HUMAN RIGHTS AND SOVEREIGN AND INDIVIDUAL IMMUNITIES (SOVEREIGN IMMUNITY, ACT OF STATE, HEAD OF STATE IMMUNITY AND DIPLOMATIC IMMUNITY) - SOME REFLECTIONS

*Ved P. Nanda**

I. INTRODUCTION

Reflections on the application of sovereign and individual immunities law are especially pertinent in light of the controversy surrounding the arrest and trial of General Augosto Pinochet in Britain, at the request of a Spanish magistrate on charges of murder, hostage-taking, and torture during his seventeen year rule in Chile. This commentary will briefly review the controversy in the next section. The following sections will discuss sovereign immunity, act of state, head of state immunity and diplomatic immunity in connection with human rights violations. In the final section, I will offer my recommendations.

II. THE PINOCHET CONTROVERSY

At the Spanish request and pursuant to British procedures the Lord Chief Justice of the High Court, Queen's Bench, interpreted the applicable United Kingdom statutes, including the United Kingdom Extradition Act of 1989, the State Immunity Act of 1978 and the Diplomatic Privileges Act of 1964. The Court held that the former dictator was "entitled to immunity as a former sovereign from the criminal and civil process of the English courts."[1] The court stated that "a former head of state is clearly entitled to

---

* Professor Ved P. Nanda teaches at the University of Denver.

1. *In re* Augosto Pinochet Ugarte, CO/4074/98, CO/4083/98 (October 28, 1998), para. 74, *cited in* ASIL, International Law in Brief, Vol. I, No. 4, Dec. 1998, at 2.

immunity in relation to criminal acts performed in the course of exercising public functions."[2] In response to the argument that the crimes allegedly committed by Pinochet were so serious that no one in the exercise of his functions as head of state could commit such crimes, Justice Collins stated in a separate opinion; "[T]here is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists."[3]

On appeal to Britain's highest court, the Juridical Committee of the House of Lords held in a three-to-two decision that Pinochet did not enjoy immunity as a former head of state for internationally recognized crimes.[4] Lord Nicholls said; "[I]nternational law recognizes, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states."

International law has made plain, however, that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law."[5] Lord Steyn stated:

> The development of international law since the second world war justifies the conclusion that by the time of the 1973 coup d'etat, and certainly ever since, international law condemned genocide[,] torture, hostage-taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state.[6]

Lord Hoffmann[7] concurred with the reasoning of Lord Nicholls and Lord Steyn, while Lord Slynn[8] and Lord Lloyd,[9] in separate opinions, found that Pinochet should be granted immunity as a former head of state. Subsequently, the United Kingdom Home Secretary, Jack Straw, who had the last word with discretion to intervene and block the Spanish extradition

---

2. *Id.* paras. 58, 63.

3. *Id.* para. 80.

4. For the statements of the five Law Lords, *see* The Guardian Home Page (London), Nov. 26, 1998, GRDN 004, 1998 WL 18679498, at 1-7.

5. *Id.* at 5.

6. *Id.* at 6.

7. *Id.* at 7.

8. *Id.* at 1-2.

9. The Guardian Home Page (London), Nov. 26, 1998, GRDN 004, 1998 WL 18679498, at 2-4.

request, decided to allow the extradition proceedings against Pinochet to proceed.[10] Ironically, after complaints from Pinochet's lawyers that one of the Law Lords, Lord Hoffmann, had not disclosed his chairmanship of an Amnesty International charity, a second panel of five Law Lords set aside the first ruling, for Amnesty International had been allowed to present arguments in the case. The reason for Pinochet's petition for reconsideration was that Lord Hoffmann's links with Amnesty International gave the appearance of possible bias. As Lord Browne-Wilkinson said in his opinion:

> If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organization as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[11]

Thus, a third panel of seven Law Lords reheard the Pinochet case from scratch starting in late January and continuing for three weeks.[12] Regardless of the panel's decision, the controversy created by the Pinochet case on the scope of the immunity and the political fallout of the decision are likely to be far-reaching, with respect to foreign policy issues between Britain, Chile and Spain.

III. SOVEREIGN IMMUNITY

Since its promulgation in 1976, the Foreign Sovereign Immunities Act (FSIA)[13] provides the sole statutory basis for United States. courts to exercise subject matter jurisdiction over any action brought against a foreign state defendant, its political subdivision, or its "agency or instrumentality."[14] Only under its enumerated exceptions will a foreign state defendant lose its immunity granted under the Act. The Act is, however, silent regarding its application to defendants who are natural

---

10. For an explanation of the Home Secretary's decision, *see* <http://news.bbc.co.uk/hi/english/uk/newsid31000/231438.-stm>.

11. House of Lords In re Pinochet, Opinions of the Lords of Appeal for Judgment in the Case, Opinion of Lord Browne-Wilkinson, <http:www.parliament.the-stationery-office.co.uk/pa/ld1999899/ldjudgmt/-jd990115/pino01.htm>, at 10.

12. *See* Pinochet hearings expected to wrap up, Agence France-Presse, Feb.4, 1999, *available in* 1999 WL 540071.

13. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1976) and amendments.

14. *Id.* § 1603(a) and (b).

persons. In the context of the present discussion, therefore, could a natural person who has allegedly committed a human rights violation and is being sued in a United States court claim that he/she falls within the scope of the term "agency or instrumentality of a foreign state?"

As defined in the FSIA, the term *agency or instrumentality of a foreign state* means any entity,

> 1. Which is a separate legal person, corporate or otherwise;
>
> 2. Which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
>
> 3. Which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.[15]

As to the legislative history of the section defining this expression, the House Report explains:

> As a general matter, entities which meet the definition of an *agency or instrumentality of a foreign state* could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry . . . .[16]

This language shows that Congress' primary concern was with organizations acting for the foreign state. Cases of individuals acting as sovereign agencies or instrumentalities were not intended to fall within the scope of the section. As early as 1987 a federal court accepted this reading of section 1603(b),[17] and there is further merit to the argument that, section 1603(b) should be interpreted narrowly so as to exclude individuals' claims to sovereign immunity for human rights violations. Immunities of a diplomat or a head of state, which I will discuss later, remain, of course, unaffected under this interpretation. However, several courts, including the Ninth Circuit and the D.C. Circuit,[18] have instead construed the section

---

15. *Id.* § 1603(b).

16. H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., *reprinted* in 1976 U.S. Code Cong. & Admin. News 6604, 6614.

17. Republic of the Philippines v. Marcos, 665 F.Supp. 793, 797 (N.D. Cal. 1987).

18. *See, e.g.*, El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996), *citing* Chuidian v. Philippine Nat'l Bank, 19 F.2d 1095, 1099-1103 (9th Cir. 1990); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 496-97 (9th Cir. 1992); Kline v.

broadly, thus applying the FSIA to individuals for acts performed in their official capacity on behalf of a foreign state or its *agency or instrumentality*.

The enumerated exceptions to the FSIA, including *implied waiver* by the foreign sovereign,[19] are seemingly unavailing to victims of human rights violations seeking judicial remedy under the FSIA. Despite merit to the argument that there could be no immunity under any statute for gross violations of human rights, an argument rejected by courts,[20] these victims are limited to finding redress under other statutes. Until 1992 the only available remedy was under the Alien Tort Claims Act (ATCA), a 1789 statute under which "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[21]

I will not discuss the developments under this statute, for they have been the subject of extensive treatment ever since the landmark case in 1980 of *Filartiga v. Pena-Irala*.[22] Suffice it here to note that, while the United States Supreme Court held in 1989 that the FSIA jurisdictional criteria apply to suits brought against governments under the ATCA, [23] the Court also said that there are no limits that FSIA imposes on lawsuits under the ATCA.[24]

Nor will I discuss the developments under the 1992 Torture Victim Protection Act (TVPA).[25] I would like to note, however, that in contrast to the ATCA, under which actions are permitted only by aliens, the TVPA

Kaneko, 685 F.Supp. 386 (S.D.N.Y. 1988); Rios v. Marshall, 530 F.Supp. 351, 371-72 (S.D.N.Y. 1981), cases *cited in* Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 11 n.3. (D.C. 1998).

19. Section 1605 of the FSIA enumerates seven exceptions. Section 1605(a)(1) provides that a foreign state shall not be immune from jurisdiction in a U.S. court in any case "in which the foreign state has waived its immunity either explicitly or by implication . . . " The argument is that by ratifying or acceding to an international human rights treaty, a state impliedly waives its sovereign immunity. The courts have, however, rejected this argument. *See* Furlova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992).

20. *See* Siderman, *supra* note 20; Princz v. Federal Republic of Germany, 813 F.Supp. 22 (D.D.C. 1992); 26 F.3d 1166 (D.C. Cir. 1994).

21. 28 U.S.C. § 1350.

22. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). In a 1995 decision, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996), the Second Circuit extended the reach of the ATCA to non-state actors for the commission of certain tortious actions by stating that it does not agree that "the law of nations, as understood in the modern era, confines its reach to state action." *Id.* at 239.

23. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

24. *Id.* at 438 (noting that the ATCA "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states").

25. Pub. L. No. 102-256, 106 stat. 78 (1992).

allows United States citizens as well to bring lawsuits in United States courts. Also, the TVPA allows lawsuits against individual defendants, contrary to the ATCA which permits suits against individuals as well as sovereigns, pertaining to a limited number of violations including torture and extra-judicial killings, subject to the FSIA's jurisdictional requirements.

Rather, I will confine my comments here to the developments under the 1996 Anti-Terrorism and Effective Death Penalty Act (Anti-Terrorism Act),[26] under which Congress lifted the immunity of foreign states for terrorism. United States courts may exercise subject matter jurisdiction under the Anti-Terrorism Act when the personal injury or death to a U.S. national has resulted from an act of torture, extra-judicial killing, aircraft sabotage, or hostage-taking. The harm must have been perpetrated either directly by the foreign state or by a non-state actor receiving material support or resources from the foreign state defendant. Also, the foreign state must be designated by the executive branch as a state sponsor of terrorism, thus limiting such remedy to a few select states, which currently include Iran, Cuba, Syria, Iraq, Libya, Sudan and North Korea.[27]

Another limitation under the Anti-Terrorism Act is that if the incident occurred within the foreign state defendant's territory, the plaintiff must afford the terrorist state "a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration."[28] In addition, the plaintiff or the victim must be a United States national at the time of the incident.

Subsequently, an amendment to the Antiterrorism Act aimed at substantially increasing the potential civil liability of state sponsors of acts of terrorism was adopted. The amendment titled Civil Liability for Acts of State Sponsored Terrorism, was enacted on September 30, 1996. Known as the Flatow Amendment, it was part of the 1997 Omnibus Consolidated Appropriations Act.[29] This amendment specifically provided for the availability of punitive damages in actions brought under the Anti-Terrorism Act.

The Federal District Court for the District of Columbia applied the Anti-Terrorism Act in *Flatow v. Islamic Republic of Iran*.[30] The plaintiff in *Flatow*, was the father of a United States national who died when the bus on which she was traveling in the Gaza Strip was destroyed by a suicide bomber. A faction of the Palestine Islamic Jihad, a terrorist organization

---

26. Pub. L. No. 104-132, Title II, § 221(a)(Apr. 24 1996), 110 stat. 1241, (codified at 28 U.S.C. § 1605).

27. 22 C.F.R. § 126.1(d).

28. 28 U.S.C. § 1605(a)(7).

29. Pub. L. 104-208, Div. A, Title I § 101 [Title V § 589] (Sept. 30, 1996), 110 Stat. 3009-172, *reprinted in* 28 U.S.C. § 1605 note.

30. 999 F. Supp. 1 (1998).

financed by the Islamic Republic of Iran, claimed responsibility for the bombing. Since the Islamic Republic of Iran has been designated by the Department of State as a state sponsor of terrorism, the court found the defendant Islamic Republic of Iran liable. The court interpreted the Anti-Terrorism Act retroactively[31] providing the court with subject matter jurisdiction. The court held that the suicide bombing was an act of extra-judicial killing.[32] It also found the Act's extraterritorial application proper.[33] The court said that:

> [W]hile the Flatow Amendment is apparently an independent pronouncement of law, yet it has been published as a note to 28 U.S.C. §1605, and requires several references to 28 U.S.C. § 1605(a)(7) *et seq.* to reach even a preliminary interpretation. As it also effects a substantial change to [the Antiterrorism Act], it appears to be an implied amendment.[34]

It further added that, [I]nterpretation of 28 U.S.C. § 1605(a)(7) and the Flatow Amendment in *pari materia* demonstrates the coherent legislative intent behind the two enactments."[35]

The court held that foreign state sponsors of terrorism were subject to punitive damages[36] and awarded $225 million in addition to several millions in damages for pain and suffering and for solatium.[37] The court did not consider the acts of the terrorist to be valid acts of the state and thereby exempted from liability under the act of state doctrine,[38] nor was the defense of head of state immunity found to be available in such actions brought pursuant to the Anti-Terrorism Act.[39]

IV. ACT OF STATE

The act of state doctrine, a judge-made corollary to sovereign immunity, was enunciated by the United States Supreme Court in 1897 in *Underhill v. Hernandez,* "[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own

---

31. *Id.* at 12-14.
32. *Id.* at 16-19.
33. *Id.* at 15-16.
34. *Id.* at 12.
35 999 F. Supp. 1 at 13 (1998).
36. *Id.* at 25-27.
37. *Id.* at 5.
38. *Id.* at 24.
39. *Id.* at 24-25.

territory."[40] The Restatement (Third) of the Foreign Relations Law of the United States describes the doctrine as follows:

> 1. In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from . . . sitting in judgment on . . . acts of a governmental character done by a foreign state within its own territory and applicable there.
>
> 2. The doctrine set forth in Subsection (1) is subject to modification by act of Congress.[41]

Thus, under this doctrine, United States courts generally exercise judicial constraint by declining to review official acts of foreign states.

Individual defendants charged with human rights violations before United States courts are, however, not likely to succeed in invoking this doctrine to claim immunity from suit. Courts have generally held that human rights violations such as torture, assassinations, and summary executions, do not constitute acts of state, for such acts cannot be considered public, official acts.[42] In *Flatow*, the court held that the defense of the act of state is not available in the case of suicide bus bombings and other acts of international terrorism since they are not "valid acts of state of the type which [under the act of state doctrine would] bar consideration of this case."[43]

The legislative history of the 1992 Torture Victim Protection Act[44] (TVPA) also sheds light on the inapplicability of the act of state doctrine to human rights violations. In March 1992, Senator Arlen Specter, sponsor of the TVPA legislation in the Senate, said:

> The act of state doctrine does not provide a shield from liability under the [TVPA]. This doctrine precludes United States courts from sitting in judgment on the official public acts of a sovereign government . . . Because this doctrine applies only to public acts, and no foreign government commits torture as a matter of

---

40. Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 (1987).

42. *See, e.g.*, Liu v. Republic of China, 642 F.Supp. 297, 301 (N.D. Cal. 1986), 892 F.2d 1419, 1432-34 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990); Paul v. Averil, 812 F.Supp. 207, 212 (S.D. Fla. 1993); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987); Letelier v. Republic of Chile, 488 F.Supp. 665, 673-74 (D.D.C. 1980).

43. *Id.* at 24.

44. *See supra* note 24.

> official policy, this doctrine cannot be violated by allowing a cause of action for torture.[45]

The Senate Judiciary Committee's Report on the legislation echoes Senator Specter's views:

> [T]he committee does not intend the *act of state* doctrine to provide a shield from lawsuit for [individuals]. In [Sabbatino], the Supreme Court held that the *act of state* doctrine is meant to prevent United States courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield [individuals] from liability under this legislation.[46]

V. HEAD OF STATE IMMUNITY

The FSIA fails to provide guidance regarding head of state immunity, which is not considered to be a matter of right but rather "a matter of grace and comity" in United States courts.[47] Since such immunity is recognized as a principle of customary international law,[48] and the FSIA remains silent regarding this immunity, courts have generally deferred to the State Department's suggestion of immunity. This was done earlier in sovereign immunity cases prior to the FSIA in deciding whether to grant a foreign head of state defendant immunity.[49] The rationale, of course, is the primacy of the executive branch regarding foreign affairs.

As noted earlier, some courts including the Ninth and D.C. Circuits, however, have applied the FSIA to individuals for acts performed in their official capacity on behalf of a foreign state defendant.[50] Furthermore, how are the courts to resolve the controversy when the executive branch has offered no suggestion at all? To illustrate the unsettled nature of the scope of head of state immunity, I will refer to three cases: (1) *Lafontat v. Aristide*,[51] decided in 1994 by the Federal District Court of the Eastern

---

45. 138 CONG. REC. S2668 (daily ed. Mar. 3, 1992).

46. S. REP. NO. 249 102d Cong., 1st Sess. 8 (1991).

47. Flatow v. Islamic Republic of Iran, 999 F. Supp 1, 24 (D.C. 1998).

48. *See* U.S. v. Noriega, 746 F.Supp. 1506, 1519 (S.D. Fla. 1990) [hereinafter Noriega].

49. *Id.*

50. *See supra* note 17 and the accompanying text.

51. 844 F.Supp. 128 (E.D.N.Y. 1984).

District of New York; (2) *Hilao v. Marcos*,[52] from the Ninth Circuit in 1994; and (3) *United States v. Noriega*,[53] a 1997 Eleventh Circuit case.

In *Aristide*, the plaintiff sought money damages, alleging that Haitian soldiers who killed her husband acted on behalf of the President of Haiti, Jean-Bertrand Aristide.[54] At the defendant's request, the State Department suggested immunity because of his status as the President of Haiti and the court, accepting the suggestion, dismissed the action.[55] It is noteworthy that Aristide was in exile in the United States at the time of the suit.

In *Hilao*, the allegations by the families of the deceased who brought suit against the former president of the Philippines were that, under Marcos' authority, the victims had been tortured and executed in the Philippines.[56] The Ninth Circuit held that Marcos was not immune because the acts alleged were not official acts, which would be considered exempt under head of state immunity. In the court's words "Ferdinand Marcos was not the state, but the head of the state, bound by the laws that applied to him."[57] The court added that a "lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts."[58]

In the *Noriega* case, the defendant sought dismissal of his charges of participation in a drug trafficking conspiracy, claiming Head of State and diplomatic immunity.[59] Subsequently, *Noriega* was forcibly brought to the United States and the court denied his claim of Head of State immunity because the United States had not recognized him as the head of state of Panama.[60] He was found guilty by a jury and was sentenced to forty years in prison.[61] On appeal, the court rejected Noriega's claim of immunity since the executive branch had "manifested its clear sentiment that Noriega should be denied head-of-state immunity."[62]

It should be noted that the circuits had earlier construed the absence of a formal suggestion of immunity from the Department of State differently. The Second Circuit decided in *In Re Doe*,[63] that "absent a formal

---

52. Hilao, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995).

53. 117 F.3d 1206 (11th Cir. 1997).

54. Aristide, 844 F.Supp. at 130.

55. *Id.*

56. Hilao, 25 F.3d at 1469.

57. *Id.* at 1471 (footnotes omitted).

58. *Id.* at 1472.

59. United States v. Noriega, 746 F.Supp. 1506, 1510 (S.D. Fla. 1990).

60. *Id.* at 1519-20.

61. *See* Noriega, 117 F.3d 1206, 1210 (11th Cir. 1997).

62. *Id.* at 1212.

63. 860 F.2d 40 (2d Cir. 1988).

suggestion of immunity, a putative head of state should receive no immunity,"[64] while the Fifth Circuit held in *Spacil v. Crowe*,[65] that the judiciary "should make an independent determination regarding immunity when the Executive Branch neglects to convey clearly its position on a particular immunity request."[66]

The Eleventh Circuit has arguably further added to the confusion by interpreting the executive branch's foreign policy by imputing to it an intent it had not explicitly expressed. Since the court did not identify standards to determine the executive's intent, *this implicit intent* approach does not to clarify the existing uncertainty in this area.

As a promising new development, however, the Flatow Amendment provides for the application of the Anti-Terrorism Act's exception of immunity to "[a]n official, employee, or agent of a foreign state . . . acting within the scope of his or her office, employment, or agency." As the court said in *Flatow*:

> This provision was directed at those individuals who facilitate terrorist acts which cause the injury or death of American citizens. The provision does not qualify or in any way limit its application only to non-heads of state. Given that state sponsorship of terrorism is a decision made at the highest levels of government, unless the Flatow Amendment is interpreted as abrogating head of state immunity in the limited circumstances of [the Antiterrorism Act], the provisions cannot give full effect to Congressional intent, and the federal cause of action created by the two amendments would be irreparably and unreasonably hobbled. This Court therefore concludes that the defense of head of state immunity is not available in actions brought pursuant to [the Anti-Terrorist Act and the Flatow Amendment].[67]

VI. DIPLOMATIC IMMUNITY

One of the most ancient principles of customary international law, diplomatic immunity, is now enshrined in the 1961 Vienna Convention on Diplomatic Relations,[68] which was codified in 1978 in the United States in

64. *Id.* at 45, *cited in* Noriega, 117 F.3d at 1212.

65. 489 F.2d 614 (5th Cir. 1974).

66. *Id.* at 618-19, *cited in* Noriega, 117 F.3d at 1212.

67. Flatow, V. Islamic Republic of Iran, 999 F. Supp. 1, 24-25 (D.C. 1998).

68. 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter the Vienna Convention].

the Diplomatic Relations Act.[69] The Convention regulates the conduct of diplomats within the receiving state. Article 41 provides:

> 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the Receiving State. . .
>
> 2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the Receiving State or such other ministry as may be agreed.
>
> 3. The premises of the mission must not be used in any manner incompatible with the functions of the mission . . .

Diplomatic privileges and immunities are justified under the *functional necessity* theory so as to enable the mission to perform its functions. However, instances of abuse by diplomats asserting immunity, ranging from violation of traffic laws to serious human rights abuses, are commonplace. There have been several proposals and some attempts to curb those abuses by amending the Vienna Convention.[70] However, for present purposes, diplomatic immunity does not raise any special problems that have not already been subsumed under the prior discussion.

VII. CONCLUSION

Immunities law still shields perpetrators of human rights abuses from lawsuits in United States courts to an unacceptable extent. The law remains uncertain and, as the *Pinochet* case demonstrates, a similar situation prevails in Britain and presumably in other countries as well. Starting with the dusting off of the 200-year-old ATCA and its application in *Filartiga* and the subsequent expansion through the TVPA and the Anti-Terrorism Act and Flatow Amendment, as discussed earlier, victims are able to seek redress in limited circumstances.

Thus, the need remains to provide a human rights exception in the FSIA to allow the law to catch up with the monumental progress of international human rights law. The attempts thus far have not succeeded in taking this next step forward, but the opportunity and the demand are both present for doing so.[71]

---

69. Diplomatic Relations Act of 1978, 22 U.S.C. §§ 251-59, Pub. L. 95-393, 92 Stat. 808, *codified in* 22 U.S.C. sec. 254a-e and 28 U.S.C. § 1364.

70. *See generally* Michael B. McDonough, *Privileged Outlaws: Diplomats, Crime and Immunity*, 20 SUFFOLK TRANS-NAT'L L. REV. 475 (1997).

71. There is voluminous literature addressing the shortcomings and recommending specific action. For several such proposals, *see, e.g.*, Jeffrey Jacobson, *Trying to Fit a Square Peg Into a Round Hole: The Foreign Sovereign Immunities Act and Human Rights Violations*, 19

WHITIER L. REV. 757 (1998); Jack Alan Levy, *As Between Princz and King: Reassessing the Law of Foreign Sovereign Immunity as Applied to Jus Cogens Violators*, 86 GEO. L.J. 2703 (1998); Hari Osafsky, *Foreign Sovereign Immunity from Severe Human Rights Violations: New directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. 35 (1998); *Separation of Powers -- Head-of-State Immunity -- Eleventh Circuit Holds that the Executive Branch's Capture of Noriega Exempts Him from Head of State Immunity*, 111 HARV. L. REV. 849 (1998); Scott Bucci, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293 (1997); Alan Enslen, *Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act With Its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695 (1997); Jennifer Gergen, *Human Rights and the Foreign Sovereign Immunities Act*, 36 VA. J. INT'L L. 765 (1996); David Mackusick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741 (1996); Shobha George, *Head-of-State Immunity in the United States Courts: Still Confused After All These Years*, 64 FORDHAM L. REV. 1051 (1995); Joan Fitzpatrick, *The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations*, 15 WHITTIER L. REV. 465 (1994); Tom Lininger, *Recent Development, Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177 (1994).