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DOES INTERNATIONAL HUMAN RIGHTS LAW HAVE SOMETHING TO TEACH MONETARY LAW?

*Cynthia C. Lichtenstein**

Although the subject of exchange controls, a substantial part of international monetary law,¹ seems hardly at first glance to be as gripping a matter of international concern as international human rights, the first glance neglects the place of exchange controls in the life blood of developing nations. If, instead of referring to exchange controls, one speaks of the human costs of the international debt crisis, the point is quickly made. Students in a class in international monetary law do see a connection between the outflow of hard currency to repay external debt and the political consequences for a nation that, in order to meet its contractual obligations, must reexport higher and higher proportions of its hard currency earnings. Students then quickly grasp the importance to a developing country of its hard currency export earnings, and come to understand why the multilateral treaty regulating currency exchanges (the Bretton Woods Agreement, sometimes called the "Fund Agreement" because the treaty also provides for establishment of the International Monetary Fund), despite its general hostility to exchange controls, has special provisions authorizing member countries not yet able, because of their stage of development, to move to full convertibility, to keep their panoply of protection for their reserves. Indeed, in a crisis such countries may, with Fund approval, institute a new regime of exchange controls. The Fund Agreement, by its provisions for Fund oversight of exchange controls, insures that these drags on world commerce are only used when necessary (in the Fund's appreciation) to stem serious outflows of hard currency or to ensure that the nation's hard currency earnings are turned over to the central government for allocation in accordance with a plan of protection. Students come to see the importance of this tool to a country's macroeconomic management.

Classically, however, exchange controls were not divided into "approved" exchange controls versus currency restrictions otherwise out-

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1. See, e.g. F.A. MANN, *THE LEGAL ASPECT OF MONEY* Ch. XV (4th ed. 1982).

lawed by the Fund Agreement. Instead, the management of its own currency was an inherent right of each sovereign state, in its own sovereign appreciation. The one limitation on the autonomy of the state was a conflict of law rule that operated to prevent extraterritorial effect from being given to exchange controls: the rule that "exchange controls, like tax and penal laws, are enforceable only in the territory of the sovereign that issued them."² Thus, as Professor Lowenfeld points out, even if the normal conflicts rules of the forum would look to the laws of another jurisdiction for decision concerning a transaction, the forum would not give effect to that jurisdiction's exchange controls — or even recognize them as a defense.³

Since the Fund Agreement, in contrast, made exchange controls a matter of international concern, and limited the autonomy of the parties with respect to currency restrictions,⁴ it also set out, in Article VIII § 2(b), to change the conflicts rule limiting enforcement, at least as to use of exchange control violations as a defense. Space prevents a complete description of Article VIII § 2(b),⁵ but the idea behind it is that a member state's courts *must* accept violation of "approved" exchange restrictions as a defense to enforcement of "exchange contracts which involve the currency" of a country that has imposed such IMF-approved restrictions on its currency. Each state member of the Agreement has promised in Article VIII § 2(b) that, if the conditions of the section are met, its courts will not be used to enforce the offending contract. Having worked out a scheme of separating "bad" exchange controls from those necessary and appropriate in certain circumstances, the Agreement enables countries using the tool "appropriately" (in the Fund's view) to discourage violation of the controls by the threat of unenforceability in the courts of any member state of contracts made in contravention of the "good" controls.

Now, that is all very well, but, as any perceptive law student learns in the first year of law school, unenforceability of a contract (here under the rubric of "illegality") is far less a deterrent to socially abhorrent conduct than the possibility of liability for civil damages in a tort suit. If the parties to the contract allowing or providing for illegal capital flight do not ever bring the contract to court, the sanction of unenforceability never bites; yet the developing country's reserves

2. A. LOWENFELD, *THE INTERNATIONAL MONETARY SYSTEM* 323 (2d ed. 1981).

3. *Id.*

4. This pertains at least with respect to current transactions. Space prevents a precise delineation of the scope of the Fund Agreement's provisions concerning exchange controls.

5. In any event, given R. EDWARDS, *INTERNATIONAL MONETARY COLLABORATION* (1985), and the works of Sir Joseph Gold cited therein, more perhaps than one wants to know about the section is already in print.

have suffered the same injury — the life blood of foreign exchange has still been spilled, to continue our initial metaphor.

It presumably was just this realization that caused Brazil, through its central bank, Banco do Brazil, to bring a tort suit in the 1960s against a United States coffee importer, Israel Commodity, which had colluded with a Brazilian coffee exporter to allow the exporter to escape turning its dollar earnings over to the central bank at a rate for cruzeiros fixed by Brazil — a currency restriction to which Brazil was entitled under the Fund Agreement.⁶ Briefly, Banco do Brazil argued that it should be entitled to damages resulting from the “conspiracy to defraud the Government of Brazil of American dollars by illegally circumventing the foreign exchange regulations of Brazil.”⁷ The majority of the New York Court of Appeals decided against Brazil, holding that while the intention of the Fund Agreement’s Article VIII § 2(b) was to render illicit contracts unenforceable, “an obligation to withhold judicial assistance to secure the benefits of such contracts does not imply an obligation to impose tort penalties on those who have fully executed them.”⁸ The majority could not find in New York law (the law of the transaction) any obligation on individuals not to enter into contracts contrary to the exchange controls of a member country of the Fund. The court continued, “[w]hile it [Article VIII § 2(b)] does mean that they [individuals making contracts violating a member country’s exchange controls] so agree at their peril inasmuch as they may not look to our courts for enforcement, this again is far from implying that one who so agrees commits a tort in New York for which he must respond in damages.”⁹ The majority then went on to bolster its decision by pointing out that if it were to sanction a tort suit, such a suit would violate the hallowed conflicts rule concerning the refusal to enforce another State’s revenue laws.

Chief Judge Desmond was trenchant in dissent: “Refusal to entertain this suit does violence to our national policy of co-operation with other Bretton Woods signatories and is not required by anything in our own State policy.”¹⁰

Subsequently, in 1975, a private Brazilian bank sued persons who had convinced the bank to violate Brazil’s exchange controls with the result that the bank was penalized by Brazil for having so facilitated

6. *Banco do Brazil, S.A. v. A.C. Israel Commodity Co., Inc.*, 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964).

7. 12 N.Y.2d at 374.

8. 12 N.Y.2d at 376.

9. 12 N.Y.2d at 376-77.

10. 12 N.Y.2d at 378-79, 190 N.E.2d at 238, 239 N.Y.S.2d at 876-77.

the exchange control violation.¹¹ The New York Court of Appeals there shifted to Judge Desmond's view concerning the old conflicts rule, but left standing, in effect, the original case's thesis that participation in a conspiracy to violate a state's Fund-validated exchange control laws does not state a cause of action sounding in tort. The court distinguished *Banco do Brazil* on the specious ground that there the sovereign itself was suing.¹²

It is the thesis of this essay that were the *Banco do Brazil* case to come up today, either in the New York courts or in a federal court, Brazil as plaintiff (through the central bank) could have another string to its bow other than trying to read Article VIII § 2(b) of the Fund Agreement (with certain violation to its negotiating history¹³) as creating a tort cause of action. In trying to get damages for injury to its foreign currency reserves, Brazil could make good use of a federal statute, the Alien Tort Statute,¹⁴ first enacted as part of the Judiciary Act of 1789,¹⁵ and later brought to prominence in a now justly famous international human rights case, *Filartiga v. Pena-Irala*.¹⁶

The Alien Tort Statute grants federal district courts jurisdiction over "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."¹⁷ Like Article VIII § 2(b), the Statute has, since its 1980 resurrection, been extensively — indeed exhaustively — commented upon,¹⁸ argued in numerous cases (one of which, *Tel-Oren v. Libyan Arab Republic*,¹⁹ would, if the Bork individual opinion were to be followed, severely restrict its use to a most limited class of violations of international law), and may be addressed by the Supreme Court when its decision in

11. *Banco Frances E. Brasileiro S.A. v. Doe No. 1*, 36 N.Y.2d 592, 331 N.E.2d 502, 370 N.Y.S.2d 534 (1975), *cert. denied* 423 U.S. 867 (1975). The defendants had convinced the bank to exchange Brazilian cruzeiros for U.S. Dollar-denominated travelers checks.

12. 36 N.Y.2d 598-99, 331 N.E.2d 506-07, 370 N.Y.S.2d 539-40.

13. The majority in *Banco do Brazil* recited these. 12 N.Y.2d at 375-77.

14. 28 U.S.C. § 1350 (1982).

15. The Judiciary Act of 1789, ch. 20, § 1 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (1982)).

16. 630 F.2d 876 (2d. Cir. 1980).

17. 28 U.S.C. § 1350 (1982).

18. See Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*. This article is presently in manuscript and is expected to be published by the *American Journal of International Law* after the Supreme Court has decided *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 108 S. Ct. 1466 (1988). The article contains complete citations and has been most helpful to me in thinking about this essay. Ms. Burley particularly cites to and elaborates upon the extensive history of the Statute given in Casto, *Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

19. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

*Amerada Hess*²⁰ comes down. The Statute was used in *Filartiga*²¹ to allow a Paraguayan family whose son had been tortured to death by a Paraguayan police chief to sue the police chief for civil damages for violation of the international norm against torture, which the Court found to be today part of customary international law. Thus, if *Filartiga* is followed rather than *Tel-Oren*,²² an alien injured by an action of a defendant that can be characterized as a "tort" "committed in violation of" international law, can have redress either in federal court, or, as Burley demonstrates, state court,²³ if personal jurisdiction can be obtained over the defendant.

Now, the curious point about the cases since 1980 that have raised the Statute is that in not one is a foreign state the plaintiff. Some of the cases concern, as in *Filartiga*, a private plaintiff against a private defendant;²⁴ most concern a state or state actor as defendant and thus raise issues of sovereign immunity (the major issue in *Amerada Hess*) and the Act of State doctrine. To date, foreign sovereigns injured by acts of a person subject to U.S. jurisdiction, as in *Banco do Brazil*, have not thought to avail themselves of the Statute; yet the Statute would seem to lend itself very well indeed to what Brazil was trying to accomplish in the *Banco do Brazil* case.

Following the lead in *Filartiga*, if Brazil could show that contemporary state practice under the Fund Agreement (e.g., state practice of submission of proposed exchange control regulations to the Fund; discussion with the Fund of means to conserve foreign exchange; Fund teams sent to states in foreign exchange crisis to work out a stabilization agreement; and state practice to get Fund seal of approval of such agreements before additional borrowing or rescheduling of loan agreement with private banks) all adds up to the formation of a customary norm of international protection — with Fund approval — of foreign exchange for nations in exchange crisis, then Brazil should be able to obtain damages from the next Israel Commodity for having, by its collusion with Brazil's coffee exporter, committed a tort in violation of the norm. Indeed, to the extent that any private party subject to U.S.

20. 830 F.2d 421 (2d Cir. 1987), cert. granted 108 S. Ct. 1466 (1988).

21. 630 F.2d 876.

22. 726 F.2d 774.

23. See Burley, *supra* note 18.

24. See Kirgis, *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 AM. J. INT'L L. 323, 329 (1988) for the point, not addressed in *Filartiga*, that there may be an intellectual problem as to how "an individual who commits torture is personally responsible under customary international law." *Id.* In this, I think Kirgis is himself misled; the Statute clearly, as is demonstrated by Casto, *supra* note 13, and Burley, *supra* note 13, was intended to permit a civil cause of action against an individual who had injured, say, an Ambassador.

jurisdiction knowingly²⁵ participates in capital flight from a nation trying to stem such flight according to its agreements with the Fund, that party could be subject to suit in state or federal court for civil damages. Since the cause of action arises under the law of nations as incorporated in state and federal law, the problem with the old conflicts rule (not enforcing another State's "revenue law") should not even arise. By definition, the law of nations is *everyone's* law.

International human rights law does indeed have something to teach international monetary law.

25. One assumes that any such suit would need to show the requisite scienter for an intentional tort; that the tort is committed in violation of the law of nations rather than the common law should not change the essential elements of the cause of action.