Vanderbilt Journal of Transnational Law

Volume 17
Issue 1 *Winter 1984*

Article 11

1984

Book Reviews

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BOOK REVIEWS

THE FUND AGREEMENT IN THE COURTS: VOLUME II. By Joseph Gold. Washington, D.C.: International Monetary Fund, 1982. pp. xii, 499.

*Reviewed by Whitney Debevoise**

Sir Joseph Gold may be a prophet without honor in his own country. He has dedicated his professional life[1] to the International Monetary Fund (the Fund) and to the principles established in the Bretton Woods Agreement.[2] He has written extensively on the Fund and its workings,[3] including his most recent work, *The Fund Agreement in the Courts: Volume II.* Although Gold speaks with an expertise achieved through more than a quarter century of effort, courts do not always listen. In fact, English and United States courts have rejected Gold's position on some key issues.[4] All is not lost, however, because there are projects described below that could be undertaken to vindicate Gold's views.

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1. Gold was a staff member of the Legal Department of the International Monetary Fund from October 1946 to July 1959. From 1960 to 1979, he served as General Counsel of the Fund and Director of its Legal Department.

2. Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1502, 2 U.N.T.S. 39 (amended by 20 U.S.T. 2775, T.I.A.S. No. 6748, 726 U.N.T.S. 266 (May 31, 1968); 29 U.S.T. 2203, T.I.A.S. No. 8937 (Apr. 30, 1978)) [hereinafter the Fund Articles].

3. *E.g.*, J. GOLD, LEGAL AND INSTITUTIONAL ASPECTS OF THE INTERNATIONAL MONETARY SYSTEM: SELECTED ESSAYS (1979); J. GOLD, MEMBERSHIP AND NONMEMBERSHIP IN THE INTERNATIONAL MONETARY FUND: A STUDY IN INTERNATIONAL LAW AND ORGANIZATION (1974); J. GOLD, VOTING AND DECISIONS IN THE INTERNATIONAL MONETARY FUND: AN ESSAY ON THE LAW AND PRACTICE OF THE FUND (1972).

4. *E.g.*, Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870 (S.D.N.Y. 1983); J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Ltd., 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975); Wilson, Smithett & Cope Ltd. v. Terruzzi, [1975] 2 W.L.R. 1009, *aff'd*, [1976] 1 Q.B. 683 (C.A.).

The Fund Agreement in the Courts: Volume II,[5] like its predecessor volume,[6] consists of a collection of essays describing and discussing worldwide litigation involving issues arising under the Bretton Woods Agreement. Eleven chapters of the book were previously published, some as long ago as the 1960s, in either the Fund's Pamphlet Series or its periodical Staff Papers.[7] Because Gold had no control over either the issues raised by the parties or their choice of forum in the litigation discussed, he could not suggest a neat organizing principle. Much of the private litigation involving the Fund Agreement, however, has dealt with article VIII, section 2(b). This coincidence has enabled Gold to organize many of his articles around this provision.[8]

The major new contribution in Volume II is a chapter addressing article VIII, section 2(b) and the United States freeze of Ira-

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5. J. GOLD, THE FUND AGREEMENT IN THE COURTS: VOLUME II (1982).

6. J. GOLD, THE FUND AGREEMENT IN THE COURTS (1962).

7. The rationale for republishing the previously written articles in book form is to make access to the materials more convenient for litigants and scholars. The benefit to litigants is mixed. They seldom would have time to penetrate the full 499 pages of Volume II, and more cross references are therefore required. For example, the reader does not learn until Chapter 3 that the Philippine Supreme Court had decided an appeal of a case discussed in Chapter 1. On the other hand, because Gold's positions on key issues are frequently repeated throughout the volume and conveniently restated in periodic summaries of principles or conclusions, a litigator looking for a legal theory could benefit from a five minute perusal of the volume.

8. Chapters 1 through 4 and 6, 8, 9, 11, and 12, as well as three of the four appendices deal, in whole or in part, with aspects of article VIII, section 2(b). This provision reads in relevant part: "(b) Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

Chapters 5, 7, and 10 discuss problems in the application of exchange rates, including the definition of a devaluation, the existence and nonexistence of par values under the Second Amendment to the Fund Articles, and the meaning of the expression "the least depreciated currency" in the Agreement on German External Debt, Feb. 27, 1953, 4 U.S.T. 443, T.I.A.S. No. 2792, 33 U.N.T.S. 4.

Appendix B focuses on the problem of applying units of account defined in terms of gold. Some aspects of this issue are currently before United States courts, most notably in Franklin Mint Corp. v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982), *aff'd*, 52 U.S.L.W. 4445 (Apr. 17, 1984) (Nos. 82-1186, 82-1465). The Supreme Court's recent decision is not likely to resolve the issue of how to fix a truly international standard to limit airline liability under the Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11.

nian assets.[9] The chapter describes the United States executive orders[10] and regulations[11] at issue in the suits brought in France and England by Bank Markazi, the Iranian Central Bank, against foreign branches of United States banks for the return of monies deposited with those branches.[12] Acting on instructions from their home offices in the United States, the foreign branches refused to return the deposits, claiming that United States asset controls barred repayment.

The defendant banks raised article VIII, section 2(b) as a defense to the actions brought in London, noting that the United Kingdom, the United States, and Iran were all members of the Fund and that, under the Bretton Woods Agreements Order, 1946, the courts of the United Kingdom must apply article VIII, section 2(b) and find that the United States regulations had rendered the deposit contracts unenforceable.[13] The Iranian plaintiff argued against this interpretation on the following technical grounds: the deposit contracts were not "exchange contracts;" the currency of the United States was not "involved;" and the imposition of the United States asset freeze was inconsistent with the Articles.[14]

A threshold issue connected to the article VIII, section 2(b) defense was whether the United States had jurisdiction to adopt the regulations freezing the Iranian assets. In his discussion, Gold follows the safe approach of the consummate international servant. Because the Fund has not decided the correct approach for determining the meaning of "legislative jurisdiction" under article VIII, section 2(b),[15] Gold expresses no preference. Gold's boldest

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9. J. GOLD, *supra* note 5, at 360.

10. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

11. The Iranian Assets Control Regulations have been codified in 31 C.F.R. § 535 (1982).

12. J. GOLD, *supra* note 5, at 370-76.

13. *Id.* at 373.

14. *Id.*

15. Gold identifies three approaches for determining the meaning of legislative jurisdiction under article VIII, section 2(b):

> The interpretation can be made in accordance with:
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> (i) general principles of legislative jurisdiction recognized by public international law, without reference to the Articles; or
>
> (ii) the conclusion that a new principle of legislative jurisdiction is implicit in the concept of the involvement of a currency under article VIII, section 2(b) and that this principle replaces general principles of public

statement on this issue is that it may be desirable in the future to reexamine the traditional principles of legislative jurisdiction in relation to banking.[16]

Gold's reluctance to comment on the legislative jurisdiction issue is understandable but unfortunate. By his unwillingness to search for an answer, Gold misses an opportunity to ask the difficult questions that might allow the Fund to confront some of the crucial issues on the agenda of the 1980s. For example, what should happen when the competing exchange controls of two nations clash in the courts of a third country? Suppose that for financial reasons unrelated to the taking of hostages at the United States Embassy in Tehran, Iranian authorities had ordered that all certificates of deposit in hard currencies held by Iranian entities be withdrawn and the funds returned to Iran. Suppose further that the amount of the Iranian deposits was sufficient to give the United States cause for concern about the stability of the international banking system. Should an English court resolve this conflict in a suit for repayment of overseas deposits that are allegedly blocked by a United States asset freeze?

The courts of England might be an appropriate forum for the suit itself, but surely the Fund should be heard on the key issue.[17] In fact, the Fund has established a procedure for determining its jurisdiction in alleged national and international security cases in Executive Board Decision No. 144-(52/51).[18] The Fund should be bold in the use of this procedure, especially in cases in which the security of the international monetary system itself is in question.[19] If the Fund is incompetent or unwilling for political rea-

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international law on jurisdiction for the purpose of article VIII, section 2(b); or

(iii) the concept of the involvement of a currency under article VIII, section 2(b), which concept is to be defined in accordance with general principles of international law on legislative jurisdiction.

Id. at 377-78, 424-25.

16. *Id.* at 391. This statement appears in the context of a discussion of the Concordat produced in 1975 by the Cooke Commission, as the Bank for International Settlements Committee on Banking Regulations and Supervisory Practices is known. The recent difficulties involving the allocation of responsibilities in the Banco Ambrosiano affair suggest that the time for reexamination has come. *See International Lending Rules Evolve*, Am. Banker, July 27, 1983, at 79 (describing Concordat II and evasion of lender of last resort issue).

17. J. GOLD, *supra* note 5, at 424.

18. Decision No. 144-(52/51), *reprinted in* J. GOLD, *supra* note 5, at 366-67.

19. This would also be consistent with Fund Decision No. 446-4 of June 10,

sons to speak on this issue, there must be few cases in which it could speak.

Once the Fund has decided a case under Decision No. 144-(52/51), the national court should consider the decision and its reasoning in its own "real state interests"[20] analysis. This analysis not only eschews a system of rigid rules that often engender extraterritorial conflict, but also is consistent with the emerging trend in solving significant international problems.[21]

After dealing with the threshhold jurisdictional issue in the Iranian cases, Gold addresses the nuts and bolts issues associated with most article VIII, section 2(b) cases, such as "exchange contracts," "involve the currency," "exchange control regulations," and "maintained or imposed consistently with this Agreement." Gold's treatment of these issues is most assertive. The Fund has clear views on these issues, and Gold's task is to refute all heresies and maintain the purity of the Fund's viewpoint.[22] For example, Gold restates the argument for the broad interpretation of the phrase "exchange contracts" and the economic view of the currency "involved" under article VIII, section 2(b). Gold also rejects motive as a factor in determining whether restrictions on payments are "exchange control regulations" which are "maintained or imposed consistently with this Agreement."[23]

The problem with these views is that courts, especially in countries with a common law tradition, have not always accepted

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1949, *reprinted in* J. GOLD, *supra* note 5, at 94, which underlines Gold's suggestion that, when asked, the Fund should advise national courts whether exchange controls are "maintained or imposed consistently with this Agreement." *Id.*

20. This phrase is used by Lowenfeld to describe the international analog to domestic interest analysis in the conflict of laws. *See* Lowenfeld, *Extraterritoriality: Conflict and Overlap in National and International Regulation*, AM. SOC'Y INT'L L. 30, 33-34 (1981) (proceedings of the 74th Annual Meeting).

21. The conflict over United States export controls on items destined for the Yamal gas pipeline was resolved in negotiations that turned on a frank evaluation of "real state interests." *See* Burns, *Economic Health of the Western Alliance, reprinted in* U.S. DEPARTMENT OF STATE, CURRENT POLICY No. 445 (Dec. 9, 1982). *Cf.* Timberlane Lumber Co. v. Bank of Am., NT & SA, 549 F.2d 597 (9th Cir. 1976).

22. Chapter 12 is entitled "The Articles of Agreement and the U.S. Freeze of Assets, November 1979 Views of Courts and Others on Legal Aspects Relating to Article VIII, Section 2(b) of the Fund's Articles." As this title suggests, the chapter largely consists of a statement and exegesis of others' views on the Fund articles in the context of the Iranian asset freeze.

23. J. GOLD, *supra* note 5, at 393-418, 424-27.

them.[24] If this problem is not addressed, there is a risk that the Fund may turn into little more than a development lending institution.

The world is currently confronted with the so-called international debt crisis. More than thirty nations have faced the need to restructure external obligations.[25] What role have article VIII, section 2(b) and the Fund played to date? Primarily, the Fund has assisted in the elaboration of economic adjustment programs and has provided member countries with additional funds. In an important departure from prior practice, the Fund no longer insists that a member country curtail external borrowings as a condition of access to the Fund's resources. In many cases, an agreement with the member's creditors to make new funds available is a precondition to the availability of Fund resources.[26] The availability of Fund resources, in turn, has become a standard precondition to the availability of private resources.[27] The net result is that an agreement with the Fund on an economic adjustment program is crucial to the success of almost any current refinancing effort.

Reaching agreement with the Fund takes time. The Fund itself has certain routine, time-consuming procedures. In addition, the press of business at the Fund limits the flexibility in the schedules of key staff personnel in all but the most important cases. Social and political pressures in the member country also may affect the timing of both the development and the implementation of an adequate adjustment program.

In the interim period prior to a refinancing, article VIII, section 2(b) could play a very important role. Yet, because United States courts have resisted Gold's views on the application of article VIII, section 2(b), the provision has not realized its full potential. Consider the following cases involving the Costa Rican refinancing. In 1981 Costa Rica perceived the need to control its foreign

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24. *E.g.*, *supra* note 4.

25. *See, e.g.*, Mendez, *Recent Trends in Commercial Bank Lending to LDCs: Part of the Problem or Part of the Solution*, 8 YALE J. WORLD PUB. ORDER 173 (1982); Cohen, *U.S. Regulation of Bank Lending to LDCs: Balancing Bank Overexposure and Capital Undersupply*, 8 YALE J. WORLD PUB. ORDER 200, 201-07 (1982).

26. *E.g.*, *IMF Plans Pressure on Banks to Help Brazil*, N.Y. Times, Dec. 15, 1982, at D3, col. 1.

27. *E.g.*, *3 Latin Debtor Nations in Talks With Creditors*, N.Y. Times, Aug. 13, 1983, at 40, col. 5.

exchange and refinance its external debt. To promote these goals, decrees were issued prohibiting external payments without Central Bank approval. When these approvals were not given and the required payments were missed, several credit syndicates that were unwilling to await the Costa Rican refinancing broke ranks and brought suit in New York. In *Libra Bank Limited v. Banco Nacional de Costa Rica, S.A.*,[28] the defendants asserted an act of state defense and an article VIII, section 2(b) defense, both of which failed. In *Allied Bank International v. Banco Credito Agricola de Cartago*,[29] the act of state defense succeeded. From Gold's perspective, both cases must be riddled with intellectual impurities.

Gold and others have argued that article VIII, section 2(b) should preempt the act of state doctrine when a defense to nonpayment depends on the foreign exchange controls of a Fund member.[30] Article VIII, section 2(b) is part of a binding United States treaty obligation and therefore falls within an exception to the act of state doctrine acknowledged in *Sabbatino*.[31] In addition, article VIII, section 2(b) stands as a significant expression of the United States policy favoring recognition of foreign exchange controls. The act of state doctrine, therefore, should never have arisen in the Costa Rican cases.[32]

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28. Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 570 F. Supp. 870 (S.D.N.Y. 1983).

29. Allied Bank International v. Banco Credito Agricola de Cartago, 566 F. Supp. 1440 (S.D.N.Y. 1983), *aff'd*, No. 83-7714 (2d Cir., Apr. 23, 1984). A petition for rehearing and a suggestion for rehearing *en banc* are currently pending.

30. J. GOLD, *supra* note 5, at 138-39; Williams, *Extraterritorial Enforcement of Exchange Control Regulations Under the International Monetary Fund Agreement*, 15 VA. J. INT'L L. 319, 387-94 (1975).

31. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

32. It is interesting, nevertheless, to observe the different approaches of the two cases to the act of state defense. In *Libra Bank*, the judge found that the Costa Rican exchange control measures were confiscatory and extraterritorial and, therefore, not within the ambit of the act of state doctrine. 570 F. Supp. at 882-83. Gold might quibble with both conclusions. *See* J. GOLD, *supra* note 5, at 139, 391; *cf.* Serbian Loans Case, 1929 P.C.I.J., ser. A, Nos. 20/21, at 44 (generally accepted principle that a state is entitled to regulate its own currency).

In *Allied Bank*, the court found that Costa Rica adopted the exchange control measures in response to a serious national economic crisis. A judicial determination that defendants must make payments contrary to the directives of their government would place the judicial branch of the United States at odds with the policies a foreign government formulated on an issue of central importance. The resulting risk of embarrassment to the relations with the Executive Branch

The *Libra Bank* decision on article VIII, section 2(b) expressly rejected the argument that the international loan agreements in question were "exchange contracts." The court also rejected Gold's position that exchange controls arising during the life of a contract could make it unenforceable.[33] Finally, the court held that the defendant had not demonstrated that the currency regulations were imposed consistently with the Fund Agreement.[34]

United States and British judges seem impelled to adopt the narrow view of the phrase "exchange contracts"[35] because the Bretton Woods Agreement was drafted in the context of a par value system. To support this system, contracts for the exchange of currency had to be policed on both the national and international levels. Gold suggests in Appendix A, which discusses the evidence found in Lord Keynes' collected writings on the drafting history of the provision,[36] that the prime concern behind article VIII, section 2(b) was the exchange rate for transactions in third countries.[37] A loan contract would not invoke this concern because it would create an obligation to repay in one or more specified currencies without setting a rate of conversion at the time of repayment.[38]

Whether this argument is right or wrong, it obviously troubles some judges. Rather than trying to overturn the narrow interpretation by producing more critical commentary,[39] perhaps scholars

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and the government of Costa Rica justified recognition of the act of state defense. 566 F. Supp. at 1442-43. The Second Circuit based its affirmance on the doctrine of comity.

33. J. GOLD, *supra* note 5, at 140-41.

34. *Libra Bank*, 570 F. Supp. at 896-902.

35. *E.g.*, J. Zeevi & Sons Ltd. v. Grindlays Bank (Uganda), Ltd., 37 N.Y. 2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, *cert. denied*, 423 U.S. 866 (1975); Banco do Brasil, S.A. v. A.C. Israel Commodity Co., 12 N.Y.2d 371, 190 N.E.2d 235, 239 N.Y.S.2d 872 (1963), *cert. denied*, 376 U.S. 906 (1964); Wilson, Smithett & Cope Ltd. v. Terruzzi, [1976] 1 Q.B. 683 (C.A.).

36. 26 THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES: ACTIVITIES 1941-1946, SHAPING THE POST-WAR WORLD, BRETTON WOODS AND REPARATIONS (D. Moggridge ed. 1980).

37. J. GOLD, *supra* note 5, at 429, 438.

38. *Cf.* Weston Banking Corp. v. Turkiye Garanti Bankasi, 57 N.Y.2d 315, 442 N.E.2d 1195, 456 N.Y.S.2d 684 (1982).

39. Although one commentator on the Iranian asset controls cited "opinions of legal advisers to international agencies," J. GOLD, *supra* note 5, at 381, as authority for the validity of the controls under international law, these opinions are not one of the sources of international law codified in article 38(1) of the Statute of the International Court of Justice, 59 Stat. 1055 (1945), or a source to

in this field should develop and propose amendments to article VIII, section 2(b) to clarify the point. In the process, they could also consider the larger structural problem raised by the Costa Rican cases.

In *Libra Bank*, the defendant could not sustain its burden of proving that the Costa Rican exchange controls were maintained or imposed consistently with the Articles because there was no showing of Fund approval.[40] Gold argues in Chapter 11 that the only safe course in these circumstances is for the court to seek the advice of the Fund.[41] This procedure certainly is preferable to the *Libra Bank* approach of determining the issue solely by examining the text of the Fund Articles. On the other hand, seeking the Fund's advice may not go far enough.

In most legal systems, a private concern may seek the protection of the courts to reorganize when it encounters liquidity problems.[42] Yet, when a sovereign debtor faces the same problem, no comparable institution exists. The government must request the deferral of principal payments and seek the cooperation of many creditors worldwide. A single lawsuit by a nonconforming creditor, however, can upset the tenuous balance. The debtor country, usually in the form of a state-owned corporation, bank, or development institution, then must rely on the uncertain act of state or article VIII, section 2(b) defenses. In short, the process is unlikely to produce uniform decisions within a single judicial system, much less across national borders.

The time is ripe to develop a proposal for a Fund mechanism analogous to Chapter 11 of the United States bankruptcy law. The advantage for member countries would be a formal mechanism for temporary interruption of principal payments (not interest). The advantage for creditor countries would be that a single bank could not promote its interests ahead of the interests of other creditors[43] and the international financial system. The mechanism could be made available upon application by a member country. The Fund would then consider the application in light of certain basic requirements (for example, that exchange

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which domestic courts are likely to give dispositive weight, especially in the face of countervailing precedents.

40. *Libra Bank*, 570 F. Supp. at 901-02.

41. J. GOLD, *supra* note 5, at 358.

42. *E.g.*, 11 U.S.C. §§ 1101-1129 (1982) (reorganization).

43. *Cf.* 22 U.S.C. § 286e(8) (Supp. V 1981).

controls be nondiscriminatory), and certify that the applicant qualified for the benefits of the program. One of these benefits would be that the member country's failure to pay principal on defined external indebtedness would be excused temporarily by domestic tribunals. Another benefit might include technical assistance with the establishment of accurate debt statistics. The program would have to be temporary and linked in some fashion to negotiations concerning an economic adjustment program. In addition, a member country would remain free to opt out at any point.

The foregoing outline provides only a peek at what such a Fund program would involve; further refinement of the proposal is not only required, but desirable, so that Gold will not remain forever a prophet without honor in the courts of England and the United States. For any who undertake the project, the mandatory starting point and invaluable resource will be *The Fund Agreement in the Courts: Volume II.*

TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES. 1982 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES. New York: Clark Boardman Co., 1982. Pp. xii, 646. $55.00.

*Reviewed by Roger S. Clark**

This is one of the few times that this reviewer has read a yearbook symposium issue from cover to cover. Much in this volume is new, provocative, and well-stated. It should be obligatory reading for anyone with a professional interest in the law, politics, or the organizational structure of the international community's response to one of the great human rights problems of our time. A brief description of the content of the *Yearbook* and a detailed review of the contributors' articles will give some indication of its ambitious scope.

Part one of *Transnational Legal Problems of Refugees*, "Refugees in International Law and Organization,"[1] contains three chapters. James L. Carlin's article, *Significant Refugee Crises Since World War II and the Response of the International Community*,[2] emphasizes the global nature of the refugee problem. Europe has been the traditional focus of concern and remains a continuing source of refugees. The decolonization process and assorted Third World crises have also contributed to the number of refugees. The turmoil in the Horn of Africa, the birth of Pakistan and Bangladesh, and the mass exodus from Southeast Asia are current refugee sources. The refugee problem is global and continuing, even if the organized international community would like to pretend otherwise.

The United Nations High Commissioner for Refugees (UNHCR)[3] has touched the lives of millions of people; its interventions often spell the difference between life and death. Very little, however, has been written on the High Commissioner's Office other than that written by current or former officials of the

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1. 1982 MICH. Y.B. INT'L LEGAL STUD. 1 [hereinafter cited as YEARBOOK].

2. Carlin, *Significant Refugee Crises Since World War II and the Response of the International Community*, in *id.* at 3.

3. Clark, *Human Rights and the United Nations High Commissioner for Refugees*, 10 INT'L J. LEGAL INFO. 287 (1982).

Office itself.[4] The second article in Part one by Paul Weis[5], *The Development of Refugee Law*,[6] is an excellent contribution to this genre. Guy S. Goodwin-Gill's article, entitled *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees*,[7] appears in Part five of the volume. Although both authors have spent many years dealing with some of the world's most depressing problems, they have retained their spirit of optimism in the articles. Both start from the same basic point: in traditional international law, people have looked to their state of origin for the protection of their basic interests. A whole body of human rights law on the protection of aliens has evolved as states have processed their citizens' claims against other sovereigns. What happens, however, if the state of origin is the source of the evil? Who protects the victims?

One response to the problem of protecting individual rights was the creation of the High Commissioner's Office during the League of Nations era. This office was recreated as the UNHCR. Like much of the international community's human rights efforts, this was an ad hoc solution to the problem. The High Commissioner's Office was established over the opposition of a significant part of the United Nations membership and was intended to operate on a temporary, facilitative basis. The organization was designed to catalyze the work of states, and especially the voluntary nongovernmental organizations (NGOs), which were charged with the day-to-day care and resettlement of refugees within the High Commissioner's mandate.[8] Although the UNHCR has been granted numerous "life" extensions and has experienced several

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4. *See, e.g.*, J. Read, *The United Nations and Refugees—Changing Concepts*, 1962 INT'L CONCILIATION No. 537; Aga Khan, *Legal Problems Relating to Refugees and Displaced Persons*, 149 ACADÉMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS 287 (1976).

5. Paul Weis is the former Director of the Legal Division of the United Nations High Commission for Refugees (UNHCR).

6. Weis, *The Development of Refugee Law*, in YEARBOOK, *supra* note 1, at 27.

7. Goodwin-Gill, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of The United Nations High Commissioner for Refugees*, in YEARBOOK, *supra* note 1, at 291. Mr. Goodwin-Gill is currently Legal Advisor and Protection Officer of the United Nations High Commission for Refugees.

8. *Id.* at 292-94.

refugee-generating crises since its inception, the problem of resettlement remains unsolved. The UNHCR has been forced to expand its operating budget by a large amount and change to an operational orientation. Through creeping jurisdictional expansions,[9] new classes of clients, including those within the "good offices" regime of the High Commissioner and those "displaced persons" for whom the UNHCR has a "concern,"[10] have been drawn into the UNHCR's net.

Weis deals primarily with the High Commissioner's symbolic tools: the principles of asylum and nonrefoulement. Nonrefoulement is the principle that a refugee should not be returned to a country where his life or liberty may be endangered. Weis traces the origin of the United Nations refugee efforts to the large volume of refugees generated by the Russian Revolution, the post-1951 treaties signed under the aegis of the United Nations, and the regional treaties aimed at the refugee problem. Using examples drawn from several nations, he discusses "a distinct trend in the legislation of many countries in the past decades, to take into account, to an ever-increasing degree, the special position of refugees."[11] Although the 1977 Conference of Plenipotentiaries did not result in an agreement on the text of a convention on territorial asylum, Weis perceives a promising, although nascent, trend in recent efforts toward the recognition of something approaching a "right" to asylum in some domestic systems.[12]

Zvi Gitelman concludes Part one with a chapter entitled *Exiting from the Soviet Union: Emigrés or Refugees?*[13] This very de-

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9. *See, e.g.*, Statute of the United Nations High Commissioner for Refugees, ch. 1(1), G.A. Res. 428(V) Annex, 5 U.N. GAOR Supp. (No. 20) at 46, U.N. Doc. A/1775/Corr. 1 (1950).

10. The UNHCR has expanded its sphere of activity without any formal amendment of its constituent document. *See id.* The Economic and Social Council and the General Assembly have gradually expanded the Statute. *See infra* note 11. Their expansive determinations have occurred either because the High Commissioner was asked to take some action in response to a crisis or because the Commissioner acted and sought ratification afterwards. High Commissioners have shared a determined creativity in both expanding their turf and in their actions as eternal scroungers. *See id.*; *see also* UNHCR General Information Paper Annex III, U.N. Doc. HCR/50B/1/82. Note the dramatic expansion of the operating budget of the office from $5,521,000 in 1965 to $496,956,000 in 1980. *Id.*

11. Weis, *supra* note 5, at 33. *See generally* Aga Khan, *supra* note 4.

12. Weis, *supra* note 5, at 37-39.

13. Gitelman, *Exiting from the Soviet Union: Emigrés or Refugees?*, in

tailed article does not readily fit into what is otherwise a more general overview. Gitelman attempts to address the difficult question of who is a refugee and thus entitled to particular kinds of treatment and placement. Unfortunately, Gitelman does not make his points clearly and leaves the reader somewhat unsure about his analysis.

Part two, entitled "Entering the Country of Refuge: National Law and Policy on Refugee Entry and Resettlement,"[14] contains only one article. In *Refugees and Refugee Law in a World of Transition,*[15] Atle Grahl-Madsen gives a depressing assessment that national laws do not facilitate the resettlement of refugees. The author's conclusion is supported by the synopses of state practices contained in the Appendix to the book.[16] Grahl-Madsen believes that the national response to refugee problems has been inadequate; as more and more refugees are generated, many countries, even first-haven nations, are making narrow, legalistic decisions that deprive refugees of the chance for a new start. At the international community level, he sees an "organizational tangle"[17] in the refugee situation. To untangle the problems, he advocates that the work of the UNHCR, which has humanitarian responsibilities for victims of man-made disasters, should be coordinated with the work of the Office of United Nations Disaster Relief Coordinator (UNDRO),[18] an organization with logistical responsibilities for victims of natural disasters. A clear division of responsibilities between the organizations would prevent an overlap of functions and ensure an effective and efficient response to the needs of disaster victims.[19]

Part three, "Entering the Country of Refuge: United States

YEARBOOK, *supra* note 1, at 43.

14. YEARBOOK, *supra* note 1, at 63.

15. Grahl-Madsen, *Refugees and Refugee Law in a World in Transition,* in *id.* at 65.

16. Review of Foreign Laws, in YEARBOOK, *supra* note 1, at 551 (app. III).

17. Grahl-Madsen, *supra* note 15, at 79-83.

18. *Id.* at 81. UNDRO was formed by the General Assembly in 1971. G.A. Res. 2816, 26 U.N. GAOR Supp. (No. 29) at 85, U.N. Doc. A/Res/2816 (1971). Initially it was restricted in its activities to mobilizing only United Nations assistance. Since 1982 it has been empowered to mobilize aid from other quarters as well. G.A. Res. 144, 37 U.N. GAOR Supp. (No. 51) at 117, U.N. Doc. A/37/51 (1982); *see* UNDRO News, March/April 1983 at 1.

19. Grahl-Madsen, *supra* note 15, at 84.

Perspectives,"[20] contains six discussions of various aspects of United States law and policy of vital importance because the "United States, for political and humanitarian reasons, has accepted for admission and resettlement, and ultimately citizenship, more refugees than any other nation."[21] David Martin's chapter, *The Refugee Act of 1980: Its Past and Future,*[22] is a particularly useful tool for understanding the United States position. It provides a very sensitive examination of United States refugee legislation and highlights a major flaw in the Refugee Act of 1980[23] dramatically revealed in the recent Cuban and Haitian refugee cases. Although the Act generally covers the admission of refugees into the United States,

> [s]cant [legislative] attention was directed, however, to the other half of the issue, the problem of asylum: how shall the United States treat people who reach the country's shores on their own and then claim to be refugees, entitled to all the protections international law provides, most particularly to protection against expulsion to their homelands?[24]

Norman L. Zucker's article, *Refugee Resettlement in the United States: The Role of the Voluntary Agencies,*[25] is particularly interesting. Although voluntary agencies play an enormous role in the refugee area on both the international and the national levels, very little scholarly literature has analyzed their roles. Zucker's chapter is the best overview discussion of this topic known to the reviewer.

Part four, "Entering the Country of Refuge: Comparative Perspectives,"[26] could have been combined with Part two. In the first of two essays, *Nordic Refugee Law and Policy,*[27] Dr. Goran Melander discusses the extent to which the Nordic countries' contributions to the solution of the refugee problem have been disproportionate to their size. In the 1940s and 1950s, the Nordic

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20. YEARBOOK, *supra* note 1, at 89.
21. Zucker, *Refugee Resettlement in the United States: The Role of the Voluntary Agencies,* in *id.* at 155.
22. Martin, *The Refugee Act of 1980: Its Past and Future,* in YEARBOOK, *supra* note 1, at 91.
23. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8, 22 U.S.C.).
24. Martin, *supra* note 22, at 91.
25. Zucker, *supra* note 21.
26. YEARBOOK, *supra* note 1, at 227.
27. Melander, *Nordic Refugee Law and Policy,* in *id.* at 229.

countries went to great pains to permit permanent resettlement of European refugees. In the 1960s and 1970s, when the largest problems related to non-European refugees, these countries made generous financial contributions to the operating budget of the UNHCR.[28] Peter Nobel, one of the most prolific writers on African refugee problems, provides a sobering picture of the magnitude of the refugee problem in the second essay of Part four.[29] He examines the effect of the generous interpretation of the term "refugee" by the 1969 Organization of African Unity (OAU) Refugee Convention[30] and places the African response in the context of the very productive 1979 Conference on "The Situation of Refugees in Africa."[31]

Part five, "Entering the Country of Refuge: International Perspectives,"[32] contains two chapters. The first is by Guy S. Goodwin-Gill;[33] the second, by Stephen B. Young, is entitled *Between Sovereigns: A Reexamination of the Refugee's Status.*[34]

Goodwin-Gill touches on some of the same themes as Weis, but is much more forceful in advocating the view, often espoused by the UNHCR, that nonrefoulement is an obligation of customary international law and not merely a duty of those states that are parties to treaties embodying the principle.[35] He also argues for an expansive interpretation of the doctrine, including an obliga-

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28. *See id.*

29. Nobel, *Refugees, Law, and Development in Africa,* in YEARBOOK, *supra* note 1, at 255.

30. *Id.* at 258. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, Organization for African Unity, art. I, U.N.T.S. No. 14691, *reprinted in* 8 I.L.M. 1288. Article I of the Convention uses the familiar definition of "refugee" as one with a "well-founded" fear of persecution in his country of origin, *id.* art. I, para. 1, and continues, "The term 'refugee' shall also apply to every person who, owing to external agression [sic], occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to . . . seek refuge in another place . . . ," *id.* art. I, para. 2. This expanded definition permits international action, including action by the UNHCR, for a wider class of victims in Africa than elsewhere.

31. Nobel, *supra* note 29, at 259-60. For more information on the 1979 OAU Conference, see materials cited in *id.* at 282 nn.21-25.

32. YEARBOOK, *supra* note 1, at 289.

33. *Supra* note 7; *see supra* notes 7-10 and accompanying text.

34. Young, *Between Sovereigns: A Reexamination of the Refugee's Status,* in YEARBOOK, *supra* note 1, at 339.

35. Goodwin-Gill, *supra* note 7, at 304-06.

tion not to reject asylum seekers at the frontier.[36] Goodwin-Gill discusses the crucial procedural problems that arise at the state level when deciding asylum and refugee status cases.[37] Goodwin-Gill posits that the involvement of the High Commissioner's Office in the process of defining refugee status in some countries may enhance the integrity of the decision.[38]

Surprisingly, Goodwin-Gill admires the procedures of the European Convention on Human Rights [39] and seems to suggest that UNHCR should emulate them. He notes that any contracting state to the Convention may refer an alleged breach of the Convention by another party to the European Commission of Human Rights. He states that "[t]he instrument itself thus provides for the emergence of a 'European public order,' a regime in which all states parties have a sufficient interest in the observance of the European Convention's provisions to allow for the assertion of claims."[40] He continues:

> While there are similarities in the objectives of the European Convention and the refugee conventions—both call for certain standards of treatment to be accorded to certain groups of persons—the refugee conventions lack effective investigation, adjudication, and enforcement procedures; they can hardly be considered to offer the same opportunity for judicial or quasi-judicial solutions.[41]

Goodwin-Gill's article makes two important points. The first relates to his comment that all states have a "sufficient interest" or "standing" to raise complaints against the actions of fellow treaty parties allegedly denying human rights. The procedures of the Convention are an example of the very important dictum in the *Barcelona Traction Case,*[42] in which the International Court of Justice asserted that some obligations are *erga omnes.*[43] Goodwin-Gill states that:

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36. *See id.* at 302, 304.
37. *Id.* at 306-20.
38. *See id.* at 319-22.
39. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221 [hereinafter cited as European Convention].
40. Goodwin-Gill, *supra* note 7, at 321.
41. *Id.*
42. *Id.* at 321-22; Barcelona Traction, Light and Power Co., 1970 I.C.J. 3.
43. *Barcelona Traction,* 1970 I.C.J. at 32.

> [I]t is tempting to invoke a dictum of [the Barcelona Traction decision] and to argue that, in view of the importance of the rights involved, all states have an interest in their protection; and that the UNHCR, by express agreement of some states and by the acquiescence of others, is the qualified representative of the "international public order."[44]

He makes this important point too cautiously. The very existence of the High Commissioner recognizes the demise of the notion that states are the only subjects of international law and the only actors on the international scene.[45] The United Nations High Commissioner for Refugees is a special kind of international organization with an international personality. It represents individuals and masses of individuals who have no other champion, as well as representing the broader concerns of the international community as a whole.

The second point in Goodwin-Gill's thesis is that the High Commissioner's Office is not a quasi-court. The Office has fact-finding functions but exercises them differently than courts or other quasi-judicial bodies like the European Commission.[46] Most refugee issues are not solvable by judicial decisions. This does not imply that complaint-type procedures are *never* useful in refugee cases. For the most part, however, the problems of refugees require negotiated rather than litigated solutions. The UNHCR is very much a negotiating office. To the extent Goodwin-Gill regrets that the High Commissioner's Office is not like the European or OAS Commission, he underestimates the strengths and nature of the Office.

Stephen Young's article[47] makes a central, critical point. Young's basic message synthesizes the theme of the book: refu-

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44. Goodwin-Gill, *supra* note 7, at 322 (footnote omitted). The International Court of Justice stated:

> [A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

Barcelona Traction, 1970 I.C.J. at 32.

45. *Id.*

46. Goodwin-Gill, *supra* note 7, at 319-22.

47. Young, *supra* note 34.

gees cannot rely upon their state of origin for protection.[48] This conclusion raises significant questions. What organs of protection can be substituted for the refugee's state of origin? In particular, what symbolic and structural techniques can the international community implement? The creation of the Office of the UNHCR is one response. Moreover, in addition to the few specialized treaties on refugees, the general human rights norms articulated in the Universal Declaration of Human Rights,[49] the Covenants on Human Rights,[50] and the regional Conventions on Human Rights[51] may also apply to refugee rights.[52] To what extent can the procedures devised in these instruments be used for refugee problems? Finally, if the refugee has found asylum, can the domestic legal system of the refuge state be used to redress some of the wrongs perpetrated in the state of origin?

Part six, the final section, deals with "Legal Remedies for Refugees."[53] Three of its chapters discuss judicial remedies in the United States legal system;[54] the other two chapters address regional human rights procedures that help resolve some of the problems of refugees.[55] Both Schneebaum and Tigar examine cases illustrating the use of the legal system of the state in which

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48. *Id.* at 339.

49. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948), *reprinted in* Y.B. of the U.N. 1948-49, at 535-37.

50. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, *id.* at 52.

51. European Convention, *supra* note 39; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, *reprinted in* 9 I.L.M. 99 (1970); Organization of African Unity, Banjul Charter on Human and Peoples' Rights, June 1981, *reprinted in* 21 I.L.M. 58 (1982).

52. *See generally* C. NORGAARD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); Tucker, *Has the Individual Become the Subject of International Law?* 34 U. CIN. L. REV. 341 (1965).

53. YEARBOOK, *supra* note 1, at 371.

54. Schneebaum, *Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy,* in *id.*, at 373; Malloy, *The Impact of U.S. Control of Foreign Assets on Refugees and Expatriates,* in YEARBOOK, *supra* note 1, at 399; Tigar, *The Foreign Sovereign Immunities Act and the Pursued Refugee: Lessons from* Letelier v. Chile, in YEARBOOK, *supra* note 1, at 421.

55. Young-Anawaty, *International Human Rights Forums: A Means of Recourse for Refugees,* in YEARBOOK, *supra* note 1, at 451; Nance, *The Individual Right to Asylum Under Article 3 of the European Convention on Human Rights,* in YEARBOOK, *supra* note 1, at 477.

the refugee is located to protect the refugee.[56]

Schneebaum's article analyzes the *Filartiga v. Peña-Irala* decision.[57] Seventeen-year-old Joelito Filartiga was tortured to death under the auspices of Peña-Irala, Inspector-General of the Paraguayan police in Asunción. His father had openly disagreed with the policies of Paraguay's dictator, General Stroessner. More than two years after Joelito's death, his sister, then a resident of the United States, discovered that Peña-Irala was illegally living in the United States. She instituted proceedings on behalf of her father and herself for Joelito's wrongful death. This claim, brought in federal district court, alleged that the court had subject matter jurisdiction pursuant to the Alien Tort Claims Act,[58] which gives district courts 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."[59] The District Court for the Eastern District of New York dismissed the suit for lack of subject matter jurisdiction. The Second Circuit Court of Appeals reversed, holding that torture constitutes a tort under the law of nations and that the district court had jurisdiction to entertain the action.[60]

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56. In the aftermath of the Nazi Holocaust, efforts to use the domestic legal system of safe haven to obtain redress were initiated. In Bernstein v. N.V. Nederlandsche, 173 F.2d 71 (2d Cir. 1949), *mandate amended,* 210 F.2d 375 (2d Cir. 1954), a Jewish refugee, who had settled in the United States, sought to recover from an assignee property taken pursuant to German law because of his Jewish status. The Second Circuit, applying the act of state doctrine, initially refused to rule on the Nazi statute. *Id.*, 173 F.2d at 71. After receiving a letter from the State Department stating that the Executive Branch did not object to the court's considering the validity of the German statute under international law, the court reconsidered its position and proceeded to a trial on the merits. *Id.*, 210 F.2d at 375. The case was subsequently settled. N.Y. Times, Mar. 17, 1955, at 80, col. 8.

57. 630 F.2d 876 (2d Cir. 1980); Schneebaum, *supra* note 54, at 374-76. Schneebaum served as counsel to three parties filing *amicus curiae* briefs. *Id.* at 373 (biographical footnote). For discussions of *Filartiga,* see Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53 (1981); Claude, *The Case of Joelito Filártiga and the Clinic of Hope,* 5 HUM. RTS. Q. 275 (1983).

58. *Filartiga,* 630 F.2d at 878-79; 28 U.S.C. § 1350 (1976).

59. 28 U.S.C. § 1350.

60. *Filartiga,* 630 F.2d at 878. *See* Schneebaum, *supra* note 54, at 375-76. A default judgment was entered for $375,000. Gold, *Paraguayans Fight Back, Aided by Obscure U.S. Law,* Phila. Inquirer, May 17, 1983, at A2, col. 1. Peña-

Michael Tigar discusses *Letelier v. Republic of Chile*[61] in his article.[62] The *Letelier* case arose from another disturbing phenomenon, the murder of opponents of authoritarian regimes on foreign soil.[63] Letelier, former ambassador of the Allende Government to the United States, was killed in Washington, D.C. by a bomb planted in his car. The bomb was detonated by members of the Cuban Nationalist Movement acting on behalf of the Chilean secret police agency, DINA. The Letelier family successfully brought a civil suit in federal district court. In addition to an action for battery and wrongful death under District of Columbia law, the family asserted tort claims based on the violation of statutory duty and tortious conduct in violation of international law.[64]

The plaintiffs relied on a federal criminal statute, section 1116 of the Act for the Protection of Foreign Officials and Official Guests, as a basis for their claim of breach of statutory duty. This section provides that:

> (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 . . . .[65]

A "foreign official" includes an "Ambassador, Foreign Minister . . . or any person who has previously served in such capacity."[66] As a former Ambassador, Letelier was within this definition. Fundamental international principles of human rights and norms that prohibit the transnational use of force except for defensive pur-

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Irala has left the United States, so prospects for collection are dim. Nevertheless, the psychological significance of the award as a vindication of the Filartiga family's rights remains.

61. 488 F. Supp. 665 (D.D.C. 1980).

62. Tigar, *supra* note 54. Tigar was counsel to the plaintiffs in the *Letelier* case.

63. *Letelier*, 488 F. Supp. at 665; *see also* Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 923 (1980) (diplomatic response to threats against Libyan expatriates who opposed the Qadhafi government); Garvey, *Repression of the Political Emigre—The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78 (1980).

64. 488 F. Supp. at 665-66; Tigar, *supra* note 54, at 438-41.

65. 18 U.S.C. § 1116(a) (1982).

66. 18 U.S.C. § 1116(b)(3)(A).

poses support the proposition that the killing of either a diplomat or a refugee under such circumstances is illegal under international law.[67] It is possible to argue that Letelier was protected under international law in his capacity as a former ambassador and as a political refugee. It is a short step from establishing a breach of international law to claiming that individuals injured by such a breach have a cause of action.

Whereas the Filartiga family short-circuited any defense of sovereign immunity by suing Peña-Irala and not the Paraguayan State, *Letelier* was an obvious case for the sovereign immunity defense. Because the bombing took place on United States soil, however, it was relatively easy to apply section 1605(a)(5), an exception to the general grant of immunity contained in the Foreign Sovereign Immunities Act of 1976 (FSIA).[68] Tigar argues that

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67. *See, e.g.*, Universal Declaration of Human Rights, *supra* note 49; U.N. CHARTER art. 2, para. 4 (use of force); *see also* agreements cited *supra* notes 50-51. International law plainly contemplates a category of persons entitled to "special protection from any attack on his person, freedom or dignity." Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, G. A. Res. 3166, 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030, art. 1. The members of this category are not specifically defined in the Convention. *See id.* To the extent that the United States includes former ambassadors in 18 U.S.C. § 1116, it arguably acknowledges some sort of international obligation to them (apparently pursuant to customary international law). Refugees should be in the same position.

68. 28 U.S.C. § 1605(a)(5) (1976). The Foreign Sovereign Immunities Act of 1976 is codified in 28 U.S.C. §§ 1330, 1602-11. Section 1605(a)(5) denies immunity in cases:

> not otherwise encompassed in paragraph (2) above [the commercial activity exception], . . . 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 [an official of] that foreign state while acting within the scope of his office or employment . . . .

Id. Section 1605(a)(5) also provides a "discretionary act" exception to the exception, based on a comparable provision in the Federal Tort Claims Act. Whatever a "discretionary act" of a government may be, it is hard to believe that the definition would include murdering emigrés. The judge in *Letelier* agreed. 488 F. Supp. at 673.

It is an interesting exercise to synthesize the *Filartiga* and *Letelier* results. What would be the outcome if Letelier had found refuge in Mexico and had been killed in Mexico City instead of Washington, D.C.? In this case, the plaintiff could not use the FSIA or its jurisprudential provisions. Section 1330(a) provides:

killing refugees on foreign soil is a tort against the law of nations; this viewpoint provides both a substantive theory of action and a basis for jurisdiction in the federal courts.[69] How can the sovereign immunity defense be avoided? Jordan Paust has argued forcefully that a further exception must be read into the FSIA: the breach of international law exception.[70] This exception strips a government acting in breach of international law of its jurisdictional immunity. This is an attractive position for those who might encourage the use of United States courts for human rights causes.[71] This position is problematic, however, in terms of United States domestic law and international developments.[72] There is nothing in the current international legal system to preclude a United States court from denying sovereign immunity to a government in a *Filartiga*-type case. The absolute immunity rule has lost its legitimacy, and no clear international rule has taken its place. Efforts to codify the restrictive immunity doctrine by international treaty structurally parallel the FSIA's list of specific exceptions that eliminate the existence of implicit

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> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam as to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

There does not appear to be a jurisdictional theory based on the Act in the absence of one of the Act's exceptions. Jurisdiction based upon some other theory, however, is not precluded.

69. Tigar, *supra* note 54, at 438-41.

70. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 232-38. The argument seems to proceed, in part, on the dubious basis that the term "international agreements," as used in the FSIA, includes international custom. *See id.*

71. *See, e.g.*, R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

72. The "restrictive" view of sovereign immunity in the FSIA is mainly, although not exclusively, devoted to eliminating the immunity in commercial cases. It does not purport to be a fundamental attack on the citadel of immunity. The FSIA is a complete codification of those exceptions contemplated by the legislature. Those not stated would appear to be excluded. *See Letelier*, 488 F. Supp. at 672. There is, however, nothing in current international doctrine that affirmatively precludes a United States court from denying immunity to a government sued in a *Filartiga*-type case. *See* Berman & Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531, 570 (1982).

exceptions.[73]

Amy Young-Anawaty's thoughtful contribution to the volume[74] discusses a complaint filed with the Organization of American States Commission on Human Rights concerning United States treatment of Haitian refugees. Her focus is on the use of regional human rights procedures to deal with refugee problems. She argues:

> The *Haitian Refugee* case tests for the first time in the Western Hemisphere the use of an international forum for protecting the rights of refugees. The complaint alleges not only violations of the right of *nonrefoulement*, but violations of other basic rights essential for a fair determination of refugee status in compliance with international law, and stands as a challenge to the refugee policy and practices of the country currently receiving the highest number of refugees in the world.[75]

It is difficult to ascertain the degree of influence the Commission's intervention will have on this ongoing saga. The actions of the UNHCR[76] have brought some dissatisfaction, which partially explains why the complaint was filed with the OAS.

David Scott Nance's chapter[77] records another international human rights procedure that has been utilized by refugees. International law has steadfastly refused to recognize a "right" to asylum; the European Convention is appropriately tight-lipped on

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73. *See* Berman & Clark, *supra* note 72. For specific treaty regimes, examine European Convention on State Immunity of 1972, Europ. T.S. No. 74, *reprinted in* 11 I.L.M. 470 (1972) (lists numerous exceptions to the basic principle of immunity); International Law Association Draft for a Convention on State Immunity, 22 I.L.M. 287 (1982) (exceptions drawn in the spirit of the FSIA); Inter-American Draft Convention on Jurisdictional Immunity for States, *id.* at 292 (contains a narrower list of exceptions that appear to exclude expansive ones).

74. Young-Anawaty, *supra* note 55.

75. *Id.* at 456 (footnotes omitted).

76. Critics of the UNHCR in the nongovernmental human rights community believed that the Office was simply not forceful enough either in pressing individual Haitian cases with the United States Government or in objecting to the outrageous procedures being used to "process" those cases *en masse*. Although the news media did not report the event, the OAS Commission on Human Rights visited some of the Haitian detention centers within the United States and probably had some impact on alleviating oppressive conditions therein. The case discussed by Ms. Young-Anawaty is noteworthy both because the target was the United States, not some authoritarian regime, and because some concrete steps were taken on behalf of the refugees.

77. Nance, *supra* note 55.

the matter. Nevertheless, in a line of decisions since 1961, the European Commission on Human Rights has recognized a limited right of asylum by an expansive interpretation of article 3 of the Convention. This provision asserts that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[78] Nance states that "the Commission has advanced the principle that a state party violates its Article 3 obligations when it returns an alien to a country where he or she might be subjected to treatment which, if inflicted by a party to the Convention, would itself constitute a violation of Article 3."[79]

We are certain to see many such creative uses of international human rights procedures to assist refugees in the coming years. Such efforts do not suggest that the UNHCR is somehow being superseded; it is merely being complemented. The *Michigan Yearbook* presents the various aspects involved in the international refugee problem, and I strongly commend this very stimulating collection of articles.

78. *Id.* at 477 (quoting the European Convention, *supra* note 39, art. 3).
79. Nance, *supra* note 55, at 477 (footnote omitted).