

# Judicial Restraint in International Law

By Allan I. Mendelsohn

**This article addresses two significant and so-far unexplored questions in today's practice of international law: (1) why it is so important that courts throughout the world exercise judicial restraint when faced with issues of international law; and (2) what the U.S. government is doing to contribute toward this goal.**

The purpose of this article is not simply to address the subject of *forum non conveniens* in international aviation law but to do so in the greater and more relevant context of the increasing need for judicial restraint in many areas of international law in general. Even though the doctrine of *forum non conveniens* is an excellent example of why judicial restraint has become such an important aspect of international aviation law, the growing popularity of this doctrine in air law should serve as an even better example of the need for judicial restraint in an increasingly wide variety of cases in today's international litigation practice.

No one doubts the merits of the recent and escalating tendency of American courts to apply and employ the doctrine of *forum non conveniens* to dismiss cases that are brought by foreigners and involve events that occur largely or exclusively abroad. The usual context in which the doctrine is and continues to be applied in the international aviation context is one in which foreign citizens bring suits in U.S. courts seeking compensation for injuries incurred in an air crash that occurred abroad, usually in the course of travel on an airline bearing a foreign flag. In the recently decided case brought against West Caribbean Airways<sup>1</sup>—a Colombian airline that did no business whatsoever in the United States—152 residents of Martinique sued the airline after one of its planes crashed in Venezuela en route from Panama to Martinique. In a more recent case involving a Sudanese airline, some 80 Sudanese citizens brought suit in Chicago against various manufacturers of the aircraft and its component parts because of a crash that had occurred upon landing in Khartoum on a flight from Jordan via Syria.<sup>2</sup> These are the kinds of cases that simply should not be litigated in U.S. courts.

## The Role of the U.S. Government in the West Caribbean Airways Litigation

What is perhaps most important to discuss in this article is the extremely helpful hand that the U.S. government gave in helping to bring about the favorable decisions in both the district and court of appeals in the West Carib-



bean Airways case. The government entered into the case at an early stage and filed both a very effective statement of interest in the district court and a comprehensive *amicus curiae* brief in the court of appeals. The thrust of the government's argument, as is now more or less internationally acknowledged, was that Article 33(4) of the Montreal Convention enables U.S. courts to use the doctrine of *forum non conveniens* as a way to decline jurisdiction over cases brought by foreigners against other foreigners.

There can be no question that, in declining to exercise such jurisdiction, U.S. courts are exercising an admirable form of judicial restraint. Instead of deciding every case that might come before them and applying U.S. law as though it were the best law or the only one that is applicable, U.S. courts are encouraging—indeed requiring—foreign plaintiffs to sue in the courts of their home countries and thus have the amount of their compensation determined not by American laws and standards but by the laws and standards of the victim's own homeland.<sup>3</sup> This approach is not only an excellent example of judicial restraint but also an equally excellent step in the direction of modernizing international law and international judicial practices. Moreover, as discussed below, there is every reason to believe that the U.S. government views the issue in much the same light.

The discussion that follows compares the judicial restraint inherent in U.S. courts' application of the *forum non conveniens* doctrine with the practices of other courts that are faced with similar problems.

## “Libel Tourism” in the United Kingdom

In the past few years, we have been witness to the escalating problem of courts in the United Kingdom—almost always at the behest of foreign plaintiffs—applying U.K.

libel laws to books that are written by American authors and published in the United States and that would encounter no problems under established U.S. libel laws. In one way or another—particularly in light of today’s Internet capabilities—these books find their way into the United Kingdom and into the hands of potential plaintiffs. Quite often, these plaintiffs are citizens of Saudi Arabia who, according to reports in the books, are involved in financing terrorist activities around the world.

In the United States, with its emphasis on freedom of speech, a plaintiff suing an author for libel must prove that what the author wrote was false. In the United Kingdom, on the other hand, the burden is reversed: Unless the author can demonstrate the truth of what he or she has written, the plaintiff can seek and successfully obtain very substantial monetary judgments. A very good example of the problem is presented by the now fairly famous case involving Dr. Rachel Ehrenfeld. Ehrenfeld, the director of the American Center for Democracy, is a well-known and well-regarded American academic who writes extensively on terrorism and lectures throughout the world. She wrote a book entitled *Funding Evil*, which was published in the United States in 2003. When 27 copies of her book found their way into the United Kingdom, it triggered a lawsuit there by a very wealthy Saudi, Khalid bin Mahfouz (since deceased), who claimed that he had been libeled. He won a judgment of \$250,000, and Ehrenfeld’s book has been banned in the United Kingdom ever since. The case provides an excellent example of how these types of libel laws can and do have very chilling effects on freedom of speech.<sup>4</sup>

Were the Ehrenfeld case the only case of this kind, it would not be a matter of major concern. But similar cases have now been brought against American defendants so frequently in the United Kingdom that the problem has become known generally as “libel tourism.” A similar problem is emerging in Canada, where the Canadian Human Rights Commission is beginning to entertain complaints brought against American authors (as well as their publishers) who are outspoken critics of radical Islam.<sup>5</sup>

The above cases are all excellent examples of circumstances in which foreign tribunals should exercise some sorely needed judicial restraint, instead of exercising their maximum jurisdiction. Whether by judicious use of the same doctrine of *forum non conveniens* or some comparable approach, when faced with these kinds of attacks on what they clearly know or should know is viewed in the United States as free speech, foreign tribunals could make a much more significant contribution to cooperation in international law by declining to exercise jurisdiction. Not only should they decline jurisdiction, but they should also direct plaintiffs to courts in the countries where the defendants live, where they wrote their books, where their books were originally published, and under whose law the books and their content should more properly be judged.<sup>6</sup>

But the foreign tribunals seem to be continuing their openly confrontational approach. As a result, the U.S. Congress has been pressed recently to draft and introduce controversial legislation known as the Free Speech Protection

Act of 2009 (S. 449), which would largely deprive foreign libel judgments of any force or effect in the United States.<sup>7</sup> Moreover, the proposed legislation would enable U.S. authors and publishers to file for treble damages against the person or persons who obtained the judgment abroad. I know of few better examples where just a modest amount of judicial restraint not only would engender much-needed international cooperation but also would totally avoid these types of unnecessary and unhelpful confrontations between governments.

### **Universal Jurisdiction over Alleged Violations of Human Rights**

Another area in which a heavy dose of judicial restraint can be enthusiastically recommended is that of the kinds of human rights legislation that was adopted some years back in Belgium and more recently in Spain. Based on the concept of universal jurisdiction over certain crimes—like genocide, torture, and crimes against humanity—these two countries have taken it upon themselves to try to convict citizens from other countries even when their alleged crimes occurred elsewhere and had absolutely no connection to Belgium or Spain. A few years ago, when Belgian judges set their sights on Gen. Tommy Franks for allegedly using cluster bombs in Iraq, the U.S. government is believed to have mounted a determined diplomatic effort—capped by Secretary of Defense Donald Rumsfeld’s public threat to pull NATO out of Brussels—to persuade the Belgian government to amend its law and restrain its judiciary.<sup>8</sup> The U.S. government’s effort was successful, and Belgium scaled back its law in 2003.

More recently and for unknown reasons, the Spanish government adopted a similar universal jurisdiction law and set its sights on the United States (for alleged crimes at Guantanamo Bay), China (for alleged crimes in Tibet), and Israel (for alleged war crimes in Gaza). Again, the U.S. government is reported to have mounted a major diplomatic offensive that resulted in the Spanish Parliament’s adoption of a resolution that very substantially cut back on what jurisdiction their courts could exercise in this area, properly limiting their jurisdiction to cases that had a clear link to Spain.<sup>9</sup> But given the persistence of the so-called international human rights lobby, we can surely expect some other country (or countries) to follow the path taken by Belgium and Spain sooner or later.<sup>10</sup> All one can say is that we owe a real debt of gratitude to the U.S. government for its vigilance in so actively pursuing the path and the goal of judicial restraint.

### **The U.S. Government’s Continuing Efforts to Limit Claims Under Its Own Alien Tort Statute**

The final example of judicial restraint is that of the role of the U.S. government in the increasing number of cases being brought by human rights groups under U.S. federal statutes like the Alien Tort Statute (ATS), the Foreign Sovereign Immunity Act (FSIA), and the Torture Victim Protection Act (TVPA) seeking compensation from foreign individuals and corporations. One group of these kinds of cases involves lawsuits brought on behalf of Palestinians

or others. These cases allege that former high-level Israeli officials committed war crimes, acts of genocide, and other crimes against humanity, causing injuries and deaths that should be compensable under the FSIA, the TVPA, and/or general principles of international law and jus cogens.

Perhaps the best and most recent example of one of these cases is *Ra'ed Ibrahim Mohamad Mater et al. v. Avraham Dichter*<sup>11</sup>—a suit brought on behalf of those who were injured or killed during an Israeli bombing raid on a Gaza apartment building in 2002. The raid was a successful targeted assassination of a known leader of Hamas, but it resulted in extensive collateral damage. The suit was brought on several bases—including the FSIA and the TVPA—and sought compensation for that damage. Similar to the U.S. government's application of the doctrine of forum non conveniens in the case involving West Caribbean Airways, in *Dichter*, the U.S. government filed both a statement of interest before the district court and an amicus curiae brief before the court of appeals—both of which essentially argued for judicial restraint and did so extensively and successfully. While laying out the legal bases for narrowly interpreting both the FSIA and the TVPA, the government also cautioned about setting a dangerous precedent in international law by encouraging a broader interpretation of international law around the world, including the possibility that foreign courts, which may be subject to fewer restraints, could apply such a precedent to the actions of U.S. officials, whether or not they were still in their governmental positions.<sup>12</sup>

A second group of these types of cases is best illustrated by an even more recent decision handed down by the *Second Circuit in Presbyterian Church of Sudan et al. v. Talisman Energy et al.*<sup>13</sup> This case is similar to a good many other recent cases involving foreign citizens who bring damage actions under the ATS and the TVPA for alleged human rights violations by U.S. and/or foreign corporations abroad. In *Talisman*, a group of Sudanese citizens argued that Talisman, a Canadian energy corporation, aided and abetted the Sudanese government in the commission of extensive human rights violations in the development of oil concessions in the Sudan.

Again, and just as in the case involving West Caribbean Airways, the U.S. government filed briefs with both the district court and the court of appeals. And again, with the idea of judicial restraint very much at the forefront, the government argued that, under the principles of the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Alien Tort Statute should not be available for private lawsuits in which, as in *Talisman*, all the alleged wrongful conduct occurred in a foreign country and involved a foreign government's treatment of its own nationals. Similarly, the U.S. government also argued that, as in *Sosa*, neither civil liability for conspiracy nor civil liability for aiding and abetting a violation rises to the level of international norms. Hence, these legal concepts cannot be employed to create liability under the ATS.<sup>14</sup>

Without referring to the government's arguments, the Second Circuit nonetheless affirmed the lower court's dismissal of the case. The basis for the Second Circuit's deci-

sion was that plaintiffs in these kinds of cases must definitively establish intentional and purposeful complicity by the defendants accused of human rights abuses and that the plaintiffs in the case had failed to do so. In so holding, the court may well have set the burden of proof so high as to discourage future suits of this type.

## Conclusion

The concept of judicial restraint in international law and practice is an ideology of neither the right nor the left, nor is the concept necessarily a servant of one group or the other. Both usually use the concept of judicial restraint when doing so suits their particular politically driven purposes. In fact, however, judicial restraint is the quintessential rule by which judicial bodies throughout the world should govern themselves, and there is a simple reason for this: in order to retain the power to judge controversies in a judicious and largely unbiased manner, the judiciary must retain the respect of all those whom it must judge. If judicial power becomes just another tool in the hands of ideologues—no matter their stripe—it will lose the very power and respect by which societies allow themselves to be judged. Forum non conveniens is an excellent example of the kind of judicial restraint that is extremely significant but that—perhaps because it is so nonpolitical—largely goes unnoticed by the broader international community. When forum non conveniens is viewed in the context of the many other areas in which judicial restraint would be a desirable international goal today, however, it rightly assumes the importance that it so well deserves. There should also be a note of very sincere thanks to the U.S. government for its role and continuing efforts in all these many areas of international law in which the idea and the ideal of judicial restraint is becoming ever more important throughout the world. **TFL**

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## Endnotes

<sup>1</sup>*Annick Joelle Pierre-Louis et al. v. Neuvac Corp. et al.* 584 F.3d 1052 (11th Cir. 2009), affirming the two decisions by District Judge Ursula Ungaro in *In re West Caribbean Airways S.A.*, 619 F. Supp. 2d 1299 (S.D. Fla. 2007) and *In re West Caribbean Airways S.A.*, 32 Av. Cas. (CCH) 15,764 (2007). In her first (and preliminary) decision, Judge Ungaro made a full and comprehensive analysis of the legislative history of the Montreal Convention and concluded that forum non conveniens was an available procedural tool that U.S. courts could use under Article 33(4) of the

Montreal Convention. In her second decision, Judge Ungaro concluded that Martinique was the more convenient forum for resolution of the survivors' claims and dismissed all the actions that were pending. This author was counsel for the defendant and appellee, Newvac Corporation, when the case was heard by the district court and the court of appeals. Certain plaintiffs have since filed a petition for certiorari with the Supreme Court. See *Bapte et al. v. West Caribbean Airways et al.*, No. 09-1199 (Docket) (U.S. Mar. 30, 2010).

<sup>2</sup>*Al Gasim Obied Ibrahim Mohammad et al. v. Airbus, SAS et al.*, (N.D. Ill., No. 09-CV-1817).

<sup>3</sup>It is interesting to note that plaintiffs' counsel in the West Caribbean Airways litigation are currently attempting, through foreign counsel, to circumvent the forum non conveniens decisions made by the U.S. courts by seeking to persuade the French court in Martinique not to accept jurisdiction. They have not been successful to date, as the Tribunal de Grande Instance de Fort de France, a three-judge regional court of Fort de France, Martinique, ruled on Aug. 24, 2009, that it had jurisdiction and that it would proceed forward to trial. It is anticipated, however, that plaintiffs' counsel may well lodge an appeal with the intermediate French appellate court. A similar approach was pursued in the French courts by plaintiffs' counsel in a comparable recent case, *Gambra et al. v. ILFC et al.*, 377 F. Supp. 2d 810 (W.D. Cal. 2005), which involved the 145 French victims of the 2004 crash of the Egyptian Flash Airlines after the plane took off from Sharm el-Sheikh, Egypt. In the face of a forum non conveniens order by the U.S. district court, plaintiffs' counsel unsuccessfully petitioned the French trial court, Le Tribunal de Grande Instance de Bobigny, to decline jurisdiction and, when that failed (7e ch. 1e sect., June 27, 2006, R.G. 05/12910), the plaintiffs appealed to the French intermediate court, Cour d'Appel de Paris, which reversed the lower court and held that it had no jurisdiction (1e ch. C, March 6, 2008, *Journal de Droit International* 2009, 171, note Cuniberti). On appeal by the defendants, who had sought and obtained a dismissal by the U.S. Court based on forum non conveniens, the French high court, the La Cour de Cassation, reversed the appellate court and held on procedural grounds that the cases had to proceed forward in the lower court (2e civ. April 30, 2009, Bull. Civ. II, no. 107). This prolonged procedural history should give the reader some idea of how resistant various entrenched interests can be toward the concept and practice of judicial restraint in international law.

<sup>4</sup>See *Attack of the Libel Tourists*, WASHINGTON POST (Feb. 20, 2009); see also Brooke Goldstein and Aaron Eitan Meyer, *How Islamist Launder Tactics are Targeting Free Speech*, THE COUNTER TERRORIST (April/May 2009).

<sup>5</sup>Courts in Brazil, like those in Canada, have reportedly also recently embarked on comparably questionable exercises of international judicial authority. See *Libel Tourism is no Vacation for Americans*, AVIATION DAILY (Oct. 13, 2009), and Robert Spencer, *Free Speech Under Foreign Assault*, [FrontPageMagazine.com](http://FrontPageMagazine.com) (Oct. 9, 2009).

<sup>6</sup>The media reported that British lawmakers have become sufficiently "embarrassed" by the situation that they

are "seriously considering rewriting England's 19th century libel laws." NEW YORK TIMES at 1 (Dec. 11, 2009).

<sup>7</sup>See Rachel Ehrenfeld, *Commentary, Ending British Abridgement of Free Expression*, WASHINGTON TIMES (Mar. 1, 2010). A comparable law, the Libel Terrorism Reform Act, was adopted by the New York legislature in 2008.

<sup>8</sup>See Ambrose Evans-Pritchard, *US Threatens to Pull Nato HQ out of Belgium*, [Telegraph.co.uk/news/world-news/europe/belgium/1432913/US-threatnes-to-pull-Nato-HQ-out-of-Belgium.html](http://Telegraph.co.uk/news/world-news/europe/belgium/1432913/US-threatnes-to-pull-Nato-HQ-out-of-Belgium.html) (last visited Dec. 16, 2009). The article first appeared June 13, 2003. For the transcript of Secretary Rumsfeld's comments, see U.S. Dept. of Defense, News Transcript, *Secretary of Defense Rumsfeld at NATO Headquarters*, June 12, 2003; available at [www.defense.gov/transcripts/transcript.aspx?transcriptid=2742](http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2742) (last visited Dec. 16, 2009).

<sup>9</sup>The law that the Spanish Congress of Deputies finally adopted on Oct. 15, 2009, limited use of the country's universal jurisdiction statute to those offenses committed by or against Spaniards or to perpetrators located in Spain. Interestingly enough, the new law will only apply prospectively, thus allowing cases that are pending to proceed, including investigations of Israeli actions in Gaza in 2002 and the U.S. government's alleged abuse of detainees at Guantanamo Bay. See Jaelyn Belczyk, *Spain Parliament Passes Law Limiting Reach of Universal Jurisdiction Statute*, JURIST PAPER CHASE NEWSBURST, Oct. 16, 2009, available at [jurist.law.pitt.edu/paperchase/2009/10/spain-parliament-passes-law-limiting.php](http://jurist.law.pitt.edu/paperchase/2009/10/spain-parliament-passes-law-limiting.php) (last visited on Dec. 15, 2009).

<sup>10</sup>Even though the United Kingdom has been somewhat restrained in this area in the past, a Westminster, London, Magistrate Court reportedly issued a warrant for the arrest of former Israeli Foreign Minister Tzipi Livni, alleging war crimes in the Gaza Strip in 2008 and 2009, see WALL ST. J. at A-12 (Dec. 16, 2009). See also Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927 (2009).

<sup>11</sup>563 F.3d 9 (2d Cir. 2009).

<sup>12</sup>See Statement of Interest of the United States of America, dated Nov. 17, 2006, filed in *Ra'ed Ibrahim Mohamad Mater et al. v. Avraham Dichter*, 500 F. Supp. 2d 284 (S.D. N.Y., 2007, Docket No. 05 Civ. 10270 WHP), and Brief for the United States of America as Amicus Curiae in Support of Affirmance, dated Dec. 19, 2007, filed in *Ra'ed Ibrahim Mohamad Mater et al. v. Avraham Dichter*, 563 F.3d 9 (2d Cir. 2009, Docket No. 07-2579-cv). For similar litigation in which suit was brought, unsuccessfully, against a retired Israeli government official for alleged illegal bombings in Qana, Lebanon, in 1996, see *Ali Saadallah Belbas v. Moshe Ya'Alon*, 466 F. Supp. 2d 127 (D.C. D.C. 2006), aff'd 515 F.3d 1279 (D.C. Cir. 2008).

<sup>13</sup>582 F.3d 244 (2d Cir. 2009).

<sup>14</sup>See Brief for the United States as Amicus Curiae, dated May 15, 2007, filed in *Presbyterian Church of Sudan et al. v. Talisman Energy et al.*, 582 F.3d 244 (2d Cir. 2009, Docket No. 07-0016-cv). See also Brief for the United States as Amicus Curiae, dated Jan. 27, 2010, filed in *Mohamed Ali Samantar v. Bashe Abdi Yousef, et al.*, No. 08-1555 (Docket) (U.S. Jun. 19, 2009).