

## Plaintiff's Diplomacy

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### UNCIVIL ACTION

TWENTY-FIRST-CENTURY America is one of the most litigious societies the world has ever known. Civil lawsuits in American courts are used to resolve an ever-expanding list of conflicts. But new forms of litigation can have powerful and wide-ranging consequences, both intended and unforeseen. This is especially obvious in one area long thought outside the power of domestic courts: foreign policy. Increasing numbers of individuals, including torture and terrorism victims, Holocaust survivors, and denizens of the dwindling Amazon rain forest, are now using lawsuits to defend their rights under international law. The defendants in these cases include multinational corporations, foreign government officials, and even foreign states themselves. And whoever wins, the cases are having a powerful impact on America's international relations.

U.S. courts have become the venue of choice for such suits because they offer plaintiffs the benefit of procedural mechanisms, not all available elsewhere, like the class action suit and punitive damages -- not to mention the prospect of unparalleled media coverage and U.S. government involvement. The issues in these cases, from war crimes to the terms of foreign investment, have long been the subjects of treaties and diplomatic parley. But the plaintiffs who initiate them now stand at the intersection of two larger trends. On the one hand, they are the latest addition to the growing chorus of nontraditional actors who have acquired a voice in foreign affairs. On the other, they both contribute to and benefit from a growing determination to hold individuals accountable for violations of international law. Newly emboldened plaintiffs are the civil counterparts to the newly aggressive prosecutors who have pursued criminals like Augusto Pinochet and Slobodan Milosevic.

"Plaintiff's diplomacy," as this new trend toward lawsuits that shape foreign policy can be called, comes in several different forms with very different implications. The first category consists of suits against individuals for grave violations of international law committed in the name of governments. These suits have the salutary effect of opening U.S. courts to foreign victims of abuse and educating American judges about global norms of human rights law.

Suits against corporations for violations of international law fall into a second category, one more likely to complicate diplomatic relations and generate pressure on governments from powerful corporate interests. Such suits are an inevitable corollary to the rising power of both civic groups and corporations in world affairs. U.S. courts may have a role to play in the larger political process as the world adjusts to the new power of such corporations. And to the extent that plaintiffs seek to relitigate the role of corporations in historic catastrophes such as the Holocaust, these cases remind new

generations of history's human face. But American tribunals alone cannot and should not handle all of the underlying issues that such corporate trials raise.

The third category of litigation is even more troubling. These are suits against foreign governments authorized and encouraged by Congress and filed in an effort to achieve justice for victims of terrorism and oppression. The appalling suffering that such individuals and their families have endured demands some kind of response. Unfortunately, Congress has tried to achieve this through ill-advised changes in U.S. law, which have unsettled key U.S. allies and complicated sensitive U.S. diplomacy by undermining attempts to ease tensions with countries such as Cuba and Iran. Further steps down this road may lead to even more unpalatable outcomes: greater strains on international relations, danger to U.S. interests and assets abroad, and long-term damage to the integrity of U.S. courts.

## THE PEOPLE'S COURT

UNTIL 20 YEARS AGO, the idea that individuals could sue or be sued in U.S. courts for violations of international law was not widely accepted. International law was thought to be a matter for states alone. This began to change in 1980 when the family of a Paraguayan citizen tortured to death by the police realized that their son's torturer had arrived in the United States. The Filartiga family's suit against the former Paraguayan cop relied on the centuries-old but almost forgotten Alien Tort Statute of 1789, which gives U.S. federal courts jurisdiction over violations "of the law of nations or a treaty of the United States." Although a lower court initially dismissed the case, the Carter administration wrote a brief urging the Second Circuit's Court of Appeals to take a closer look.

The appellate court decided in favor of the Filartigas, fundamentally changing the role of U.S. courts in the fight for human rights. Suddenly foreigners could be held liable for violations of international law, even if committed outside the United States and against non-Americans. Labeling torturers "enemies of all mankind," the court elaborated a vision of international law broad enough to include recent developments in human rights. The court's interpretation of the Alien Tort Statute put a powerful new tool in the hands of those hoping to hold liable violators of human rights, and a collection of new plaintiffs soon sought to make use of the ruling. Philippine nationals sued the family of ex-dictator Ferdinand Marcos for torture carried out during his rule. An Ethiopian victim likewise sued his torturer. And a group of Guatemalan peasants won a large judgment against their country's former defense minister.

Encouraged by a Reagan administration uncomfortable with this expansive new jurisprudence, however, some U.S. courts soon acted to limit the reach of *Filartiga vs. Pena Irala*. In 1986, the deeply divided Washington, D.C., Circuit Court ruled that a victim of Palestine Liberation Organization (PLO) terrorism could not sue the PLO for violating international law. Three years later, the Supreme Court rejected a plaintiff's attempt to use the Alien Tort Statute to overcome the protection of sovereign immunity (the traditional doctrine that governments and their leaders cannot be sued in other countries for carrying out their duties), limiting the statute's scope to lesser officials. Following this line of

reasoning, federal courts then threw out suits against the Saudi Arabian government and Haiti's President Jean-Bertrand Aristide.

Nonetheless, the door that *Filartiga* opened remains ajar today. While limiting it somewhat, the Supreme Court has declined to completely overturn the *Filartiga* court's interpretation of the Alien Tort Statute. The Clinton administration has also been more receptive to these suits than its Republican predecessors. In 1993, when a group of Bosnian refugees sued Radovan Karadzic, the president of the self-declared Bosnian Serb Republic, the administration decided not to support his immunity claim. In its eventual ruling, the Second Circuit found that although Karadzic's crimes were committed "under color of law" (that is, in a quasi-governmental capacity), because he was not the head of an acknowledged government he was not protected from suit by sovereign immunity. Karadzic remained outside the United States and so the verdict was largely symbolic. Still, the court's strongly worded decision restored momentum to human rights litigation in U.S. courts.

The impact of such cases has been greater in theory than in practice, however. The *Filartiga* ruling opened U.S. courts to only a very small group of foreign plaintiffs: those victims able to identify and file suit against violators of human rights not protected by sovereign immunity yet capable of committing a violation of international law. Traditionally, international law imposed obligations on states alone. Individuals and nonstate actors could not, therefore, commit violations of international law. *Filartiga* and its progeny have created an opening in this rule, but one too narrow for lawsuits against those most responsible for human rights violations abroad -- namely, leaders and governments -- since they tend to be protected by sovereign immunity. At the same time, the effect of these civil suits in fostering respect for human rights has been uncertain at best. The massive judgments (in the tens of millions of dollars) that the courts entered against Karadzic and others have gone unpaid. For the moment, then, the principal benefit of these suits to their plaintiffs is the public attention they generate.

From the perspective of American jurisprudence, however, the Alien Tort Statute cases have been more beneficial. They have forced U.S. courts to grapple with developments in international law that might otherwise have received little attention -- a much-needed tonic for a judicial system often lamentably out of touch with international law.

The diplomatic implications of the Alien Tort Statute suits, meanwhile, have been more limited. Most defendants -- Karadzic being a notable exception -- have either been bit players or major figures no longer in power. (The action against Pinochet in the United Kingdom and Spain was a criminal suit brought by government prosecutors and therefore differs from the civil cases described here.) The Karadzic suit, however, hints at the kind of diplomatic complications that future Alien Tort Statute suits might present. In deciding whether to recommend immunity for Karadzic, the Clinton administration had to balance the possible harm the suit against him might do to the ongoing negotiations over Bosnia against the public relations damage that might come from recommending immunity for someone responsible for such atrocities.

Furthermore, the spate of civil wars in recent years has made deciding whether to grant immunity all the more complicated, since negotiations today often involve rebel and ethnic leaders whose status in international law is unclear. Future American administrations will have to resolve the legal and political dilemma of how to treat suits against such individuals. Still, the limits that the courts have placed on Alien Tort Statute suits make the likelihood of more serious interference with diplomacy unlikely. What minimal disruption has occurred must be set against such cases' very real value in giving a forum to those otherwise without recourse and in confronting American courts with developments in human rights law.

## CATCHING THE CORPORATIONS

IF THE DIPLOMATIC impact of suits against individuals has been limited, not so the growing body of litigation against foreign and multinational corporations for violations of international law. In some cases, plaintiffs have used corporations as proxies for what are essentially attacks on government policy; because corporations do not have sovereign immunity, they are generally more vulnerable to suit. In other cases, corporations have been the actual targets but the scale of the lawsuits and the prominent nature of the claims have nonetheless ensured high-level government involvement. By targeting major corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention at the highest levels.

The recent Holocaust litigation is the most visible example of this phenomenon. The suits have come in several waves. In 1996, as revelations emerged that Swiss banks might still be holding funds deposited by or stolen from the Nazis' victims, a class of plaintiffs brought suit in a U.S. federal court against several prominent banks. The lawsuit and the publicity surrounding it provoked a diplomatic furor and, eventually, an anti-American backlash in Switzerland. A former Swiss president even accused the United States of using the Holocaust to undermine Switzerland's success as a financial center. President Clinton sent then-Undersecretary of Commerce Stuart Eizenstat to mediate talks between the plaintiffs and the banks. The settlement talks, which involved at various stages not only Eizenstat but a federal district court judge, New York Senator Alfonse D'Amato, and a number of Jewish leaders, finally produced a \$ 1.25 billion payment.

The focus next shifted to German corporations that had used concentration camp inmates as slave labor during the war. In 1998, a group of plaintiffs sued several major German businesses in a New Jersey federal court. Once again, the suit forced the hands of governments: Eizenstat and a German counterpart set up a parallel negotiating track, and eventually both Clinton and German Chancellor Gerhard Schroder intervened. Clinton sent a personal letter to Schroder in early December 1998 reminding him of the issue's importance for German-American relations. Schroder, for his part, eventually arranged a crucial contribution of almost \$ 1 billion from the German government to the corporate fund. A key element in the final \$ 5.1 billion settlement was a promise of protection for the corporations from future suits in U.S. courts, which the Clinton administration pledged to ensure by opposing further litigation.

In the past, issues such as compensation for wartime crimes would have been dealt with exclusively on a government-to-government level, excluding individuals. The plaintiffs in these cases, however, managed to bypass such an "espousal" procedure by bringing suit directly rather than simply petitioning the State Department for support. Indeed, several weeks before the final settlement was brokered by the two governments, the New Jersey court dismissed the suit, arguing that the U.S.-German government compensation agreements precluded further private claims. But by then, the court had served its purpose. Bringing suit had generated public and legal pressure on the United States and Germany. The disputes were ultimately settled through an amalgam of classic intergovernmental negotiation and private discussion, but it was litigation that put the issue on the agenda in the first place.

The attention of plaintiffs' attorneys has now turned to Japanese and Austrian corporations. On December 7, 1999 -- 58 years to the day after the bombing of Pearl Harbor -- plaintiffs filed suit against Japanese corporations in California courts, alleging that these firms had also used slave labor during the war. Meanwhile, a separate class of plaintiffs brought suit against several Austrian corporations on similar grounds. Both governments have sought the assistance of the U.S. State Department in dispensing with the suits, and the department recently filed a statement in court arguing that such suits against Japanese corporations are precluded by postwar treaties.

The Clinton administration and its successors should expect to continue to play an active role in mediating between plaintiffs and the foreign interests they have forced into court. True, the Eizenstat negotiations created tensions of their own: frustrated at an impasse in the talks, chief German negotiator Otto Lambsdorff chastised the American government for its tendency to "mirror the demands of class-action lawyers." But the process effectively headed off prolonged litigation that would have had a corrosive effect on important U.S. diplomatic relationships and should be a model for the future.

#### FORCING REFORM

SUITS BROUGHT against corporations for ongoing projects or recent activities could have an even greater impact on relations between states, and such cases have also begun to proliferate in U.S. courts. For example, a group of Burmese plaintiffs has sued the oil companies Unocal and Total for alleged complicity in the human rights violations of the Burmese government. (According to the lawsuit, the corporations acquiesced in and even supported government abuses of residents in areas of the country where a pipeline was to be built.) An important suit against Texaco for allegedly dumping tons of toxic waste in Ecuador's jungles is also pending. Meanwhile, a group of Nigerian activists has brought suit against Shell for alleged complicity in the murder of activist Ken Saro-Wiwa. An Indonesian tribal council supported by several environmental groups has brought both federal and state claims against an American mining company. And victims of perhaps the largest-ever industrial disaster -- the 1984 chemical spill in Bhopal, India -- have jumped on board. Frustrated by the inadequacy of a 1989 settlement negotiated between the Indian government and Union Carbide, a group of Bhopal plaintiffs filed suit in November 1999 in federal court in Manhattan, charging the chemical company with violations of international law.

These suits create distinct but often-conflicting pressures on governments. First are the pressures from the plaintiffs' side. It is often difficult for a government to deny diplomatic support to a lawsuit brought by its citizens against a foreign corporation, especially when their cause is a sympathetic one. Yet in most of these cases, the governments involved are of developing countries heavily dependent on foreign investment. They therefore find themselves caught in a painful bind. Public pressure and the possibility of a large payout may pull a state toward supporting a lawsuit, but the danger of scaring off future investment will tug in the other direction. Ecuador's reaction to the suit against Texaco illustrates this ambivalence. The Ecuadorian government initially supported Texaco, an important investor, as it defended itself against the claim. After an election, however, the new administration reversed the government position and submitted a brief arguing that Texaco was indeed liable for the environmental damage.

Regardless of the position that developing countries ultimately take, the willingness of U.S. courts to entertain these suits means that settling the disputes, rather than fighting them in court, may be the best option for the defendant corporations. Texaco, for example, is reported to have already offered a \$ 500 million settlement to the Ecuadorian plaintiffs. Large settlements are victories for the plaintiffs and confirm that power has shifted from governments and investors to coalitions of individuals, their lawyers, and the nongovernmental organizations (NGOS) often crucial to organizing the lawsuits.

This newfound power might simply focus greater attention on the human rights and environmental implications of corporate investment. But successful litigation may produce another, more ambiguous outcome: de facto sanctions against states with poor environmental and human rights records. Few corporations will want to risk liability by working with countries that regularly violate international standards. Although that seems desirable, one troubling aspect is the relative lack of public accountability for the actors effecting this change. As Peter Spiro, a Hofstra University law professor and former State Department official, has noted, "NGO leaders have emerged as a class of modern day, nonterritorial potentates, a position rather like that commanded by medieval bishops." Another source of concern is the indiscriminate nature of these sanctions, which target rich and poor alike.

A second set of pressures brought by such suits will affect governments of both developing and developed countries, whose development policies these suits may overturn or undermine. Making decisions about economic priorities is a highly political process in all states and is highly specific. Not all countries can or should share the same goals. This idea was reflected recently by a federal appeals court that, in dismissing a claim by Indonesian plaintiffs against an American mining company, urged restraint in similar suits so that the "environmental policies of the United States do not displace environmental policies of other governments." Rulings by U.S. courts cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development.

Finally, the home governments of defendant corporations will soon feel pressure to limit the opportunities for these suits. NGOs may seek to bypass the state in favor of direct action against global

corporations, but these corporations are very likely to turn to the state for protection. Corporate lobbyists will press for laws making these suits difficult or impossible to bring.

To accommodate these conflicting interests, the next U.S. administration should help craft meaningful international standards regulating corporate conduct abroad that leave corporations vulnerable to lawsuits for truly egregious conduct while providing some defense against more debatable claims. After all, when corporations are complicit in blatant violations of international law, why should they not be held accountable? States, for their part, need to remain immune for many reasons. Suing them is often just a way of suing their citizens and imposing collective guilt. But corporations with global reach and quasi-sovereign power present tempting targets. Not only do they have deep pockets, but their power to commit grave violations of human dignity and to despoil the global environment is great and often seems to render countries powerless to resist them.

National courts may indeed be the scalpel needed to cut through the tangled web of money and politics and lay bare the moral and social dimensions of global wrongdoing. As with the great civil rights crusades in the United States, however, litigation should be only one part of the answer, an initial step in a long and complicated process of reform. Courts alone should not make broad-based changes; without engaging the broader political process, they risk losing legitimacy and doing more harm than good.

#### THE NAME OF THE ROGUE

WHILE PLAINTIFFS and their lawyers have begun to find new ways to use U.S. courts against individual and corporate violators of international law, Congress and the White House have been wrestling over an even more vexing question: whether American citizens should be allowed to sue foreign states directly, particularly those states that support terrorism. American courts have become the battleground in a contest between an executive branch seeking to defend traditional immunity for foreign states and a Congress eager to punish rogue governments and allow constituents a means of redress.

The ground rules for this struggle were set by the Foreign Sovereign Immunities Act (FSIA), passed in 1976 to clarify and depoliticize the often-contentious process of deciding when foreign states should enjoy immunity from suit in U.S. courts. In the last several years, Congress has enacted or considered a number of changes to the FSIA that would make it easier for American citizens to sue foreign countries. A 1996 revision permitted civil suits by victims of attacks by countries the State Department had designated as supporting terrorism (a list that today includes Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria). One of the first actions brought under this provision was a suit by Stephen Flatow against Iran for the death of his daughter in Israel at the hands of a suicide bomber allegedly backed by the Iranians. In 1998, a federal district court awarded Flatow more than \$ 250 million in damages. His victory was a hollow one, however. The Clinton administration has looked coldly on Flatow's requests for help in seizing Iranian assets; with the State Department's blessing, a federal court recently ruled that Flatow could not attach Iranian assets seized by the United States in connection with the hostage

crisis. The administration has been similarly reluctant to help secure assets in a judgment against the Cuban air force for its role in the 1996 downing of two civilian aircraft.

Unhappy with the administration's reluctance, congressional supporters of the plaintiffs have drafted legislation that would make it easier to collect judgments in such cases. Congress hopes to pressure the executive into a more assertive approach. But the case against further congressional encroachments on sovereign immunity is compelling. By weakening its sovereign-immunity laws, the United States may put its own assets and interests abroad at risk. After all, sovereign immunity is meant to be a reciprocal arrangement. With its worldwide reach, the United States would be particularly vulnerable should other countries imitate Congress and permit suits against the U.S. government abroad.

Nor is it clear that massive judgments against terrorist states serve U.S. interests. The looming presence of such judgments may actually make rogue governments defensive, discouraging dialogue, engagement, political reform, and integration by these states into international legal and financial regimes. The Flatow decision, for example, came down just as President Muhammad Khatami was consolidating his pro-reform political position in Iran. Understandably, U.S. administration officials worried that the judgment might hinder rather than help his cause.

Even when Washington does decide (for strategic or moral reasons) to isolate and punish so-called terrorist states, the decision should be the result of careful deliberation by foreign policy experts, not the product of haphazard litigation. And when financial penalties are imposed on a country, the emerging consensus now favors the use of "smart" sanctions -- those carefully targeted at responsible leaders and domestic groups. Massive court judgments against rogue states are clumsy weapons that, if complied with, would ultimately place the heaviest burden on the general population, not their rulers.

These "terrorist state" suits also pose another, less apparent, but just as serious danger to U.S. courts: namely, that they will become politicized as they are drawn into foreign policy debates. In the wake of the Elian Gonzalez furor, it is now helpful to remember how the Supreme Court handled another Cuban crisis: the post-revolution wave of Cuban expropriations of U.S. property in the 1960s. When asked in *Sabbatino vs. Banco Nacional de Cuba* to recognize the illegality of these expropriations under international law and return the proceeds from the sale of American property seized in Cuba to its rightful owner, the court declined to rule, holding that any judgment "could seriously interfere with negotiations being carried on by the executive branch." Moreover, the justices observed, "it is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." In an atmosphere of pervasive ideological conflict, the court chose the wise course of restraint.

That decision holds lessons for today's courts. The justices sought to avoid a precedent that would make American tribunals instruments of particular foreign policies. Yet courts that regularly adjudicate cases against "terrorist states" run the risk of becoming just such political tools. The very basis of jurisdiction over foreign states in these cases -- designation by the State Department of a government as a supporter of terrorism -- is itself a political decision that the court then endorses. Often foreign states

do not even appear to defend themselves. In such an environment, the fairness of the proceedings becomes questionable. Judges may feel tempted to set policy from the bench, and the perception of impartiality will suffer.

These concerns must not obscure the need to compensate victims of terrorism. The suffering of Hezbollah hostages, precisely detailed in the judgments handed down in favor of Joseph Cicippio and Terry Anderson, and the enduring grief of victims' families such as the Flatows deserve attention and compensation. But the remedy should be diplomatic rather than judicial. The administration should therefore establish a fund to compensate such victims. Washington should then negotiate, at the appropriate time, for payments into this fund by the states deemed responsible for supporting terrorism -- or better yet, by their leaders. There is precedent for this approach: when Chile was sued for alleged complicity in the killing of an opposition political figure in Washington, the administration ultimately negotiated a quiet payment from the Chilean government, independent of the judicial proceeding.

## SUPERCOURTS

AMERICAN COURTS today are walking a fine line between expanding a transnational legal system capable of enforcing international law and engaging in a unilateral legal expansion that will damage long-term U.S. interests. From one perspective, the new openness of U.S. courts to suits by individuals seeking to enforce international law against foreign leaders, states, and multinational corporations reflects the continuing decentralization and democratization of foreign policy. Just as NGOs, ethnic lobbies, and other nontraditional actors are assuming important roles in certain foreign policy decisions, so too are private plaintiffs. From these shores, the process may seem a beneficial one. When traditional diplomacy proves inadequate to the task of enforcing international law and justice, plaintiffs should be able to carve out new diplomatic channels, bypassing the uncertainty of political negotiations and compensating for the weakness of international tribunals by turning to effective national courts.

But the expansion of plaintiffs' power in U.S. courts looks quite different from the perspective of other countries. The juxtaposition of this increased involvement of U.S. courts in foreign affairs with the continued American refusal to participate in bodies like the International Criminal Court creates the image of a country happy to haul foreign defendants into its own courts while stubbornly resisting even the remote possibility that its own citizens might be called to account. Viewed in this context, the successful lawsuits against the Cuban and Iranian governments, Swiss banks, and German corporations suggest that the world's sole superpower is arming itself with superpower courts. This picture understandably may threaten those uncomfortable with U.S. hegemony. In the legal sphere, as in so many other areas, the United States should be wary of the resentment its muscle-flexing produces.

Keeping U.S. courts open to legitimate claims based on violations of international law but closed to issues likely to damage the conduct of foreign policy and politicize the courts will not be easy. Such a process will require several elements. Congress should look more to the country's long-term interests than to the short-term political gains that come from hauling foreign states into U.S. courts. The courts themselves should fulfill their obligations under international law while acknowledging the practical

limits of their power. And the administration must recognize and try to contain the diplomatic implications of plaintiffs' newfound power.

U.S. courts have an important role to play in creating a truly transnational legal system that will help give substance to international legal commitments. To have value, such commitments should apply equally at home and abroad. Private plaintiffs who have suffered have a right to reframe affairs of state as injuries to individuals requiring redress. Thus governments must get used to some degree of intrusion into foreign policy.

Plaintiff's diplomacy is one of several forces changing the way policy is made in the twenty-first century. The days of backroom deals and policy elites may be fading. But the transition must be carefully managed to balance both the rewards and the dangers that plaintiff's diplomacy inevitably incurs.

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