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U.S. Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications

BY UGO MATTEI* & JEFFREY LENA**

In the last several years, numerous lawsuits have been filed in United States federal and state courts relating to the tragedies of World War II asserting what are commonly referred to as "Holocaust Claims." The claimants maintain that the wrongs alleged—which include concealment of bank accounts, withholding of victim gold, looting of art, confiscation of real property, and failure to pay out long overdue insurance proceeds—are best adjudicated by U.S. courts. Plaintiffs' argument has been that, while the claims are temporally and spatially remote from American courts, the procedural mechanisms afforded by U.S. courts—principally discovery and the class action mechanism—permit the efficient disposition of the claims.

There is no denying the dire tragedy and emotional impact of the plaintiffs' claims. Indeed, they are more than mere claims. They are the detritus of millions of ruined lives. Each case involves stories about still-living plaintiffs or their friends and family, being either brutally subjected to Nazi horror during the war (looted asset and slave labor claims), or unscrupulously denied access to their legal entitlements after the war (insurance and bank deposit claims). Several countries have acknowledged either complicity with the Nazis

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through government activity (the French Vichy government, for example), or at least some sort of withholding of money not their own (Swiss and French banks). Commissions have been authorized and funded (Bergier in Switzerland, Matteoli in France, and Eizenstat in the United States) to pursue the question.\(^1\) A substantial literature has also emerged. One thinks of Richard Chesnoff's *Pack of Thieves: How Hitler and Europe Plundered the Jews and Committed the Greatest Theft in History*, the recently revised book by Mark Aarons and John Loftus, *Unholy Trinity: The Vatican, the Nazis, and Soviet Intelligence*, and Tom Bower's book, *Nazi Gold: The Full Story of the Fifty-Year Swiss-Nazi Conspiracy to Steal Billions from Europe's Jews and Holocaust Survivors* as only three of many examples.\(^2\) There is a clamor for justice. And, it should be added, the new litigation does not relate only to the European Theatre of World War II. Substantial and non-frivolous claims have been filed in U.S. courts by both American and foreign nationals alleging forced labor and sexual slavery by the Japanese in the Pacific Theatre of the war. In short, at the turn of the twenty-first century, U.S. courts are undertaking adjudication of the horrors of World War II.

But in the surging interest to assist these aging plaintiffs in the United States, important questions arise that will endure beyond the life of the claims themselves. This brief paper focuses on the question of why these claims, which have no original factual connection to the United States, have nevertheless been brought in U.S. courts some fifty years later. We suggest that the expansionist thrust of the jurisdiction of U.S. courts over such claims may be viewed as a sort of legal imperialism in which the United States (and some of its member

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1. The so-called “Eizenstat Report,” actually performed under the direction of State Department Historian Richard Slany, is of particular interest because it effectively provides much of the factual ground work for the U.S. holocaust-related lawsuits and provided, at a crucial moment, the United States State Department “seal of approval” for these suits to be brought in U.S. courts. See U.S. DEP’T OF STATE, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUDY (1997); U.S. DEP’T OF STATE, U.S. AND ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY (1998).

states) asserts itself upon the rest of the world. Approaching the question from a foreign legal perspective, we ask: what are the implications of this expansionist policy upon transnational legal practice?

The mechanics of the jurisdictional rules and policies that have resulted in these cases being brought in the United States are technical and complex. It is not our intent to describe them in any detail here. Rather, we will try to depict a trend toward the use of those mechanisms as applied to foreign legal claims and to shed light on this phenomenon as part of the Americanization of the global legal order. To do so we will, in Part I, describe the phenomenon that we wish to discuss. In Part II, we will describe the fundamental characteristics of the U.S. procedural system that make it so attractive for plaintiffs to file their cases in the United States. In Part III, we will discuss the implications of an aggressive U.S. judiciary for the exercise of transnational legal practice and suggest how and why the U.S. judiciary is successfully asserting itself around the globe. Finally, in Part IV, we will try to explain the legal phenomenon in connection with its economic background.

Part I

The United States Constitution reflects the natural law beliefs that dominated late eighteenth century jurisprudence and political discourse. A primary tenet of those beliefs was the recognition, preservation and vindication of individual rights, whether they arose in the United States or abroad. The framers and the first generation to follow them gave substance to those beliefs in part through the

3. For a first attempt to explain post-war Americanization in structural legal terms, see Ugo Mattei, Why the Wind Changed: Intellectual Leadership in Western Law, 42 AM. J. COMP. L. 195 (1994) (discussing changes of legal hegemony in modern times from France to Germany to the United States). For a broader theoretical discussion going beyond the notion of Americanization towards that of Empire, see MICHAEL HARDT & ANTONIO NEGRI, EMPIRE 160 (2000).

4. This aspect of U.S. jurisprudence has remained largely buried through the 20th century and is only recently being excavated in the interest of bolstering modern claims to human rights jurisprudence. As Jordan Paust points out, what we presently term "human rights" has a long and rich tradition in American legal and political discourse. Whether called "inalienable rights," "natural rights," the "common rights of mankind," "immutable rights," or otherwise, this concept informed U.S. constitutionalism and jurisprudence from the outset. See JORDAN J. PAUST, INTERNATIONAL LAW AS THE LAW OF THE UNITED STATES 167-292 (1996) (chapter five entitled On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy).
idea that international law could be seen as a system of customary protection of the most fundamental individual rights through their incorporation in the American legal system.\(^5\) This was reflected in Article III of the Constitution itself, which, while concerned with \textit{limiting} federal jurisdiction vis-à-vis the state courts of the United States, interpreted the notion of cases “arising under this Constitution [and] the Laws of the United States” to include international law claims based on both custom and treaty. The Constitution also granted “alienage” jurisdiction over all cases between “a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” This set the stage for the expansive vision of federal court authority in all areas that touched on foreign affairs.\(^6\) Subsequently, Congress further extended subject matter jurisdiction to U.S. federal courts through passage of the Alien Tort Statute, part of the original Judiciary Act of 1789. That statute, today codified at 28 U.S.C. § 1350 ("ACTA"), provides that “[t]he district courts shall have 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.” While the origin of the Act remains somewhat obscure, its likely practical purpose was to afford jurisdiction over piracy claims. On a theoretical level, it also signaled the early view that the U.S. judiciary was prepared to extend its enlightened political and legal beliefs beyond its own borders.

For almost 200 years, it lay practically dormant. Particularly with respect to the nebulous “law of nations” prong, U.S. courts were reluctant to assert jurisdiction over claims between aliens. But the statute suddenly came to life in the 1980 case of \textit{Filartiga v. Pena-Irala}.\(^7\) In \textit{Filartiga}, the United States Court of Appeals for the Second Circuit held that the act complained of—torture of a Paraguay citizen by a Paraguay official acting under color of law—violated the “law of nations” directly incorporated in Federal Common Law through Article III of the United States Constitution.\(^8\) With that decision, the

\(^5\) See id. at 1-9 (exploring theories of incorporation).

\(^6\) The logic behind the federal courts taking original jurisdiction over these matters was to ensure that they would be heard, to the greatest extent possible, in federal and not state courts on the theory that the federal sovereign, having been vested with the sole power over foreign relations, should also have jurisdiction over matters concerning the law of nations. This effectively limited state court jurisdiction, which was in all other respects plenary and not limited by the federal Constitution.

\(^7\) \textit{Filartiga v. Pena-Irala}, 630 F.2d 876 (2d Cir. 1980).

\(^8\) This, of course, was not a new idea. See, e.g., \textit{United States v. Smith}, 18 U.S. (5 Wheat.) 153, 161 (1820) ("The common law ... recognises and punishes piracy as
nascent potential for U.S. courts to vindicate wrongs committed throughout the world, and thereby protect the natural rights of the world’s individuals, was given its first full modern expression. Since Filartaga, each of the U.S. circuits, with the singular exception of the District of Columbia Court of Appeals, has cited the case with approval for the proposition that the ACTA creates a federal cause of action sounding in tort. 9

Clearly, such *jus cogens* violations of natural rights conflicting with clearly established norms of international law can and do happen everywhere in the world; in theory, then, the United States may be transformed into a forum for the world’s grievances. 10 And the purpose of this paper is not to suggest that such acts should not, somehow, be brought to the bar of justice. Rather, the question we pose is whether it is appropriate for an individual nation-state to provide that bar.

The potential world-wide jurisdiction of the American judiciary has been historically balanced by a number of countervailing principles. For example, one limitation on jurisdiction is the doctrine of “minimum contacts,” under which the plaintiff must show, under a general personal jurisdiction analysis, that the defendant has “systematic” and “continuous” contacts with the forum if the basis for personal jurisdiction does not relate to the claim itself, and that such contacts are not accidental, but rather based upon purposeful availment of the benefits and protections of the forum’s laws. 11

The constitutional doctrine of justiciability provides another important limitation on a U.S. court’s ability to adjudicate foreign

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10. The use of international law as a basis for asserting claims under Federal Common Law was slow to develop because general consensus as to what might be considered a violation of a *jus cogens* norm developed most rapidly in the second half of the twentieth century. See Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 439-40 (D.N.J. 1999) (describing the growing consensus as to what constitutes a violation of a *jus cogens* norm); see also *Restatement (Third) of Foreign Relations Law* §§ 102(2), 702 (1987).

claims. When the defense of non-justiciability is raised, the court is required to determine whether the issue at bar involves a "political question" that unnecessarily interferes with the foreign relations powers committed to the other branches of government—Congress and the President. The finding of a "political question" may be based on a number of theories, including whether the court’s adjudication of the claim would embarrass or interfere with the co-ordinate branches, whether the claim has historically been handled by the co-ordinate branches, and whether or not a decision might result in "multiple pronouncements" on the question. Thus, where vindication of rights would appear to the court to interfere unduly with powers committed to other branches of government, it will decline jurisdiction. As well, the prudential doctrine of "comity" allows a court to decline jurisdiction out of respect for other nations.12

A fourth limitation is provided by the unwillingness of foreign courts to enforce judgments of American courts where independent review by the judicial authority of the foreign country determines that there would be no jurisdiction under the law of the foreign forum.13

Other doctrines, such as *forum non conveniens*, have been interpreted by U.S. courts to safeguard the principle that they have jurisdiction, but allows them to decline the exercise of jurisdiction when it is more proper for the litigation to proceed outside the United States.14 While in theory a *forum non conveniens* defense would appear strong in these cases, the court’s decision is based upon a balancing of interests and the sound discretion of the trial court.

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12. *Baker v. Carr*, 369 U.S. 186 (1962) remains the most important statement of what constitutes a "political question" and sets forth an analytical framework for making that determination. All subsequent cases relating to justiciability are substantially glosses on *Baker*. The doctrine contemplates a variety of non-prudential constitutional bars to the exercise of jurisdiction. The one most frequently cited in these cases is the commitment of the foreign relations power to the coordinate political branches, as discussed in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). A relevant modern discussion of the doctrine may be found in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).


Hence, where there is any fear that a factually legitimate claim may not receive fair treatment in foreign courts, U.S. courts may be disinclined to apply the doctrine, and the defendant is therefore stuck litigating in the United States even though all the events, evidence, defendants, and applicable substantive law are connected with a foreign jurisdiction.

Thus, despite these and other counter-principles, it can be said that, generally speaking, American law has always claimed for itself, on a planetary scale, a role as protector of not only American citizens, but of all persons throughout the world.

While for many decades the potential for American law to extend its reach into foreign lands remained largely unexploited (and perhaps unknown outside of a relatively restricted sphere of international law experts), the impressive explosion of Holocaust-related litigation in 1996 provided the phenomenon with world-wide exposure. Indeed, European lawyers representing a large number of Europe-based corporations active in insurance, banking and industry are today involved in one capacity or another in litigation on both coasts of the United States concerning hundreds of claims based on facts that occurred more than a half century ago. Because the Holocaust is removed in time and space from the United States,

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15. The Uniform Interstate and International Procedure Act, a model law for adoption by the various state jurisdictions, provides a fair general statement of the doctrine: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any conditions that may be just." UNIF. INTERSTATE AND INT'L PROCEDURE ACT § 1.05 (1986).

16. One need not look far into the pages of American history to find numerous examples of this U.S. view of itself as the protector of interests abroad in the political as well as the legal realm. From the Monroe Doctrine, which was the defining United States foreign policy statement of the nineteenth century, to the violent interventions (or strategic support therefor) in Vietnam, Indonesia, the Persian Gulf, Columbia, and the Balkans, the United States has intervened where such intervention is co-incident with its own interests. In so doing the United States has often disregarded the very international law precepts embraced when a U.S. court takes ACTA jurisdiction over alien tort claims. See WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION, AND HEGEMONY (1996); see also NOAM CHOMSKY, ROGUE STATES (2000).

17. See Michael J. Bazyler, Nuremberg in America: Litigating the Holocaust in United States Courts, 34 U. RICH. L. REV. 1 (2000). This mega-article, hundreds of pages long, details the various Holocaust cases, albeit decisively from the plaintiffs’ perspective. Notwithstanding the plaintiffs' bent, it is an excellent account of the factual range and legal theories underlying plaintiffs’ claims.

18. From another perspective, it may be noted that not uncommonly the plaintiffs are persons who were once citizens of European countries who...
given the nature of judicial challenge to actions carried on under the shadow of foreign law and politics, the Holocaust litigation is the most extreme and symbolic episode of a world-wide trend in international litigation in which U.S. courts promote themselves as de facto judges of world history.

In addition to the emotional implications of such litigation, Holocaust-related litigation may also be viewed as an indictment of this very activist jurisdictional posture of U.S. courts. From the international perspective, this posture is now resented as a major phenomenon of legal imperialism because of the way in which it imposes American standards of not only substantive law (which are in any case, with respect to these appalling events, largely shared by most nations in the world), but also procedure and legal culture. In particular, the relatively pro-plaintiff nature of U.S. procedure, which has already created so many difficulties from a foreign legal perspective, is once again imposing standards that offend the legal sensibilities of non-American lawyers.

Part II

Defendants have always filed comprehensive motions to dismiss (or their state-based procedural equivalents) arguing American courts do not have, or should decline to take, jurisdiction over these matters. Interestingly, with the exception of one Holocaust insurance claim, one French bank claim, and one Austrian looted art claim, subsequently became United States citizens. Like any country, American courts would, of course, like to offer a forum to their own citizens. This does not change the fact, however, that the events themselves took place generations ago, on another continent, when the plaintiffs were citizens of other countries, and that defendants, evidence, and substantive law continues to be in those countries.

19. One thinks, for example, of the disputes that arose during the Evidence Convention negotiations at the Hague Conference of Private International law. The best and most accessible discussion of this remains RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 470-75 (6th ed. 1998).


few of the nearly five hundred Holocaust-related actions filed in U.S. federal or state courts have ever reached the stage of a full-fledged decision on the comprehensive "motion to dismiss."\textsuperscript{22}

It might be useful, for a readership not limited to American-trained lawyers, to explain briefly the way in which litigation proceeds in its early phases in a U.S. court of law. In Common Law countries, procedure is traditionally considered within the domain of each court. While the American system is federal and therefore somewhat variegated among the states, the Federal Rules of Civil Procedure provide the general model for procedure both in federal and state courts. Moreover, to avoid confusion, it should be mentioned that in American law, the Constitution is "the supreme law of the land" and it must be applied together with the whole system of federal law, not only in federal courts but in state courts as well. This means that international litigation can occur (and indeed is occurring with respect to Holocaust litigation) before both federal and state courts under the very same federal constitutional principles that we have mentioned in the previous section.\textsuperscript{23} It should be noted that while most of these cases are filed in federal courts because either diversity or federal question jurisdiction is available, U.S. state courts are courts of general jurisdiction empowered to hear federal questions as well. Federal substantive and constitutional law is applied where relevant. Some, but not all, of the state court claims have been removed to federal court.

\textsuperscript{22} The "motion to dismiss" in United States federal procedure occurs at an initial stage of litigation in which defendants raise a number of defenses, including statute of limitations and related equitable defense doctrines, failure to state a claim, non-justiciability, abstention theories like comity or forum non conveniens, lack of standing to sue, lack of subject or personal jurisdiction, sovereign immunity, and others under Rule 12 of the Federal Rules of Civil Procedure. State courts, though they do not follow the Federal Rules, have similar procedural mechanisms for challenging plaintiffs' claims. Rule 12 motions can be brought successively as the case develops. So, for example, where an initial motion to dismiss for lack of subject matter jurisdiction fails, that defense may be reasserted if additional facts develop indicating that the court does not have subject matter jurisdiction over the claim.

\textsuperscript{23} This is the case despite the tendency, noted above, for these cases to be concentrated at the federal level. In fact, many of the cases originally filed in state courts were "removed" to federal courts on motions by the defendants pursuant to 28 U.S.C. § 1441 either based upon diversity or based upon some governing federal question that would have allowed the action to be originally filed in United States federal court.
Differences in terms of substantive law and procedural details might still play a large role when skillful forum shopping plaintiffs choose a forum in the United States. Three examples from the State of California will suffice. The California legislature has attempted to create a friendly environment for Holocaust litigation by passing statutes purporting to toll the statute of limitations on slave labor claims until the year 2010 and voiding forum selection clauses in Holocaust era insurance contracts. These first two changes were designed to create a friendly forum by eliminating by legislative fiat two strong defenses to the claims. Finally, resourceful plaintiffs' attorneys have also turned to California's broad and generally worded "unfair business practices" statute to claim that insurance companies failing to pay on contracts and who refuse to disgorge profits from their prior failure to pay on the contracts should pay treble damages and be enjoined from engaging in business in the state. Both the extension of the applicable statute of limitations and the voiding of forum selection clauses are suspect on due process grounds, and the use of the unfair business practices statute is novel, to say the least.

It may be helpful, at this juncture, to explain the rudiments of an action in a U.S. court. An action begins with a "complaint" that must be served on the defendants, and which can be amended a number of times subsequent to service as the plaintiff's case is refined through discovery and the development of additional legal theories. In international litigation, service is usually effected pursuant to Rule 4(i) of the Federal Rules of Civil Procedure, or according to the prescripts of the Hague Convention, or by letter rogatory when foreign sovereigns are named as defendants. After being served,

24. See CAL. CIV. PROC. CODE § 354.6; CAL. BUS. & PROF. CODE § 17200, et seq.
25. Terminology is uniform in the federal system, but varies in state courts. Here, we will discuss procedure using federal terminology.
26. This section sets forth specific rules for service "upon a party not an inhabitant of or found within the state . . . [where the service] is to be effected upon the party in a foreign country."
28. Letter rogatory is the traditional method of service on foreign sovereigns and relies upon transmittal of the complaint to the defendant through diplomatic channels of the United States and the receiving state. Other methods may be considered permissible, however. See Foreign Sovereign Immunity Act, 28 U.S.C. § 1602 (2001) (providing for several methods of service even on foreign sovereigns).
defendants must “answer or otherwise respond” within a specified time in order to avoid a default judgment. In the Holocaust cases, the response to the complaint uniformly takes the form of a “motion to dismiss” on a variety of grounds. Plaintiffs then must file an opposition to the motion to dismiss, and defendants then must file a reply to the plaintiff’s opposition. Extensive oral arguments are thereafter entertained by the presiding court. In high profile cases where history as well as money are at stake, the questioning is close and courts justifiably offer both sides every opportunity to clarify their arguments.

Under present law, even at the earliest stages, plaintiffs are normally entitled to substantial merits-related discovery, and may also request special discovery related to anticipated jurisdictional issues. Where the jurisdictional issues are weighty, it is possible to have the substantive merits-related discovery held in abeyance until some of the early jurisdictional issues are addressed. A magistrate judge commonly presides over discovery matters. What for civilians is the stunning reach of U.S. discovery rules is one of the most important factors explaining the present hegemony of U.S. law in world-wide litigation. American style discovery, often experienced by defendants as a “fishing expedition,” is traditionally resented in European countries. As American lawyers know, discovery is designed not only to ferret out merely “admissible” evidence, but also to allow the discovering party to examine any information “reasonably calculated to lead to the discovery of admissible evidence.” It is a broad net to which foreign defendants are entirely unaccustomed. The European discomfort with this broad net is well documented by Article 23 of the Hague Convention on the Taking of

29. See supra note 13; FED. R. CIV. P. 12.

30. Indeed, presently the federal “default” discovery rules provide that the parties must exchange relevant merits-related documents at the outset of the proceedings; where jurisdictional defenses are raised, however, defendants may seek relief from such initial document exchange. The default rule is stated at FED. R. CIV. P. 26(a)(1).

31. The magistrate judge is not an Article III “constitutional judge” appointed by the President, and is not subject to congressional confirmation. Nevertheless, they are generally considered to be judges of high quality, and the fact that discovery issues are relegated to them does not mean that discovery has a secondary role in the system. A magistrate judge’s decision is directly appealable to the assigned Article III judge.


33. FED. R. CIV. P. 26(b)(1).
Evidence Abroad in Civil or Commercial Matters,\textsuperscript{34} which allows signatory countries to deny cooperation in matters of American style discovery. Article 23 provides: "A contracting state may at the time of signature ratification or accession declare that it will not execute letters of request issued for the purpose of obtaining non-trial discovery of documents as known in common law countries."\textsuperscript{35} A majority of the signatories to the convention have made such an Article 23 declaration.\textsuperscript{36}

Also at the preliminary stages, a number of pre-trial conferences are mandated by the court in order to discuss the timing of the litigation and to seek as much cooperation as possible among counsel.\textsuperscript{37} Out-of-court settlement is encouraged, sometimes quite aggressively, by American judges. In the Holocaust context, a classic but by no means unique example is provided by Judge Korman's handling of \textit{In re Holocaust Victim Assets Litigation}.\textsuperscript{38} In that case, Judge Korman allowed the parties to extensively brief all of the preliminary issues and heard extended oral arguments from counsel. Thereafter, he \textit{declined} to rule on defendant's motion to dismiss for over a year in order to give the parties the opportunity to settle the case. The settlement talks were guided by Judge Korman personally and by a "special master" that he appointed for that purpose. As political pressure and the fear of an adverse ruling built on both sides, a settlement was ultimately achieved. In effect, settlement may be said to be directly attributable to Judge Korman's management of the litigation to achieve settlement.

It is important to note that while the court will be quite flexible under certain circumstances, docket pressures in the majority of courts ultimately result in the judge pushing the case along. Decisions usually come rapidly in cases where the judge has decided not to encourage settlement by withholding judgement on the initial motion to dismiss. Typically, a ruling on a motion to dismiss is reviewed \textit{de}

\begin{thebibliography}{9}
\bibitem{35} \textit{Id.} at art. 23.
\bibitem{36} Canada, France, The Netherlands, Sweden, and the U.K. moreover issued so-called "blocking statutes" prohibiting compliance with discovery orders of American courts. For an interesting discussion of this issue, see SCHLESINGER ET AL., \textit{supra} note 19, at 472.
\bibitem{37} \textit{Fed. R. Civ. P. 16(a)}.
\bibitem{38} \textit{In re Holocaust Victim Assets Litigation}, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (adjudicating Swiss bank account and looted asset claims).
\end{thebibliography}
novo on issues of law and on a "clearly erroneous" standard for issues of fact.

The preceding paragraphs offer but a glimpse of the initial stages of litigation. Even at this early phase, it is complicated, time consuming, and very expensive. For example, in complex international litigation involving issues of foreign law, a rather extensive role for expert witnesses might be involved. Expensive expert declarations would be needed to address issues of foreign law, but experts might also be needed for other factual questions before the court (e.g., historians, bankers, experts on business practice, and the like, who must be dearly compensated for their time and knowledge). Moreover, the responsible attorney must absorb, to a great extent, the impact of the foreign law on the case and be prepared to argue it both on the briefs and at oral argument. Because each point of law in the motion to dismiss must be thoroughly briefed—involving massive searches of the case law for helpful precedent—large numbers of attorneys are typically involved in various capacities, charging rates ranging from $200 to $500 per hour. It is no exaggeration to estimate that defending even an entirely spurious claim involving complex international litigation in the United States might cost a defendant not less than one million dollars per year. This "third factor"—the high cost of litigation—in part explains the high rate of out-of-court settlements. To be sure, there are procedural tools to discourage completely frivolous litigation and to discourage unreasonable litigation of non-frivolous claims. Nevertheless, when highly emotional issues such as those at stake in Holocaust-related litigation are at bar, it is unlikely that such devices would be used by courts that in principle cannot help but be sympathetic to the plaintiff's side.

The financial pressure that can be imposed on a defendant sued in the United States together with the highly intrusive and potentially embarrassing discovery devices are not the only reasons why the U.S. judicial system is a plaintiff's paradise. There are other structural

39. The bringing of frivolous claims is primarily controlled by Rule 11 of the Federal Rules of Civil Procedure, which provides for sanctions and the payment of attorneys' fees where an action has been brought absent a reasonable good faith basis. And, the court often exercises its "inherent power" to control its own court by ordering sanctions against attorneys or parties who needlessly waste court time or force opponents to expend time and money needlessly. Both Rule 11 and the sanction power are important checks on the "open door" policy in U.S. courts, which encourages parties to bring claims. But where the substance of the claims implicates human rights, courts may be disinclined to apply these mechanisms.
features as well. To begin with, the system of attorney compensation
is, at least in tort cases, very attractive for plaintiffs. Plaintiffs' attorneys are usually compensated on a contingency fee basis, i.e., they are only paid out of the amount of money that they can extract from defendants, either by settlement or as a damage award. Defense attorneys, on the other hand, are typically compensated on an hourly basis, usually a less lucrative but more certain form of compensation. This means that the whole risk and expense of complex litigation are sustained on the plaintiff's side by attorneys motivated either by the hope of a return on a good investment or, when acting pro bono, as are many of the firms involved in the Holocaust-related litigation, by the high visibility that their involvement entails. For the plaintiff, suing in a U.S. court is a “risk free, no cash advance” proposition. This would simply be impossible in any other jurisdiction due to restrictions on the unavailability of contingency fee agreements. Moreover, for the plaintiff, suing in a U.S. court is potentially lucrative because tort law in the United States has been very creative in terms of doctrines employed to extend liability to defendants. One need only think of the “market share liability” concept first employed in the pharmaceutical class action setting. A second feature of the system is, of course, the availability of punitive damages. A third is the employment of the jury to determine liability and damages. Jurors tend to be sympathetic to victims, adopting a “rough equity” approach, and are sometimes liberal with standards of proof.

Finally, and perhaps most obviously, the vehicle of the class action itself is one of the most powerful attractions of a U.S. forum. As American lawyers know well, the class action allows “representative” plaintiffs to pursue an action on behalf of a “plaintiff class” and offers a means of disposing of sometimes hundreds of

40. It is also proper to acknowledge that the attorney compensation schemes worked out in several of the cases reflect no avarice by the attorneys. In the so-called “fairness hearings” under Rule 23 of the Federal Rules of Civil Procedure, courts are mandated to determine whether the compensation of class action attorneys who are settling putative class actions is a fair and reasonable sum. While the typical contingency fee is 30% before trial and 40% after trial, attorney compensation in the Holocaust cases has hovered between one and three percent, and all compensation arrangements have been approved as “fair” as far as we can determine. There is no question, on the other hand, that the exposure these cases have engendered is surely beneficial in acquiring future business.

41. There are, however, practical limitations on enforcement of such awards in foreign jurisdictions when not in conformity with a foreign ordre public. This concept is discussed below in the last section.

42. FED. R. CIV. P. 23.
thousands of claims in one trial, with the sole remaining issue being proof of damages. In a word, the class action is a technical device that allows relatively small individual interests that could never afford the costs of litigation to aggregate, forming a large and structured interest strong enough to attract plaintiffs’ lawyers to litigate the claims. This procedural mechanism is available only in the United States and provides a strong incentive to invest in litigation in the United States, where the return (for attorneys) may be astronomical even though each individual claim is relatively small.

Sometimes litigation in the United States would appear to be the only vehicle available for vindication of rights. And this is indeed one of the strongest rhetorical rationales promoting the hegemony of American law in the international context. The class action is the intellectual-ideological device that permits U.S. hegemony to obtain the consent of hegemonized communities by offering and promoting an alternative to political struggle. Indeed, the international human rights movement is based on the assumption, itself naturalistic and universalistic, that individual rights (constructed in the American sense only) require institutional tools to assert those rights. As suggested above, U.S. courts of law are ready to respond and to declare themselves available for this civilizing and normalizing mission.

The class action is the key to understanding this phenomenon. Counsel’s briefs in Motions to Dismiss and expert witness declarations in *forum non conveniens* motions are the technical *loci* in American legal discourse where this hegemonic pro-plaintiff attitude finds expression. This is not, of course, the place to discuss class actions in any detail. Suffice to say that without class actions aggregating relatively small claims, Holocaust victims and their heirs, environmental litigants, victims of pharmaceutical industries, and myriad other groups of harmed individuals would rarely, alone, have the ability to attract powerful plaintiffs’ attorneys to assert their claims on their behalf and, consequently, to gain a comparative advantage from U.S. law as a forum for international law litigation. In fact, invariably, the winning strategy in defeating *forum non conveniens* motions is to show that the interest being litigated as a class action in the U.S. could never find access to courts anywhere else in the world because of the lack of the class action as a tool. Since class actions are usually used in the context of egregious, selfish acts by defendants affecting the life and limb of thousands of people, it is clear that the rhetorical element of showing that *only* American
legal process could vindicate the rights of so many people is truly a winning argument. Of course, this demonstrates a denial of the possible use of the political process abroad and reinforces the image of U.S. law as a gift to humankind. If one adds that the basis for jurisdiction in not a small percentage of complex international litigation derives from *jus cogens* violations, it becomes clear that the plaintiff's position is so strong that it would be difficult to defend on more technical grounds.

**Part III**

Initiation of an international class action in the United States on the basis of *jus cogens* violations is a tremendously complex and expensive procedure. Class actions are carried on in the name of the so-called "named plaintiffs." A "putative" class action implies that, after the preliminary issues are addressed, assuming that defendant's motion to dismiss is denied, the class must be "certified" in order for the "putative" class to be recognized. And, once again, class certification is tremendously expensive. Interestingly, class certification not only grants a *de facto* monopoly to strong and powerful American-based plaintiffs' firms (the only ones that have the resources and skills to litigate in the name of a world-wide class of plaintiffs), but also introduces into the international arena a number of typically American technical devices. These include showing that the interests of the class predominate over the interests of individual plaintiffs and even the culture, unknown elsewhere, of private law litigation as a public policy instrument rather than as a mere dispute-resolution device. The Holocaust litigation is, of course, a prime example of this tendency to handle through private law that which has traditionally only been remedied through public law initiatives or the political process.

Hence, because of the attractive force of the American courts for international forum shoppers, and because of the traditional reluctance of U.S. courts (motivated by international human rights and by notions of *jus cogens*) to give up jurisdiction in favor of foreign courts, a quite interesting phenomenon has emerged. Concepts and notions that are inherently American have become part of the common vocabulary and culture of the international legal practice, even among lawyers belonging to Civil Law jurisdictions. Typically, international defendants that are sued in American courts will refer the case to their own local firms, which in turn will have to rely on corresponding American-based firms and to familiarize themselves, at
least superficially, with American notions and phases of litigation. In the long run, it is easy to predict that this phenomenon will grant yet another comparative advantage to large corporate international mega-firms, the only ones that, wherever located in the world, can afford to keep on their staff American-trained lawyers able to understand what is going on in the American setting.\(^{43}\)

Hence, with respect to impact on the international legal practice, one can note at least a couple of related phenomena. On the one hand, American legal culture has spread throughout the world, with notions such as that of discovery, or American style due process penetrating legal cultures world-wide. On the other hand, American-trained lawyers have become more and more marketable abroad so that law graduates world-wide have strong incentives to participate in one of the many LL.M. programs that U.S. law schools aggressively market. But of course, an LL.M. does not an American lawyer make, so fully educated American lawyers will become increasingly necessary throughout the globalized world.

As a consequence, the spread of American law abroad is now finding another powerful vehicle. Not only is the U.S. academy offering practically valuable training (as has been the case for quite a while\(^{44}\)) but U.S. courts of law are also becoming a powerful vehicle through their jurisdictional reach.

Before attempting a few conclusions, it is important to dwell briefly on the issue of choice of law.

As is well known to any lawyer involved in international legal practice, the choice of substantive law might be a crucial factor in forum shopping.\(^{45}\) Every jurisdiction applies its own choice of law rules and different jurisdictions might point to different rules for the same transaction. American choice of law rules are considered very advanced and the Americans are considered world masters in the field of private international law because, the United States being a full-fledged federal judicial system with a fully integrated market, the choice of law issue has always been part of the everyday practice of law. The American conflict of law system is very complex but also


very pragmatic. It is based on the fundamental idea that the legal system that has the more intense contact with the transaction should prevail. It is, however, also very sensitive to the idea that the commonalities between legal systems should be exploited in order to promote a notion of judicial economy sensitive to and aware of the tremendous costs that applying a foreign law might imply. Hence a strong functionalist flavor finds its way into the choice of law discourse, which points at not bothering to belabor the application of foreign law when the results of its application would not be terribly different from those that would be reached by application of U.S. law. In litigation attracted to the American system based on the *jus cogens* idea, this functionalist attitude finds a strong positive expression in Article 38 of the statute of the International Court of Justice, which promotes the common principles of law recognized by the "civilized nations" to the ranking of source of law in international matters.46

When, as in the case of Holocaust-related litigation, applicable law would be that of a profoundly foreign legal system applied as interpreted more than half a century ago by courts that in many cases no longer exist, the temptation to short-circuit foreign law and instead apply broad common principles is strong indeed. And of course, these broad principles themselves end up being interpreted in light of American culture so that even the kind of diversity and cultural sensitivity that might be provided by private international law is at risk of being lost.

**Part IV**

The previous discussion suggests some institutional factors, formal and informal, that have attracted high profile Holocaust-related litigation to the United States. In Part II, we discussed some formal factors, such as the existence of the class action and the

46. Article 38 provides, in relevant part:
   The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

structure of legal fees. In Part III, we glanced at some informal factors such as the birth of a global class of American-minded practitioners carrying with them a *mentalité* and rhetoric over the rule of law and the international legal order. To such informal factors one should, of course, add the growth of the English language as a worldwide lingua franca, a phenomenon itself offering a tremendously important competitive advantage to U.S. law.

Any explanatory framework requires clarification that the U.S. legal hegemony that we have attributed to such institutional factors may not be based only on those factors alone. There is also an underlying legal reality giving them force and effect: in order for the law to become binding, it needs to be sufficiently threatening to encourage defendants to respect its orders and to make international actors play according to the rules that it sets. Indeed, in international litigation, the door to defaulting is always open, and foreign judgments are not easy to collect.

So, one must ask the question: why should not defendants default in the U.S., particularly given the tremendous costs imposed on them even at the earliest stages of litigation? From the legal point of view, American complex litigation is so far removed from the standards of due process of most non-American jurisdictions that it is very unlikely any court of the world would enforce most of the judgments entered in the United States against non-American defendants for facts happening abroad. European jurists, for example, are accustomed to a notion of due process of law that is not limited to the idea that plaintiffs should have tremendously strong tools in order to vindicate their rights. They strongly believe that the possibility that a defendant might be innocent is entitled to the same due process guarantees as the possibility that the plaintiffs' human rights have been violated. It is well known, but worth repeating, that in international litigation, when the matter of recognition in forum B of a judgment entered in forum A arises, there are two possible outcomes. If there is some sort of "Full Faith and Credit" clause, such as that provided among American states by the Constitution or among European Union states by the Bruxelles Convention, the convention applies and states recognize each other's judgments without difficulty. If there is no international agreement, however, forum B will recognize the judgment entered in forum A only if under the rules of jurisdiction of forum B, forum A would have had

47. See supra note 20.
jurisdiction. Moreover, the recognition would occur only if standards of due process as interpreted in forum B have been respected in forum A. 48

Clearly, in the case of litigation attracted to the United States only on the basis of violations of jus cogens, with no connection to U.S. soil, the jurisdictional issue alone would defeat recognition in most courts outside of the United States. But even if jurisdiction were to be recognized, the issues of discovery and the kinds of remedies available—in particular punitive damages—would be invariably perceived as against the ordre public and not enforced in other jurisdictions.

If this is the case, then it is of great interest to observe that the U.S. legal system, considered so different in fundamental conceptions of fair procedure from most of the other systems in the world, nevertheless imposes its standards world-wide, without any possibility of global enforcement. And here the explanation can only be economic. Should the courts of an economically weaker country behave like U.S. courts, there is no question that most defendants would default, denying de facto the power of local courts to assert jurisdiction over them. Since, however, most international corporate defendants do have significant assets in the United States and wish to avail themselves of business opportunities here, the jurisdiction of U.S. courts is in some sense voluntarily accepted and acknowledged because defendants are fearful for their current or future economic assets and hopeful that future business opportunity is worth the risk of acquiescing to jurisdiction.

Such an economic explanation offers new strength to Gramscian theories of hegemony 49 and shows that the comparative lawyer's dismissal of the connection between the economic infrastructure and the legal system has been too hasty. 50

48. See Schlesinger et al., supra note 19, at 414.
