

Case Comment

International Tribunals and Forum Non Conveniens Analysis

Nemariam v. Federal Democratic Republic of Ethiopia, 315 F.3d 390 (D.C. Cir.), *cert. denied*, 124 S. Ct. 278 (2003).

Many international civil disputes are resolved via state-driven litigation before multinational tribunals. Indeed, under traditional principles of international law, individuals may not appear before such tribunals at all. Instead, states must advance claims on behalf of their nationals, a procedure known as diplomatic espousal.¹

As the D.C. Circuit's decision in *Nemariam v. Federal Democratic Republic of Ethiopia*² demonstrates, U.S. courts rarely consider such international tribunals adequate to vindicate individual claimants' interests, because the tribunals' procedures are often in tension with American notions of due process. Accordingly, many courts find that international tribunals are inadequate alternative forums under forum non conveniens analysis.³ In so holding, courts are allowing forum non conveniens, a

1. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 902(2) (1986).

2. 315 F.3d 390 (D.C. Cir.), *cert. denied*, 124 S. Ct. 278 (2003).

3. Under the common law doctrine of forum non conveniens, a court may decline to exercise its jurisdiction because a more convenient alternative forum exists. The touchstone cases in the United States, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), endorse a presumption in favor of the plaintiff's choice of forum, mandating that it be disturbed only rarely and in compelling circumstances. See *Koster*, 330 U.S. at 531-32; *Gilbert*, 330 U.S. at 508.

Forum non conveniens analysis involves two steps. First, a court must determine if an adequate alternative forum exists. Second, assuming that such a forum exists, the court must balance the private and public interests at stake to determine whether trial in the plaintiff's chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or whether the "chosen forum [is] inappropriate because of

doctrine developed to balance proceedings between courts, to undermine the authority of international tribunals—a very different type of adjudicative body.

This Comment argues that, in evaluating whether an international tribunal is an adequate alternative forum under *forum non conveniens* analysis, U.S. courts should focus less on formalistic factors like the identities of the parties who espouse claims before the tribunal and more on the ability of those parties to represent the interests of the individuals whose claims they advance.⁴ Emphasizing interest representation, rather than party structure, would help U.S. courts avoid undercutting established international institutions; lessen the perception of U.S. courts as disconnected players in a multilateral world; and allow war-torn states to devote their resources to broad-based compensation and redevelopment, rather than to the litigation of private claims in multiple forums.

Part I of this Comment details the background of the *Nemariam* dispute and describes the D.C. Circuit's holding. Part II explains why the D.C. Circuit's decision is so troubling and argues that the decision's focus on party structure is inappropriate when considering the adequacy of an international tribunal as an alternative forum. Part III lays out alternative bases for the court's holding that would be more consistent with settled international law and would pose less of a threat to the continued effectiveness of international dispute resolution bodies. Part IV concludes.

I

In May 1998, a simmering border dispute between Ethiopia and Eritrea erupted into war. By October 1999, the government of Ethiopia had expelled 30,000 to 70,000 Eritreans and Ethiopians of Eritrean descent from the country.⁵ Many of the deportees were merchants; the Ethiopian government froze their assets and revoked their business licenses.⁶

In June 2000, Ethiopia and Eritrea signed a provisional cease-fire; six months later, the nations formally agreed to end their dispute.⁷ The peace treaty between the nations created a Claims Commission charged with, inter

considerations affecting the court's own administrative and legal problems." *Koster*, 330 U.S. at 524; *see also* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1982) (elaborating on this balancing test in the context of international disputes).

4. This Comment does not argue that *forum non conveniens* analysis should be changed in all cases—just that the analysis should be reconsidered in the context of cases in which the alternate forum under consideration is an international tribunal.

5. *See* HUMAN RIGHTS WATCH, *WORLD REPORT 1999*, at 40 (1999), *available at* <http://hrw.org/worldreport99/africa/ethiopia.html>.

6. *See id.* at 41.

7. *See* Peace Agreement, Dec. 12, 2000, Eth.-Eri., 2138 U.N.T.S. 93, 40 I.L.M. 260.

alia, using binding arbitration to decide all conflict-related claims for loss, damage, or injury by the nationals of one nation against the government of the other resulting from violations of international law.⁸ By the terms of the agreement, individuals cannot bring claims before the Commission. Instead, each government may bring claims on behalf of its nationals and certain other individuals.⁹

One of the merchants expelled from Ethiopia was Hiwot Nemariam. After her expulsion, Nemariam emigrated to the United States. She brought suit against the government of Ethiopia and its national commercial bank, which controlled her confiscated assets, in federal court in June 2000—just days after the signing of the cease-fire agreement.¹⁰

In November 2000, Ethiopia and the national bank moved to dismiss Nemariam's federal case, in part on forum non conveniens grounds. Nine months later, the district court granted the motion, determining that the Commission provided an adequate alternative forum and that the private and public interest factors key to forum non conveniens analysis weighed decisively in favor of the Commission.

However, the D.C. Circuit reversed, holding that the Commission did not provide an adequate alternative forum to aggrieved individuals and reinstating Nemariam's federal court case. The court focused only on the first part of the forum non conveniens test and was troubled by two factors.¹¹ First, the Commission could not award relief directly to individuals, who could not be parties before it. Second, because individuals could not appear before the Commission, the governments bringing claims on their behalf could potentially set off individuals' claims. That is, the governments could net out the amounts they each owed to the other's nationals, with the government that owed a net amount paying only that amount to the other for distribution.

II

At first glance, the D.C. Circuit's decision seems required on due process grounds. A U.S. court probably could not dismiss a litigant's case on forum non conveniens grounds if, in a foreign country's domestic court, that litigant (1) could not appear,¹² (2) could not control the litigation,¹³ (3)

8. *See id.* at 97, 40 I.L.M. at 262.

9. *See id.* at 98, 40 I.L.M. at 263.

10. Nemariam sued under the international takings exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) (2000).

11. *Nemariam*, 315 F.3d at 394.

12. *Cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (noting that "[t]he fundamental requisite of due process of law is the opportunity to be heard" and stating that this right has little worth if a

could not determine whether or not to settle the case,¹⁴ and (4) might not be able to obtain a judgment because her claim could be set off against the claims of others.¹⁵ All of these are characteristics of Nemariam's alternative forum, the Claims Commission.

However, the court was faced with deciding whether an *international* tribunal, rather than a foreign country's *domestic* court, presented an adequate alternative forum. Only nation-states may appear before many international judicial institutions—not only the Claims Commission, but also bodies like the International Court of Justice¹⁶ and the World Trade Organization.¹⁷ Such tribunals are constructed to enforce international law, which was traditionally a vehicle to resolve disputes between nations, not disputes between individuals and a foreign state.¹⁸

The Supreme Court has affirmed the settled view that nation-states control the causes of action that can be brought before international tribunals. The Court's decision in *Dames & Moore v. Regan* establishes that when U.S. nationals have a claim against another nation, the United States government, not its nationals, "owns" the claim and controls the manner in which it may be brought.¹⁹ Likewise, a number of cases suggest that when the United States has received funds from another state based on an individual's claim before an international tribunal, the United States may refrain from distributing the funds to the claimant.²⁰

Accordingly, in considering Ethiopia's forum non conveniens motion, the D.C. Circuit faced a formidable problem, albeit one the court did not

litigant cannot choose for himself whether or not to appear (internal quotation marks omitted)); *Ownbey v. Morgan*, 256 U.S. 94, 102 (1921) ("[T]he essential element of due process [is] the right to appear and be heard in defense of the action . . .").

13. *Cf. Martin v. Wilks*, 490 U.S. 755, 761-62 (1989).

14. *Cf. MODEL RULES OF PROF'L CONDUCT R. 1.2(a)* (2002); Grace M. Giesel, *Enforcement of Settlement Contracts: The Problem of the Attorney Agent*, 12 *GEO. J. LEGAL ETHICS* 543, 548 (1999) ("In the United States, a basic legal ethics principle is that the client . . . controls the decision to settle and the terms of settlement.").

15. *Cf. Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 412 (3d Cir. 1993).

16. Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059, T.S. No. 993.

17. *See* Marcia J. Staff & Christine W. Lewis, *Arbitration Under NAFTA Chapter 11: Past, Present, and Future*, 25 *HOUS. J. INT'L L.* 301, 309 (2003).

18. *See* RALPH G. STEINHARDT, *INTERNATIONAL CIVIL LITIGATION: CASES AND MATERIALS ON THE RISE OF INTERMESTIC LAW* 5 (2002).

19. 453 U.S. 654, 679-80 (1981) (noting that the United States "has repeatedly . . . settle[d] the claims of its nationals against foreign countries"—sometimes "dispos[ing] of the claims of its citizens without their consent . . . [and] without exclusive regard for their interests" (internal quotation marks omitted)).

20. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899) (upholding an act of Congress preventing disbursement of funds to a private plaintiff that had been paid to the United States by Mexico); *see also United States ex rel. Boynton v. Blaine*, 139 U.S. 306, 322 (1891); *Frelinghuysen v. Key*, 110 U.S. 63, 73 (1884).

recognize. American notions of due process generally require that individuals control their own litigation, but settled principles of international law dictate that individuals rarely espouse their own claims before international tribunals. Thus, U.S. courts applying American notions of due process in conducting forum non conveniens analysis may impugn the legitimacy of international tribunals like the Claims Commission.

Such logic has the potential to undermine the effectiveness of a range of international tribunals. Commissions that rely on diplomatic espousal for the bringing of claims are often used to resolve the individual claims precipitated by major conflicts. In recent years, such commissions have been established to resolve private claims related to the Iranian Revolution,²¹ the first Persian Gulf War,²² and ethnic cleansing in the Balkans.²³ However, if U.S. courts suggest that the tribunals are somehow lacking in due process, the respect the commissions' judgments are accorded—and, with it, their effectiveness—may be decreased as litigants ignore or circumvent their decrees.

Alternatively, this reasoning may undercut the respect that U.S. courts are accorded by other nations and their citizens. If even well-respected institutions are derided by U.S. courts as inadequate, then U.S. courts may be marginalized as out of step with international values.

Further, such logic may delay the resolution of some conflicts and force war-torn states to divert their scarce resources from redevelopment. Establishing a commission allows nations to end hostilities more quickly than they otherwise could, because a peace treaty between them need only contain the broad outlines of an agreement regarding individual claims, leaving the commission to negotiate the more arduous details. The reliance of such commissions on diplomatic espousal helps facilitate the provision of relief to large numbers of claimants in an efficient manner, prevents the tribunals' dockets from being overrun, and provides a mechanism for fairly apportioning often limited funds.

However, the D.C. Circuit's reasoning suggests that states that have in the past assented to the jurisdiction of such commissions—or that may do so in the future—would be forced to defend themselves, not just before the commissions, but in any U.S. court that could assert jurisdiction over them.

21. For a description of the Iran-United States Claims Tribunal, see GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* (1996).

22. For a description of the United Nations Compensation Commission, see Lea Carol Owen, Note, *Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims*, 31 VAND. J. TRANSNAT'L L. 499 (1998).

23. For a description of the Commission for Real Property Claims of Displaced Persons and Refugees, see Hans van Houtte, *Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina*, 48 INT'L & COMP. L.Q. 625 (1999).

This multiplication of litigation may stall post-conflict redevelopment within each state.²⁴ Further, the increase in expected expenses associated with such litigation exposure may alter the cost-benefit analysis by states considering whether to sign peace agreements, making peace less cost effective and increasing the likelihood of prolonged conflict.

III

Instead of focusing on party-structure differences, the D.C. Circuit should have resolved Ethiopia's forum non conveniens motion in one of two ways.

First, and most narrowly, the court could have determined that Nemariam's case fit within an exception in the treaty between Ethiopia and Eritrea. That treaty vested exclusive jurisdiction in the Commission over all claims arising from the conflict, except for those filed in another forum prior to the effective date of the treaty.²⁵ Nemariam filed her district court case some six months before the treaty was signed. The court of appeals ignored this possible line of decision. Though resolving the case this way would not have relieved the underlying tension inherent in U.S. courts' application of forum non conveniens analysis to problems involving international tribunals, such a decision would at least not have created a problematic precedent.

Second, the court could have focused on the ability of the parties before the Commission to represent Nemariam's interests. Such an inquiry might have been similar to the inquiry courts conduct in class action settings, with the country advancing the claim before the tribunal being akin to the named plaintiff in a class action. Application of the class action framework to the Commission suggests that the D.C. Circuit's two-part critique of the Commission need not carry the day; the factors the court criticizes are typical of class actions as well, but their presence in that setting has not resulted in courts barring all such actions. In the class action setting, representatives are approved based not on their identity but on their ability to "fairly and adequately" protect and represent the interests of the class.²⁶ That all plaintiffs may not receive full compensation does not make a class

24. Analogous concerns about the inefficiency of litigation in multiple forums motivated the development of procedures for the consolidation of litigation across multiple districts in the United States. See 28 U.S.C. § 1407 (2000); H.R. REP. NOS. 94-499, 94-1343 & 94-1373 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572; H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898.

25. See Peace Agreement, *supra* note 7, 2138 U.N.T.S. at 98, 40 I.L.M. at 263.

26. See FED. R. CIV. P. 23(a)(4), 23(g)(1)(B). The same is true for plaintiffs in derivative actions by shareholders. See *id.* 23.1.

action untenable: Those who advance a claim on behalf of a class can settle or waive claims of class members, subject to approval by the court.²⁷

In conducting this interest analysis, the D.C. Circuit need not have been troubled by the possibility that Eritrea and Ethiopia might set off their respective nationals' claims. Eritrea indicated in a memorandum to the Commission that "awards should be given directly to claimants" and that "[f]inancial compensation for large amounts of property damage should . . . be given directly to the individual victims."²⁸ While the D.C. Circuit noted that Eritrea had informed the Commission that in some instances practical difficulties associated with distribution might preclude individualized compensation, the court noted that the circumstances of Nemariam's case appeared different.²⁹ While nothing in the record indicated that Eritrea would set off claims—an absence the district court found persuasive³⁰—the D.C. Circuit focused on the fact that it *could*, holding that Eritrea's goodwill provided inadequate security that Nemariam would be compensated.³¹

However, U.S. courts have relied explicitly on the goodwill of the parties in a range of decisions. In a well-known tort suit stemming from a gas plant disaster in India, the defendant's pledge to consent to the jurisdiction of the Indian courts and to continue to waive certain defenses was vital to the U.S. court granting the defendant's request to dismiss the case on forum non conveniens grounds.³² Similarly, the immediate effectiveness of a declaratory judgment depends on the voluntary compliance of the burdened party.³³ Ultimately, even if a focus on Eritrea's ability to protect Nemariam's interests would not have resulted in a different outcome in this case, such an approach would have been less troubling than the D.C. Circuit's, because it would not have marked the U.S. court system as categorically opposed to many established international tribunals.

27. See *id.* 23(e).

28. *Nemariam*, 315 F.3d at 394 (internal quotation marks omitted).

29. See *id.*

30. See *Nemariam v. Federal Democratic Republic of Ethiopia*, No. 00-1392 (TPJ), slip op. at 10 (D.D.C. Aug. 2, 2001).

31. See *Nemariam*, 315 F.3d at 394-95.

32. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842, 852 (S.D.N.Y. 1986), *aff'd in relevant part*, 809 F.2d 195 (2d Cir. 1987). The district court's requirement that Union Carbide "consent to the Indian court's personal jurisdiction over it and waive the statute of limitations as a defense [was] not unusual and [similar conditions] have been imposed in numerous cases where the foreign court would not provide an adequate alternative in the absence of such a condition." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 203-04 (2d Cir. 1987).

33. See OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 28-29 (2003).

IV

Some may argue that it is not necessary to reexamine the relation of the forum non conveniens doctrine to cases that might have been brought before international tribunals. After all, a number of other defenses provide a way for defendants in international civil disputes—often states or their instrumentalities—to dismiss frivolous lawsuits on summary judgment, while still ensuring that plaintiffs with meritorious claims can access U.S. courts. Such doctrines include foreign sovereign immunity,³⁴ head of state immunity,³⁵ the act of state doctrine,³⁶ and the political question doctrine.³⁷ However, because a U.S. court using such doctrines addresses the substance of the dispute,³⁸ its decision may undercut any decisions that an international tribunal later reaches on the same case. The use of the forum non conveniens doctrine, by contrast, delves far less into substance. It thus does not so seriously undermine the legitimacy of any decision reached by a tribunal, because it does not lead to a seemingly conflicting decision on the same set of facts. Accordingly, it is vital that forum non conveniens analysis, as applied to international tribunals, be updated with a new focus on interest representation.

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34. *See, e.g.*, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 619-21 (1983).

35. *See, e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 130 (E.D.N.Y. 1994).

36. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-37 (1964).

37. *See Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring in the judgment); *Baker v. Carr*, 369 U.S. 186, 217 (1962).

38. For example, a U.S. court determining whether an action fits within an exception to the Foreign Sovereign Immunities Act looks searchingly at the conduct itself. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 356-62 (1993).