I refer to the "human rights" policies of the Carter Administration.

<sup>29</sup> See text at notes 54-60 *infra*.

<sup>30</sup> Von Mehren, *supra* note 20, at 38.

<sup>31</sup> See note 18 *supra*.

<sup>32</sup> See testimony of Bruno A. Ristau, in *Hearings*, *supra* note 17, at 32.

<sup>33</sup> See, e.g., testimony of State Department Legal Adviser Monroe Leigh, Justice Department spokesman Bruno A. Ristau, Cecil J. Olmstead, Chairman of the Rule of Law Committee and Vice President of Texaco Co., and the representative of the Maritime Law Association of the United States, in *Hearings*, *supra* note 17, at 24-57, 79-87.

<sup>34</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803). Justice Marshall took up the same theme in the sovereign immunity case of *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 147 (1812) (war vessel of a friendly foreign sovereign is exempt from local jurisdiction where peacefully enters port of call in that jurisdiction), and his opinion concludes by stating that a "suggestion" of the United States Attorney will be enough to establish the immunity of a foreign vessel.

35

In September 1976, [Michael] Townley [the DINA agent in charge of the Letelier operation] purchased a roundtrip ticket to travel via LAN Chile between Santiago and New York. The ticket was issued to Townley under one of his aliases, Hans Peterson Silva. On September 8, 1976, he used this ticket to travel to New York. It was on this trip that Townley carried approximately two grams of [an explosive] . . . and several flash caps (used to ignite explosives).

On September 9, Townley met two other DINA agents, Captain Fernandez Larios and Lilliana Walker, at Kennedy International Airport. The three of them met with Enrique Gamba, a LAN Chile employee, in the LAN Chile VIP lounge, and arranged to have Fernandez' and Walker's tickets to fly from New York to Santiago via LAN Chile upgraded from economy to first class at no extra cost, and to rent a car from them in New York under a false name. Townley continued his surveillance of Letelier, and placed the explosives (which had been provided to him by the CMN) in Letelier's car. Townley then left New York to return to Chile, using the ticket issued to him under the Hans Peterson Silva identity. He was able to travel as far as Miami; but for a number of reasons, he could no longer leave the United States using that identity. However, his ticket issued to Silva was legally non-transferrable. Townley approached a LAN Chile pilot, Ronald Berger, who used his internal account to arrange for the issuance of a new ticket under the name of Kenneth Enyart, another of Townley's fictitious identities. Townley then returned to Chile.

As part of the deal that he arranged with the CNM, Townley had agreed to repay them for the explosives that they used to build the bomb used in the assassination. After the assassination, Townley forwarded . . . [explosives and cash] . . . via LAN Chile. Subsequently, LAN Chile personnel participated in a number of currency transactions

that were undertaken in order to pay off various participants in the assassination scheme.

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS, *supra* note 10, at 4-5.

36 Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200, 201 (1979) [hereinafter Brower].

37 *Id.*

38 HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 20-21 (1976) reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6619 (emphasis added) [hereinafter cited as REPORT]. See also testimony of Monroe Leigh, *Hearings, supra* note 17, at 24-25, suggesting that the tort provision has a broad potential application.

39 Albert Ehrenzweig was an early and leading proponent of this view. See his A TREATISE ON THE CONFLICT OF LAWS § 29 (1962). The most recent Supreme Court exploration of these issues is *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

40 Ch. 753, § 421, 60 Stat. 842 (1946) (as amended) (current version at 28 U.S.C. § 2680(h) (1976)).

41 The borderland between tort and contract has been well-guarded of late. See, e.g., W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92 (4th ed. 1971). The crossover from tort to contract is easier for civil law lawyers, given that contract and tort are branches of the law of "obligations." See 1 P. OURLIAC & J. DE MALAFOSSE, HISTOIRE DU DROIT PRIVÉ (2d ed. 1969).

42 The identical language appears at 28 U.S.C. § 2675(a) (1976).

43 RESTATEMENT (SECOND) OF AGENCY §§ 220, 228 (1958); PROSSER, *supra* note 41, at § 70.

44 See, e.g., *Carter v. Carlson*, 447 F. 2d 358 (D.C. Cir. 1971), *rev'd on other grounds*, 409 U.S. 418 (1972) (act of making an arrest is ministerial rather than discretionary, and thus the District of Columbia cannot claim sovereign immunity with regard to officer's tortious conduct in carrying out his duty).

45 See text at notes 65-75 *infra*.

46 28 U.S.C. § 2680(a)(1976), discussed at 488 F. Supp. at 673.

47 *Carter v. Carlson*, 447 F.2d at 362. The general rule in the District of Columbia as to claims against the government is that they are actionable if "an injury inflicted as a consequence of one of such functions can be subjected to judicial redress without thereby jeopardizing the quality and efficiency of government itself." *Elgin v. District of Columbia*, 337 F.2d 152, 154 (D.C. Cir. 1964) (repair of broken guard rails in school year is ministerial rather than discretionary). See also *Spencer v. General Hospital*, 425 F.2d 479, 482 (D. C. Cir. 1969) (*en banc*) (fact that hospital is a governmental entity does not automatically render it immune from suit). Other applications of the discretionary act rule in the context of police misconduct are *Marusa v. District of Columbia*, 484 F.2d 828 (D.C. Cir. 1973) (D. C. and police chief are vicariously liable for negligent use of police revolver even though policeman was out of uniform at time of tortious conduct); *Thomas v. Johnson*, 295 F. Supp. 1025 (D.D.C. 1968) (D.C. duty to supervise and control police officer is ministerial rather than discretionary where suspect was assaulted and injured during course of false arrest).

48 522 F.2d 990 (6th Cir. 1975) (FBI agent's handling of an airline hijacking, in which two hostages were killed, not within discretionary act exemption).

49 522 F.2d at 997-98.

50 *Driscoll v. United States*, 525 F.2d 136, 138 (9th Cir. 1975)(discretionary act exception to sovereign immunity limited to decisions at planning rather than operational states); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974) (HEW decision to release a production lot of polio vaccine not discretionary); *United Air Lines, Inc. v. Weiner*, 335 F.2d 379, 393-94 (9th Cir. 1964), *cert. dismissed sub non* *United Airlines, Inc. v. United States*, 379 U.S. 951 (1964) (failure to conduct adequate investigation of local air traffic conditions in planning Air Force flight training program is within the discretionary act exception); *White v. United States*, 317

F.2d 13, 17 (4th Cir. 1963) (negligent treatment of patient in Veterans Administration hospital not within the discretionary act exception).

<sup>51</sup> See Plaintiff's Memorandum in Support of Motion to Set a Trial Date at 2-3, *Letelier v. Republic of Chile*, No. 78-1477 (D.D.C., filed Nov. 5, 1980) and materials there cited.

<sup>52</sup> 488 F. Supp. at 673.

<sup>53</sup> See cases cited at notes 55, 57 *infra*.

<sup>54</sup> 425 U.S. 682 (1976)

<sup>55</sup> 488 F. Supp. at 673-74, citing legislative history of FSIA, *Dunhill*, and *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

<sup>56</sup> 425 U.S. at 687.

<sup>57</sup> 425 U.S. at 705 n. 18.

<sup>58</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 419-20.

<sup>59</sup> See A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* §§ 79, 81 (1967); 1 H. BATIFFOL, *DROIT INTERNATIONAL PRIVÉ* § 374 (5th ed. 1970).

<sup>60</sup> *Filartiga v. Pena-Irala*, 630 F. 2d 876 (2d Cir. 1980).

<sup>61</sup> 22 C.F.R. § 93.1, 93.2(e), as prescribed by 28 U.S.C. § 1608(a)(1976).

<sup>62</sup> The procedural history is set out by Judge Green, 488 F. Supp. at 666-67.

<sup>63</sup> 488 F. Supp. at 667-68.

<sup>64</sup> See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940) (determinations of lower federal courts as to whether they have jurisdiction to entertain cause are open to direct review but may not be challenged collaterally); *Durfee v. Duke*, 375 U.S. 106 (1963) (full faith and credit clause requires that local determinations of jurisdiction be binding on other states).

<sup>65</sup> REPORT, *supra* note 38, at 26.

<sup>66</sup> *Carroll v. Secretary, Dep't of HEW*, 470 F. 2d 252, 256 (5th Cir. 1972) (case to be decided on basis of sufficiency of evidence, quantity not relevant).

<sup>67</sup> *Putnam Mills Corp. v. United States*, 479 F.2d 1334, 1341 (Ct. Cl. 1973) (judgment against the United States to be entered with caution where evidence not adequately presented).

<sup>68</sup> *Campbell v. Eastland*, 307 F.2d 478, 491 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963) (policy of Rule 55(e) requires each litigant to present evidence in support of his claim; there can be no default judgments without a basis in evidence).

<sup>69</sup> *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970) and *California v. Green*, 399 U.S. 149, 161 (1970), dealing with the standards to be applied in evaluating admissibility of hearsay evidence against a criminal defendant.)

<sup>70</sup> 357 U.S. 197 (1958), followed in *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1979) (district court decision to dismiss for failure to respond to discovery orders a discretionary remedy). See also *Kahn v. Secretary, HEW*, 53 F.R.D. 241 (D. Mass. 1971) in which the court took "as established" facts supported on the record in those areas where the government obstructed discovery.

<sup>71</sup> No. 78-367 (D.C. Criminal, Feb. 14, 1979), *rev'd sub nom* *United States v. Novo Sampol*, No. 79-1541 (D. C. Cir. Sept. 15, 1980).

<sup>72</sup> 79 F. Supp. 714, 715 (D. Tenn. 1948).

<sup>73</sup> See generally 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶¶ 803(24)[01]-[02], 804(b)(5)[01]-[02] (1979).

<sup>74</sup> FED. R. EVID. 804(b)(3) abolishes the common law limitation on declarations against interest, which had restricted them to declarations against pecuniary, as opposed to penal, interest. The Supreme Court had already held that declarations against penal interest might bear such an indication of reliability as to be admissible at the instance of a criminal defendant if they were exculpatory. See *Chambers v. Mississippi*, 410 U.S. 284 (1973) (declarations against penal interest not subject to hearsay rule), and Professor Peter K. Westen's masterful

articles, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); *Compulsory Process II*, 74 MICH. L. REV. 191 (1975).

75 See the Advisory Committee Notes to FED. R. EVID. 803(8), for a discussion of the intended reach of this very broad provision.

76 REPORT, *supra* note 38, at 28 (emphasis added).

77 14 C.F.R. §§ 221.175-176 (1980).

78 See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284, 1300 (S.D.N.Y. 1980) (foreign sovereigns are immune from suit by U. S. citizen who is victim of foreign state's tortious activity while abroad, even where such tortious conduct emerges from the commercial activities of such sovereigns). Compare *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (Nigeria waived sovereign immunity by conduct) with *Patterson Zochonis U.K. Ltd. v. Compania United Arrow*, 493 F. Supp. 621 (S.D.N.Y. 1980) (no waiver by filing Federal Maritime Commission application and accepting bills of lading with New York choice of forum clause).

79 *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979) (setting up a hotel in United States is not plenary waiver).

80 REPORT, *supra* note 38, at 28.

81 *Id.* at 28. See also *Del Bianco, Execution and Attachment Under the Foreign Sovereign Immunities Act*, 5 YALE STUD. WORLD PUBLIC ORDER 109 (1979).

82 See generally, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

83 See notes 58-60 *supra* and accompanying text.

84 PROSSER, *supra* note 41, at § 36.

85 422 U.S. 66 (1975) (analysis of 18 U.S.C. § 610 reveals no evidence of intent to grant a private right of action to corporate shareholders).

86 441 U.S. 677 (1979) (Title IX meets all *Cort v. Ash* tests and therefore a private remedy is available).

87 *Cort v. Ash*, 422 U.S. at 78.

88 *Cannon v. University of Chicago*, 441 U.S. at 690, n. 13 (1975).

89 Pub. L. 92-534, 86 Stat. 1070 (1972) (amended by Pub. L. No. 94-467, 90 Stat. 1997 (1976)) (codified in scattered sections of 18 U.S.C.).

90 SENATE COMM. ON THE JUDICIARY, PROTECTION OF FOREIGN OFFICIALS AND OFFICIAL GUESTS OF THE UNITED STATES, S. REP. NO. 1105, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4316, 4316-17.

91 *Id.* at 4319.

92 HOUSE COMM. ON THE JUDICIARY, IMPLEMENTING INTERNATIONAL CONVENTIONS AGAINST TERRORISM, H.R. REP. NO. 1614, 94th Cong., 2d Sess. (1976), reporting on Pub. L. No. 94-467, 90 Stat. 1997 (1976); Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, done Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, done Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

93 175 U.S. 677 (1900).

94 *Id.* at 700.

95 See generally sources cited and text at note 23 *supra*; BISHOP, *supra* note 21, at 79; C. PARRY, THE SOURCES AND EVIDENCE OF INTERNATIONAL LAW (1965).

96 See note 24 *supra*.

97 See, e.g., in addition to materials cited *id.*, the Report cited at note 92 *supra*.

98 See *The Paquete Habana*; 175 U.S. 677 (1900); *United States v. Rauscher*, 119 U.S. 407 (1886); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

99 This is the dominant theme of the United Nations Charter. See authorities cited at note 23 *supra*.

<sup>100</sup> See G. A. Res. 2131, *supra* note 24.

<sup>101</sup> Quoted in M. TIGAR, *LAW AND THE RISE OF CAPITALISM* 6 (1977).