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HUMAN RIGHTS AND CIVIL LITIGATION IN UNITED STATES COURTS: THE HOLOCAUST-ERA CASES

SAMUEL P. BAUMGARTNER*

I. INTRODUCTION

Human rights are a serious matter. Unfortunately, in spite of half a century of improving the civil rights of individuals through treaties and customary international law, and despite increasing attention to those rights by both governments and scholars of international law and international relations, much remains to be done to prevent and punish even the most egregious violations of human dignity.¹ As if we needed another reminder, Professor Neuborne's Article and the extensive briefs to which he repeatedly refers recap the atrocities committed by the German Nazi regime and ask uneasy but necessary questions about the Nazi regime's accomplices and their responsibility for what transpired in the death camps of Eastern Europe some sixty years ago.² His paper provides a rich repository of material for case study. It invites one so inclined both to analyze some of the more controversial issues of human rights law today and to study tactical and procedural issues of class action litigation—particularly settlement—as well as the role of civil litigation in U.S. courts within transnational society.

Unlike Professor Neuborne, I have not really³ been involved in any of the cases he describes and thus am no match for his excellent and, to a considerable degree, even-handed advocacy. At the same time, however, I am sufficiently removed from those cases to try to address some of the larger issues that his paper raises. I am particularly interested in the role of civil litigation in American courts for purposes of enforcing international human

* Deputy Head, Section of Private International Law, Federal Office of Justice, Swiss Department of Justice and Police. The views set forth in this comment are mine and do not necessarily represent those of the Swiss government. I would like to thank Steve Burbank for commenting on a draft.

1. See *infra* notes 4-14 and accompanying text.

2. See Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002).

3. As an academic at the University of Bern Law School, I participated in the drafting of a written expert opinion supporting a motion to dismiss for forum non conveniens in a related case. That motion and accompanying expert opinion were never filed, however. Moreover, in preparing the opinion, we were limited to procedural issues and had available to us no more than the complaint in the case.

rights law and in the way such litigation affects the conduct of transnational procedure in general.

II. THE ROLE OF CIVIL LITIGATION IN U.S. COURTS FOR PURPOSES OF ENFORCING INTERNATIONAL HUMAN RIGHTS LAW

A. A Theoretical Framework

Since its reincarnation after World War II,⁴ the movement to improve the human rights of individuals the world over has been very successful in terms of norms created.⁵ The movement has, however, faced considerable difficulty in bringing states, individuals, and groups into compliance with those norms.⁶ Partly this is due to the fact that this most “radical development in the whole history of international law”⁷ has challenged some of the basic tenets of traditional international law doctrine, particularly the notion of territorial sovereignty.⁸ More importantly, however, the problems with

4. Although the movement to create international human rights law is often considered to have begun in response to the atrocities committed during World War II, there were earlier movements in the history of international law, particularly the drive to outlaw slavery. *See, e.g.,* Walter Kälin, *Die Allgemeine Erklärung der Menschenrechte: Eine Kopernikanische Wende im Völkerrecht?*, in *MENSCHENRECHTE IM UMBRUCH: 50 JAHRE ALLGEMEINE ERKLÄRUNG DER MENSCHENRECHTE* 7 ff. (Amnesty International ed., 1998).

5. *See, e.g.,* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, Optional Protocol, 999 U.N.T.S. 302; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 75 U.N.T.S. 287; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. In addition to these universal instruments, there are a considerable number of regional human rights treaties. *See, e.g.,* A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANS. L. 45, 60-69 (1999).

6. *See, e.g.,* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Weisburd, *supra* note 5, at 51-53, 55-60, 67-69.

7. JOHN P. HUMPHREY, *THE REVOLUTION IN THE INTERNATIONAL LAW OF HUMAN RIGHTS* 205 (1974).

8. *See, e.g.,* RICHARD A. FALK, *HUMAN RIGHTS AND STATE SOVEREIGNTY* 4, 153-83 (1981); HUMPHREY, *supra* note 7, at 208-09. Under traditional international law doctrine, territorial sovereignty has meant, among other things, that a nation state can “treat its subjects according to [its] discretion,” free from interference by other nations. I L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 124 (1905). *But see* STEPHEN D. KRASNER, *SOVEREIGNTY, ORGANIZED HYPOCRISY* (1999) (arguing that, for hundreds of years, states have entered into treaty obligations ascertaining certain rights of their citizens, particularly minority rights, and that powerful nations have always intervened in other states’ internal affairs regarding those rights, and, hence, that modern human rights

enforcing various human rights regimes correspond with the teachings of Realist international relations theory, equally a product of the immediate post-World War II era.⁹ Realism, so far as important for our purposes, holds that international politics is a struggle for power.¹⁰ In this view, international human rights norms will be enforced when it is in the strategic interests of powerful nations to do so, or, at the very least, if not opposed by those interests.¹¹ This view would explain why human rights were vigorously enforced in the Nuremberg and Tokyo trials after World War II and have led to further ad hoc courts for war crimes committed in the former Yugoslavia, while no such tribunals have been set up for the atrocities committed in the scores of bloody conflicts that occurred during the Cold War.¹² Realism also explains the reluctance of powerful countries, such as the United States and China, to ratify the Rome Statute of the recently created International Criminal Court (ICC).¹³ And it explains the attempt of the United States to force those countries that have ratified the Rome Statute to declare not to surrender or transfer any U.S. nationals to the ICC, irrespective of whether or not such nationals have committed war crimes or crimes against humanity.¹⁴

Luckily, other theories of international politics have since been developed. The empirical record supporting them has demonstrated what international lawyers had argued all along, namely that factors other than raw

regimes have not truly imposed any new restrictions on territorial sovereignty).

9. See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 207-08 (1993).

10. See, e.g., HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 25 (4th ed. 1966) ("International politics, like all politics, is a struggle for power."); KENNETH WALTZ, *THEORY OF INTERNATIONAL POLITICS* 104 (1979).

11. See, e.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 218, 221 (2000). See also John Gerard Ruggie, *Human Rights and the Future International Community*, 112 DAEDALUS 93, 104 (winter 1983) (suggesting that human rights regimes will be weaker than nuclear nonproliferation regimes because the former are not as high on the list of superpower security interests as the latter).

12. See, e.g., Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in International Conflicts*, 93 AM. J. INT'L L. 361, 371-72 (1999); Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned from It*, 25 FORDHAM INT'L L.J. 95 (2001) (arguing that the International Criminal Tribunal for the former Yugoslavia is nothing but "NATO's propaganda arm"); Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES I* (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997) (criticizing the Nuremberg and Tokyo trials as victor's justice, in which Axis leaders were convicted for misdeeds some of which the Allies also committed).

13. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A. CONF/189/9. See, e.g., Barbara Crossette, *War Crimes Tribunal Becomes Reality, Without U.S. Role*, N.Y. TIMES, April 12, 2002, at A3. In fact, the Bush Administration has since made clear its intention to withdraw the U.S. signature to the Rome Statute. See, e.g. Neil A. Lewis, *U.S. Is Set to Renounce Its Role in Pact for World Tribunal*, N.Y. TIMES, May 5, 2002, at A18.

14. See, e.g., Serge Schmemmann, *U.S. v. U.N. Court: Two World Views*, N.Y. TIMES, July 2, 2002, at A8.

power politics affect outcomes in international relations.¹⁵ Professor Koh's work, for example, has drawn in part on one such theory: Constructivism. With an emphasis on transnational norm entrepreneurs who help in interaction, norm-interpretation, and, ultimately, internalization of international norms into domestic law—and thus “bringing international law home”¹⁶—he draws heavily on the Constructivist insight that the behavior of states on the international plane is socially constructed.¹⁷

I would like to emphasize another such school of international politics here: Liberalism. Liberal international relations theory holds essentially that state action is the result of the identity and strength of the preferences of groups and individuals acting in transnational society.¹⁸ There is considerable theoretical and empirical research in this vein demonstrating that norms of international law in general and of human rights in particular are most successfully enforced if groups and individuals are given standing before international or domestic courts to enforce such norms.¹⁹ This insight is in

15. For an account of the emergence of one such theory—Regime Theory, which has since expanded into Institutionalism—and its considerable convergence with modern American international-law thinking that developed in response to the Realist assertion that law played no significant role in international politics, see Slaughter Burley, *supra* note 9, at 217-20. See also Abbott, *supra* note 12, at 364-68 (naming three schools of international relations theory in addition to Realism: Institutionalism, Liberalism, and Constructivism).

16. Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998). See also Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1409-11 (1999); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L. Rev. 2599, 2646, 2656-57 (1997).

17. See, e.g., John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 Int'l Org. 855 (1998). See also MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 6-7 (1998) (noting the importance of nongovernmental organizations and activist groups in transnational networks); Thomas Risse, “*Let’s Argue!*”: *Communicative Action in World Politics*, 54 Int'l Org. 1 (2000).

18. See, e.g., Slaughter Burley, *supra* note 9, at 226-28; Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513, 515-22 (1997).

19. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 Harv. Int'l L.J. 129, 160-71 (2000) (using the Pinochet litigation in Spanish and English courts as a case study to show the effectiveness of litigation initiated by private groups in domestic courts to enforce international human rights law); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 Int'l Org. 41 (1993) (identifying the ways in which the European Court of Justice (ECJ) created opportunities for pro-European Community subnational actors and national courts and thus provided them with a stake in the promotion of European Community law, thus leading to faster and deeper integration than most member states would have liked); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 282-337 (1997) (tracing the success of the ECJ and the European Court of Human Rights (ECHR) in terms of compliance with their judgments in cases involving private parties vis-à-vis their compliance record and that of other international tribunals in traditional state versus state litigation and isolating the factors contributing to such effective supranational adjudication).

line with the theory of the private attorney general that is often cited in support of class action and other litigation in U.S. courts.²⁰ Moreover, liberal research shows that such enforcement of human rights and other norms of international law in domestic and international courts is most likely to occur among liberal democratic states, where courts act within a “zone of law” rather than a “zone of politics.”²¹ This Liberal research explains the extraordinary success of the European Convention of Human Rights²² and its interpretation by the European Court of Human Rights and of the courts of its various member states.²³ It also helps account for the rather dismal record of compliance with international human rights norms in less democratic countries.²⁴ Professor Neuborne’s narrative of the recent Holocaust-related

20. See *Deposit Guar. Nat. Bank. v. Roper*, 445 U.S. 326 (1980).

The aggregation of individual claims in a class-wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class action device.

Id. at 339. See also John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1 4-5 (1997) (“Congress has elected to use the . . . private attorney-general as an enforcing mechanism for the antitrust laws, the securities laws, environmental laws, civil rights and more.”).

21. The terminology is Professor Slaughter’s. See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1910 (1992); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 532 (1995). Despite her apparent (I suspect normative) misgivings about Liberal theory, Professor Hathaway’s empirical findings, too, largely support this assumption. See Hathaway, *supra* note 6, at 1953-55, 1997-2000. Moreover, Professor Moravcsik’s empirical research adds an interesting spin to this Liberal insight, suggesting that the states most likely to agree to a limitation of national sovereignty by signing on to an international human rights treaty are threshold democratic states, whose leaders often attempt to “lock in” the achievements of democratic rule by obligating future governments through international treaty norms. See Moravcsik, *supra* note 11, at 225-46.

22. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

23. See, e.g., Helfer & Slaughter, *supra* note 19, at 283; Moravcsik, *supra* note 11, at 218-19.

24. It is interesting, with these insights in mind, to observe that the U.S. Senate, upon the suggestion of the first President Bush, ratified the most encompassing of human rights treaties—the International Covenant on Civil and Political Rights, *supra* note 5, only after declaring it a non-self-executing treaty, thus effectively eliminating the possibility that a litigant in U.S. court could ground a cause of action in the Covenant. See U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. S4783, S4784 (daily ed. Apr. 2 1992). This happened ostensibly because—except for the Supreme Court’s case law on issues such as “equal protection,” the constitutionality of the death penalty as applied to juveniles, and “cruel and unusual punishment,” which all were to be exempted by way of special Senate declarations to the ratification—U.S. law was already in compliance with, and partly even exceeded the protections of, the Covenant. Indeed, the U.S. government argued in favor of ratification primarily on the basis that it needed to enhance its credibility when pushing other countries to enforce human rights. See *id.* at S4781-83. This, of course, sounds very much like the arguments advanced by the government of the United Kingdom in opposition to giving the European Convention on Human Rights direct effect

litigation appears to add further support to these insights, as well as to Professor Koh's Constructivist-inspired process.²⁵

B. Problems with Human-Rights Litigation in U.S. Courts

As the designated continental European on this panel, I write not only to praise Professor Neuborne and his work. In what follows, I point out a number of problems with using civil litigation in U.S. courts as a means to enforce international human rights, particularly as happened in the cases described by Professor Neuborne. One of the most pervasive obstacles to effective lawmaking for transnational litigation, of which the litigation described by Professor Neuborne represents a part, is a general lack of in-depth information about the relevant foreign procedural systems and the jurisprudential preferences underlying them by those responsible for making such law.²⁶ As a student of the U.S., German, and Swiss litigation landscapes, I thus hope to contribute to a more informed approach in this enormously important area of law.

1. U.S. Procedure and the Rule of (International) Law

U.S. courts are not the only ones in which civil claims for human rights violations may be pursued. To be sure, such violations are primarily sanctioned by way of criminal prosecutions in other countries.²⁷ In fact, several continental European nations, such as Belgium, France, Spain, and Switzerland, have become quite active in prosecuting war crimes, crimes

within that country in the 1950s. *See, e.g.,* Moravcsik, *supra* note 11, at 238-43. Since then, the United Kingdom has lost just as significant a number of lawsuits before the European Court of Human Rights—where individuals have increasingly been able to sue the governments of member states—as other member states of the Convention.

25. Less relevant for the analysis of Professor Neuborne's paper, but very important for understanding the functioning of international human rights norms, is that Institutional international relations scholars would point out that international human rights treaties and less formal agreements increase the costs for member states found to be in noncompliance by affecting their credibility in the future and by increasing access to information about compliance through reporting requirements, among other things. *See, e.g.,* Abbott, *supra* note 12, at 374.

26. *See* SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS AND TRANS-ATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION §§ 5-8 (forthcoming 2002) [hereinafter TRANS-ATLANTIC LAWMAKING]; Samuel P. Baumgartner, *Gaining a Worldly Perspective for the World in Our Courts* (unpublished manuscript, on file with author) [hereinafter *Gaining a Worldly Perspective*].

27. *See, e.g.,* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 144, 147-48 (2001).

against humanity, and genocide in their domestic criminal courts.²⁸ But most of those states also allow for intervention by the injured party in such criminal proceedings.²⁹ Under specific circumstances, the injured party may both initiate a criminal proceeding when the criminal prosecutor fails to act and may join a civil claim with the criminal proceedings in order to gain compensation.³⁰ This procedural specialty has been usefully applied to prosecute human rights abuses civilly as well as criminally in a number of civil law jurisdictions. For example, initiation of such proceedings in Spain by various victims of abuses by the regime of General Augusto Pinochet have led to the request for extradition of General Pinochet from the United Kingdom to Spain.³¹

In spite of these possibilities for claiming civil redress for human rights violations in other jurisdictions, U.S. courts have remained particularly attractive for such purposes. Chief among the reasons for that attractiveness is the enormous flexibility and latitude of U.S. procedure—including its ability to create new remedies, judicial discretion, liberal pleading, the availability of the class-action device, and the ability of the parties to join every conceivable claim.³² All of this has, of course, a name: equity.³³ But it

28. See, e.g., REDRESS TRUST, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, AND GENOCIDE 16-17 (1999); jpk, *Langwierige Vorarbeit vor einer Verhaftung*, NEUE ZÜRCHER ZEITUNG [NZZ], Aug. 14, 2001 (noting that the Swiss are investigating between six and twelve cases against persons from Rwanda and the former Yugoslavia); Fati Mansour, *Le notable rwandais est condamné à quatorze ans de réclusion*, LE TEMPS, May 26, 2000, at 8 (reporting that a Rwandan mayor was sentenced to fourteen years in prison by the Military Court of Appeals, Division 1, in Geneva, Switzerland, on May 25, 2000).

29. See, e.g., Van Schaack, *supra* note 27, at 145-46.

30. *Id.* On the various ways in which a private party may participate in criminal proceedings in France and Germany, see, e.g., William B. Fisch, *European Analogues to the Class Action: Group Action in France and Germany*, 27 AM. J. COMP. L. 51, 60-65, 71-74 (1979). While Professor Fisch's account is somewhat dated in other respects, it still depicts the status quo fairly well with regard to the issues relevant here. In particular, Professor Fisch notes that, unlike in many other civil law jurisdictions, such participation is possible only under very limited circumstances in Germany. *Id.* at 72.

31. See Aceves, *supra* note 19, at 162-64; Naomi Roht-Arriazza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311 (2001). Ultimately, General Pinochet was spared from extradition only because of his failing health. See, e.g., Jamie Wilson, *How the General Escaped Trial*, THE GUARDIAN, Jan. 12, 2002. Similarly, twenty-three survivors of the massacres in Sabra and Shatila, Lebanon, in 1982 had initiated criminal proceedings in the courts of Belgium against Prime Minister Ariel Sharon for his role as an Israeli Officer in the massacres. However, a Belgian court of appeals dismissed the suit because Mr. Sharon could not be arrested in Belgium. See, e.g., Marlise Simons, *Belgium: Sharon War-Crimes Suit Dismissed*, N.Y. TIMES, June 27, 2002, at A10.

32. I intentionally do not list discovery here because, when using the combined civil/criminal proceeding described above, the civil claimant in a criminal proceeding in many civil law countries has available the full investigative facilities of the state prosecutor. Thus, while Professor Neuborne is correct that the evidence-taking procedures in Germany, Switzerland, and other civil law countries do not come close to matching the scope of discovery in the United States, this is not true for human

is precisely these features of equity that also render U.S. civil procedure problematic for purposes of enforcing human rights norms. A quarter century ago, Professor Chayes queried whether these features of U.S. procedure could properly be utilized for public law litigation “without introducing so much complexity that the procedure falls of its own weight.”³⁴ One of the main reasons it has not is that the vast majority of lawsuits in the United States, particularly in federal court, where most human rights litigation is brought, are settled.³⁵ The “settlement class,” although severely restricted in its availability by the Supreme Court in *Amchem Products v. Windsor*³⁶ and *Ortiz v. Fibreboard Corp.*³⁷ under the current wording of Rule 23 of the Federal Rules of Civil Procedure, is one of the last steps along this path toward the lawsuit as a business deal.³⁸ In such a system, Professor Koh’s goal of “provok[ing] judicial articulation of a *norm* of transnational law”³⁹ is as elusive as the very notion that “what is being applied is law”⁴⁰ that

rights violations for which a civil claim can be joined with a criminal investigation. Neuborne, *supra* note 2, at 832.

33. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). Another source not only of the attractiveness of U.S. courts for civil human rights litigants but also of the problems with using those courts for purposes of enforcing human rights norms is the existence of a number of specialized mass tort judges, some of whom are both remarkably resourceful and willing to push the limits of their judicial accountability in attempting to find imaginative ways to resolve the complex disputes before them. See, e.g., Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997). Closely related is another pillar of American jurisprudence: the common law process and its view of the judge as one who can and should adapt the law to newly emerging social circumstances. Although not unknown on the European continent, this role of the judge has been much less significant than in the United States in a legal culture that has traditionally placed less faith in the power of judges vis-à-vis the legislature and legal academy. On the long U.S. tradition of celebrating the common law process over continental European codification and formalism see BAUMGARTNER, *TRANS-ATLANTIC LAWMAKING*, *supra* note 26, § 2.III.A.2.

34. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1312 (1976).

35. See, e.g., Sam Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

36. 521 U.S. 591, 619-22 (1997).

37. 527 U.S. 815, 863-64 (1999).

38. See, e.g., Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371 (2001). See also Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

39. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 (1991).

40. Chayes, *supra* note 34, at 1309. See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1485-86 (1987). There are, of course, exceptions. In 1994, for example, a jury returned a verdict of \$1.2 billion against the estate of Ferdinand Marcos on behalf of a class of 10,023 Filipinos for torture, summary execution, disappearance, and prolonged arbitrary detention. See *In*

underlies the liberal research referred to above.⁴¹

Where I come from, the prevailing view of adjudication remains relatively formalist, perhaps too much so.⁴² The main concern is to cabin judicial power.⁴³ Similarly, positivism predominates.⁴⁴ But one need not be a hard positivist and a formalist to believe that it would be quite a stretch to argue that law is simply what the parties negotiate under pressure of the power of the trial judge. Rejecting such a view, what is the norm of law, particularly the norm of international or (following Professor Koh) of transnational law applied in, or emanating from, the Holocaust-era litigation? Professor Neuborne's paper is replete with strategic and moral judgments. He praises Chief Judge Korman for leaving the parties in limbo over where he might come out,⁴⁵ while criticizing Judges Greenaway and Debevoise for actually ruling and thus compromising the German settlement.⁴⁶ He equally criticizes a group of plaintiffs attorneys in the Swiss litigation for compromising the Swiss settlement by publicly airing views not in conformity with the plaintiffs' Executive Committee.⁴⁷ He further criticizes Judge Kram for accepting a settlement containing a probably worthless assignment of claims against German banks in the Austrian settlement and then holding up the German settlement in trying to correct the mistake.⁴⁸ And he makes clear that, in his view, significantly more money should have resulted from all three settlements "to even begin to approach real compensation," but that what has been accomplished is still considerable.⁴⁹

re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994), *cert. denied* 513 U.S. 1126 (1995); Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995).

41. See *supra* text accompanying notes 18-24.

42. Unfortunately for comparative analysis, the term "formalism" in the United States has had a negative connotation since the advent of antiformalism and legal realism earlier in the past century. See, e.g., Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144 (1999) (book review). Professor Neuborne himself has offered a particularly colorful and unflattering critique, see Burt Neuborne, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419 (1992), with which he follows in the footsteps of Montesquieu's ridiculing of a view of the judge as "la bouche qui prononce les paroles de la loi." CHARLES-LOUIS DE MONTESQUIEU, *DE L'ESPRIT DES LOIS*, ch. 6 (1748). The continental European views on adjudication that I refer to in the text have, of course, long since abandoned such a strict syllogistic understanding, if they ever adhered to it. See, e.g., Samuel P. Baumgartner, *Related Actions*, 3 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 203, 217-18 (1998).

43. See, e.g., TRANS-ATLANTIC LAWMAKING, *supra* note 26, § 9.III.C. See also *supra* note 33.

44. See, e.g., TRANS-ATLANTIC LAWMAKING, *supra* note 26, § 1. On formalism and positivism see Leiter, *supra* note 42, at 1140-47, 1150-53.

45. Neuborne, *supra* note 2, at 807.

46. *Id.* at 815.

47. *Id.* at 806 n.27.

48. *Id.* at 818.

49. *Id.* at 828 n.120.

However, there is little in Professor Neuborne's paper to identify the legal norms on which these views are premised. To be sure, some of his footnotes and the briefs he repeatedly refers to contain a plethora of good and interesting legal arguments, both under domestic and international law. But ultimately, I suspect, they, as well as the legal arguments of the defendants, were only of secondary importance in the outcome of the litigation. As Professor Neuborne observes, no American court has yet ruled on a Holocaust claim on the merits.⁵⁰ Moreover, consider his account of how the Swiss settlement was reached: At a dinner at a landmark Brooklyn restaurant, Chief Judge Korman cites a number after seeing some of the plaintiff's evidence and both sides cannot help but accept, knowing full well that a rejection of the Chief Judge's offer can only hurt their respective cases.⁵¹ The real negotiations only begin after this "settlement in principle" is reached, when the defendants attempt to achieve as global a peace as possible while the plaintiffs can only hope to prevent a watering-down of the amount agreed.⁵²

Some will insist that this sort of negotiation always takes place in the "shadow of the law."⁵³ Indeed, the easiest of the claims (and incidentally the one apparently worth the most within the Swiss litigation),⁵⁴ the deposited assets claim, had much to commend it from a domestic law perspective,⁵⁵ although crucial questions such as choice of law⁵⁶ and the most obvious difficulty under Swiss law—the running of the statute of limitations⁵⁷—remained undecided here, as well. Where, however, a claim is not based on traditional and mostly well-settled questions of private law, but rather on

50. *Id.* at 805 n.23.

51. *Id.* at 807 n.33.

52. *Id.* at 808.

53. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

54. See Neuborne, *supra* note 2, at 812 (noting that of the \$1.25 billion settlement, \$800 million was allocated to deposited assets claims, \$200 million to slave labor claims, and \$100 million to looted assets claims).

55. See *id.* at 807 n.31 (noting his hunch that Chief Judge Korman, "if forced to issue an opinion, . . . would uphold the claim for bank deposits . . . but might well strike down plaintiffs' more adventurous claims premised on international law").

56. On the difficult choice-of-law issues in these cases from a Swiss perspective, see, e.g., DANIEL GIRSBERGER, *DAS INTERNATIONALE PRIVATRECHT DER NACHRICHTENLOSEN VERMÖGEN IN DER SCHWEIZ/PRIVATE INTERNATIONAL LAW AND UNCLAIMED ASSETS IN SWITZERLAND* (1997).

57. In another concession to the transactional nature of American civil procedure, the defendants failed to raise the statute-of-limitations defense, apparently in exchange for avoiding extensive discovery, Neuborne, *supra* note 2, at 813, and with it, I assume, avoiding the involvement of the Swiss government, whose likely vigorous defense of Swiss sovereignty and bank secrecy might have compromised the defendants' credibility with both of its negotiating partners: Chief Judge Korman and the plaintiffs' attorneys.

novel legal theories and difficult questions of international law, as were the claims based on corporate responsibility for harm inflicted by the German state,⁵⁸ bargaining for the most part takes place, as Professor Subrin has observed, in the “shadow of a shadow”⁵⁹ in a litigation system that today produces few, if any, precedents,⁶⁰ let alone legislative solutions worthy of the name.⁶¹ When combined with the next factor to be discussed here—political pressure by the U.S. government, this sort of litigation leaves the impression abroad that what matters for the outcome is not the rule of law, but the relative power of the litigants and of the governments that they are able to mobilize.⁶² Indeed, one of the factors increasingly distressing European observers of the Swiss and the German litigation, as time wore on, was that, although the defendant companies had some good points to make and although it would be interesting to see how their arguments would affect adjudication, these arguments really did not matter.⁶³ This is hardly a

58. The plaintiffs’ claim of corporate responsibility for human rights violations by a state was both relatively novel and difficult under international law. For a reconsideration of the difficult issues involved in such a claim and a suggested approach, see Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

59. Subrin, *supra* note 33, at 989.

60. As Professor Rubenstein observes, the problem lies not only in a rising lack of adjudication but in an equally increasing substitution of transactional work for traditional litigation work—the writing of briefs, motions, and the preparation of legal arguments in court—among class action attorneys. See Rubenstein, *supra* note 38, at 420-22.

61. See, e.g., Chief Justice Rehnquist’s repeated, but so far futile, calls for a legislative solution to the Asbestos litigation. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 865 (Rehnquist, C.J., concurring). From this perspective, the German settlement has much to commend it, for it resulted in German legislation and thus in a form of conflict resolution for large-scale claims preferable from a German point of view. See, e.g., Gerhard Walter, *Mass Tort Litigation in Germany and Switzerland*, 11 DUKE J. COMP. & INT’L L. 369, 376 (2001). Here, too, however, the problem remains that the legislation came about only after insistent pressure from litigation in U.S. courts, the outcome of which was less than clear under applicable norms, and, more importantly, from strong political pressure by both state and federal legislatures in the United States, thus putting into question the internalization of this treaty solution in Germany as expression of a new *norm* of customary international law. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (requiring *opinio iuris*).

62. See, e.g., Burkhard Heß, *Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, 44 AKTIENGESELLSCHAFT 145, 154 (1999) (observing that, “due to the [American] procedural structure, this is less about questions of law than it is about power”) (translation by the author).

63. See, e.g., Burkhard Heß, *Staatenimmunität bei Menschenrechtsverletzungen*, in WEGE ZUR GLOBALISIERUNG DES RECHTS 269, 284 (Reinhold Geimer, ed., 1999) (suggesting that civil litigation under these circumstances appears to be a mere means of forcing a favorable political solution between the countries involved); Detlev Vagts et al., *Mit Prozessieren den Holocaust bewältigen? Die Rolle des Zivilrechts und Zivilprozesses beim Versuch der Wiedergutmachung internationaler Katastrophen*, 118 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT, NEUE FOLGE 511, 521 (1999) (noting Professor Drolshammer’s statement at a panel discussion at Harvard Law School discussing the Holocaust-related cases that Europeans are not used to the kind of mobilization of political and economic power of the federal and state governments of the United States to support civil litigation and thus tend to

principled basis upon which to “promote a political settlement [on an issue of transnational law] in which both governmental and nongovernmental entities will participate.”⁶⁴ This aspect deserves serious attention for those of us seeking to improve the rights of human beings in transnational society.

2. *Power Politics (or the Perception Thereof)*

The Swiss litigation, the reaction to which I am most familiar with, nicely demonstrates the problems arising from using the political power of the federal and state governments of the United States to support human rights claimants in U.S. courts. After initial despair over sanctimonious posturing by some of the plaintiffs’ lawyers (who are not favorably mentioned by Professor Neuborne) and in the face of continued hostility by some segments of the Swiss population,⁶⁵ the plaintiffs were met with considerable sympathy by a Swiss public that has always been quite critical of some of its banks’ motives.⁶⁶ In line with that sentiment, the Swiss government quickly earmarked a large part of the proceeds from a planned sale of its gold reserves for compensation of the victims of the Swiss banks’ behavior during World War II in the form of a “Solidarity Fund.”⁶⁷ To some degree, the

view them simply as a form of American imperialism and hegemony).

64. Koh, *supra* note 39, at 2349. The problem is further compounded by a U.S. judiciary that, from the 1940s to the 1960s, created, or expanded upon, a number of doctrines, such as act of state, political question, comity, and the non-self-executing character of treaties, to avoid having to adjudicate issues of international law for which it supposedly lacks institutional competence. *See id.* at 2356-58. The result has been that negotiations over claims premised on international law are colored much more by assumptions of whether a dismissal on justiciability grounds is likely before a particular judge, as happened in the German litigation described by Professor Neuborne, than by the “shadow” of the claimed norm of international law.

65. The wartime generation in particular had difficulty with the notion that its ability to keep Switzerland out of harms way was anything other than heroic, for it had lived through the constant fear of invasion from, and, through lengthy active duty, had defended the country against, possible attacks by the Axis powers surrounding Switzerland at the time, and had experienced the enormous deprivation that had resulted from that situation. But this generation had also been influenced by the Swiss government’s propaganda of the time, which had both vilified the Germans and emphasized the importance of individual sacrifice to defend the country without mentioning the less heroic concessions to the Nazis that the Swiss government felt necessary to make or—such as identification of Jews through special stamps in their passports—even eagerly proposed to the Germans. *See, e.g.,* Hans Senn, “Ich war dabei, habe nachgeforscht und nachgedacht,” in: “. . . denn es ist alles wahr”, *Erinnerungen und Geschichte 1939-99*, Bundesarchiv Dossier 11, 121. For a brief assessment of these Swiss fears and actions under international law in English, see Detlev Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INT’L L. 466 (1997).

66. *See, e.g.,* Robert Hauser, *Aktuelle Fragen zum schweizerischen Bankgeheimnis*, 40 JURISTENZEITUNG [JZ] 871, 872 (1985) (noting several political sources of criticism of behavior of Swiss banks).

67. *See, e.g.,* Alan Cowell, *Swiss to Use Gold for a Holocaust Fund*, N.Y. TIMES, March 6, 1997, at A5.

process also had the beneficial effect of forcing the Swiss to revisit some of the more unpleasant aspects of their country's history.⁶⁸ When, however, the governments of California and New York decided to boycott Swiss banks⁶⁹ and when Senator Alfonse D'Amato, then Chairman of the Banking Committee, in an obvious attempt to garner favor among his constituency, threatened to conduct hearings on the behavior of Swiss banks during World War II,⁷⁰ the mood rapidly changed.⁷¹ And when the \$1.25 billion settlement became public, a great number of editorialists, members of Parliament, and other protagonists of public opinion berated the Swiss banks for selling out to the "blackmail" from overseas.⁷²

Perhaps, as Professor Neuborne points out, the "blackmail" argument is unfair.⁷³ And one can certainly argue, as he does, that there is nothing wrong with utilizing political clout to force a settlement on a claim one believes to be well founded.⁷⁴ Let me suggest, however, that those who favor the use of the political power of the United States to force a settlement on foreign defendants in a litigation system in which legal norms appear to play only a secondary role engage the costs of such an approach. Professor Neuborne mentions the possible rise of anti-Semitic sentiment in Switzerland as one such cost.⁷⁵ Although fortunately this development may have been of short duration, another casualty may have been the Solidarity Fund. After the settlement became public, the legislation creating that Fund languished in Parliament, gradually diminishing in size.⁷⁶ Ultimately, the Swiss rejected the

68. In December of 1996, the Swiss government empanelled a commission of independent historians to study Switzerland's role during World War II. After five years of study, the final findings of the Commission, named after its chairman, Jean-François Bergier, were released in March 2002. The findings were in many ways quite critical of Swiss policies at that time. Bergier Commission Findings, at <http://www.uek.ch>.

69. See, e.g., David Cay Johnston, *New York Officials to Impose Sanctions on Swiss Banks Sept. 1*, N.Y. TIMES, July 3, 1998, at A3; David Cay Johnston, *Two States Outline Sanctions on Swiss Banks in Holocaust Case*, N.Y. TIMES, July 2, 1998, at A5.

70. See, e.g., *Profanierung des Holocaust im Wahlkampf, Kritik an den populistischen Strategien Senator D'Amatos*, NZZ, Oct. 29, 1998.

71. See, e.g., Vagts et al., *supra* note 63, at 520 (quoting statement of Swiss Minister Beglinger); "Dem Bundesrat fehlt jegliches Verständnis . . .", *Schweizerische Reaktionen auf New Yorker Boykottandrohungen*, NZZ, July 3, 1998.

72. See, e.g., Elizabeth Olson, *Swiss Are Relieved, but Sour, Over Banks' Holocaust Accord*, N.Y. TIMES, Aug. 16, 1998, at A13.

73. See Neuborne, *supra* note 2, at 828 n.117.

74. *Id.*

75. *Id.* at 828 n.118.

76. While the Swiss Executive had originally proposed exclusively to use the yearly interests on a \$4.7 billion fund for victims of the Holocaust and other human rights violations, more and more of that money was appropriated purely for Swiss purposes, including the Swiss social security fund, in the process. Compare Cowell, *supra* note 67 with *Botschaft betreffend die Verwendung von Goldreserven und ein Bundesgesetz über die Stiftung solidarische Schweiz*, May 17, 2000, Bbl. 2000,

measure in a referendum.⁷⁷

What most clearly suffers under such an approach, however, is the credibility of the United States in attempting to persuade other countries to conform with established human rights norms. This credibility suffers further from the fact that the same U.S. government that throws its weight behind various human rights claims against foreign companies at home appears to be unwilling to commit to basic human rights treaties that are not in its political or strategic interest, such as the Statute of the new International Criminal Court,⁷⁸ allows state courts to inflict capital punishment in situations that are considered in violation of human rights law elsewhere,⁷⁹ and appears to see nothing wrong in sending suspected terrorists to Middle Eastern countries that still allow torture and other inhumane practices to force the suspect to talk.⁸⁰

Under these circumstances, any moral argument, as well as Professor Neuborne's celebration of the American procedural system and what he himself calls his "jingoistic point,"⁸¹ all come with a decidedly sour taste from the point of view of a foreign lawyer. But the costs may be even larger. The Swiss Holocaust litigation has apparently contributed to the rise of anti-Americanism with regard to everything having to do with the U.S. legal system.⁸² For example, while Professors Stürner and Wiegand ably documented what they called the "reception of American law in Europe" a decade ago,⁸³ comparing the adoption of U.S. solutions in continental Europe

3979 and Botschaft zur Volksinitiative "Überschüssige Goldreserven in den AHV-Fonds (Goldinitiative)," Feb. 28, 2001, Bbl. 2001, 1403. See also François Gross, *Solidarité? Mon oeil!*, LE TEMPS, Mar. 18, 2002.

77. See, e.g., *Der Souverän hat gesprochen. Aber Was?*, NZZ, Sept. 23, 2002.

78. See *supra* note 13 and accompanying text. Cf. *supra* note 24.

79. See, e.g., Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1105-06 (2002). But see *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (declaring execution of mentally retarded individuals "cruel and unusual punishment" under the Eight Amendment of the U.S. Constitution).

80. See, e.g., Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, March 11, 2002, at A1, A15. For these purposes it does not exactly help that the leading figures of the Bush foreign policy team are declared Realists, see, e.g., Elaine Sciolino, *Compulsion to Achieve: Condoleezza Rice*, N.Y. TIMES, Dec. 18, 2000, at A1, whose policy preferences in this area have become painfully clear since the events of Sept. 11, 2001. See, e.g., Michael Ignatieff, *Is the Human Rights Era Ending?*, N.Y. TIMES, Feb. 5, 2002, at A25.

81. See Neuborne, *supra* note 2, at 831.

82. This is, of course, only the latest wave in a development that began much earlier. See TRANS-ATLANTIC LAWMAKING, *supra* note 26, at § 1.

83. See Rolf Stürner, *Die Rezeption U.S.-amerikanischen Rechts in der Bundesrepublik Deutschland*, in Festschrift Rebmann 839 (1989); Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137 (Lawrence M. Friedman & Harry N. Schreiber ed., 1996); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229 (1991).

to the reception of Roman law in the thirteenth and fourteenth centuries, Professor Honsell, in a 1999 article, used everything from class action litigation to punitive damages to “three strikes and you’re out” legislation to the impeachment of former President Clinton to argue that U.S. law is incapable of distinguishing the serious from the trivial, the most important attribute of law.⁸⁴

As I have shown in a case study elsewhere, such circumstances provide fertile ground for corporations to fill the information deficit about U.S. procedure in those countries by spreading as the truth the view of the U.S. litigation landscape usually held by the proponents of tort reform.⁸⁵ The result is, as you may imagine, a picture of U.S. litigation practice sadly lacking in perspective,⁸⁶ but one that, as I have also shown, may be instrumental in guiding approaches to transnational litigation involving the United States, particularly with regard to issues of judgments recognition and judicial cooperation.⁸⁷ As a result, litigants in future transnational cases in U.S. courts, including human rights litigants, may pay the bill for the aggressiveness of those who have gone before them. All of which, of course, should raise the question of who should make the decision on whether those costs are worth incurring.

84. See Heinrich Honsell, *Amerikanische Rechtskultur*, in *DER EINFLUSS DES EUROPÄISCHEN RECHTS AUF DIE SCHWEIZ* 39 (Peter Forstmoser et al. eds., 1999). Moreover, as Professor Honsell rightly points out, some of the borrowings identified by Professor Wiegand have been the result of insistent U.S. pressure and thus have not occurred voluntarily. *Id.*, at 52-53. See also Regina Kiener & Raphael Lanz, *Amerikanisierung des schweizerischen Rechts—und ihre Grenzen*, 119 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT, NEUE FASSUNG*, 155 (2000) (exploring the limits of emulating what the authors consider the pathologies of the U.S. legal system in Switzerland).

85. See *Gaining a Worldly Perspective*, *supra* note 26.

86. Cf. Burbank, *supra* note 40, at 1467-68. For an example, see Kiener & Lanz, *supra* note 84, at 155:

The American legal system is identified by characteristics, whose most spectacular varieties [include the following]: Generally, there appears to be a great readiness to sue; for relatively insignificant infliction of harm, apparently absurd amounts for damages are claimed and also awarded; class actions against financially strong enterprises or entire segments of the economy are brought in order to force the opponent to the negotiating table and thus to force him into accepting astronomical settlement amounts.

Id. (translated by author). This depiction of the U.S. litigation landscape does not appear in a polemic against the United States or its legal system but rather in a serious and thought-provoking law review article in one of the leading academic journals in Switzerland. On some of the problems with these views in the United States, see, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 *ARIZ. L. REV.* 717 (1998).

87. See *Gaining a Worldly Perspective*, *supra* note 26.

3. *Judicial Jurisdiction*

At the beginning of the Holocaust-related litigation described by Professor Neuborne, much exasperation was informally expressed in Austria, Germany, and Switzerland over the extensive judicial jurisdiction asserted by U.S. courts in such cases. However, I do not believe that customary international law can be shown to impose any significant limits on judicial jurisdiction.⁸⁸ It also seems to me that at least Germany and Austria, with their assets jurisdiction,⁸⁹ can reach quite far jurisdictionally themselves (not to speak of France, where a French national can sue anyone in French court⁹⁰). Moreover, in light of the universality principle,⁹¹ any attempt to limit the judicial jurisdiction over human rights cases would be misguided. For all these reasons, I think that the argument against judicial jurisdiction was more of a proxy for displeasure with other aspects of the U.S. litigation as I have presented them above. As such it is an argument that is not to be taken lightly because it may well have influenced the decision of Europeans to push hard for the limitation of U.S. jurisdiction in exchange for improving the recognition and enforcement of U.S. judgments within the framework of the Convention on Jurisdiction and Judgments currently being negotiated at The Hague.⁹² Thus, U.S. litigants may have incurred another cost of the Holocaust-related litigation described by Professor Neuborne.⁹³ It is a cost that significantly affects potential human rights claimants in U.S. courts and elsewhere, for it appears that the episode has led several governments other than those traditionally ambivalent about human rights⁹⁴ to press for clear limits on a suggested exception from the black list of jurisdictional grounds

88. *But see, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421; Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 18-20 (1987).

89. German ZPO § 23; Austrian Jurisdiktionsnorm § 99.

90. French Code Civil art. 14. On all this, see TRANS-ATLANTIC LAWMAKING, *supra* note 26, § 3.II.B.

91. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404.

92. *See* Hague Conference, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Interim Text, *available at*: <http://www.hcch.net/e/workprog/jdgm.html>. On the interests of the participants in the negotiations at The Hague, *see, e.g.*, TRANS-ATLANTIC LAWMAKING, *supra* note 26.

93. It may well be, of course, that the strong European stance at The Hague will lead the U.S. negotiators to abandon the project, thus preventing any treaty limits on U.S. jurisdiction. *See* TRANS-ATLANTIC LAWMAKING, *supra* note 26. If so, however, U.S. litigants will have foregone a chance at improving the enforceability of U.S. judgments abroad. *Id.*

94. *See, e.g.*, Van Schaack, *supra* note 27, at 187-88 (discussing Chinese proposal).

that may not be used in a member state for human rights litigation in the proposed Convention.⁹⁵

4. *Comparison of Litigation Systems*

As I have argued at length elsewhere, avoiding such unexpected costs, or at least assessing them in advance in transnational litigation, requires the relevant lawmakers to gain better knowledge of the relevant foreign litigation systems and the jurisprudential choices underlying them.⁹⁶ For this purpose, Professor Neuborne's characterization of German and Swiss civil procedure, including his conclusion that the European courtroom "is a fortress for the powerful"⁹⁷ is less than helpful, although I agree with him that both the German and the Swiss litigation probably would have been lost before a local court without prior legislative action to remedy some of the legal obstacles in their way.⁹⁸ In addition, it is apparently easier to adjudicate human rights violations allegedly committed in foreign lands than it is neutrally to evaluate one's own past.⁹⁹

Professor Neuborne's statement about German and Swiss procedure, however, is just as sadly lacking in perspective as is the view of U.S. litigation prevalent in continental Europe. It seems to be heavily influenced by the current state of the reform debate in the United States, where one seems to have the choice to be either in favor of the status quo and thus in favor of underprivileged claimants, or else one prefers procedural reform and thus the protection of corporations (and perhaps the courts) from "the

95. *Id.* at 184-85. See also Burkhard Heß, *Die Anerkennung eines Class Action Settlement in Deutschland*, 55 JZ 373, 382 (2000) (suggesting that exception for human rights cases be stricken from the black list in the proposed Convention).

96. See *Gaining a Worldly Perspective*, *supra* note 26.

97. See Neuborne, *supra* note 2, at 832.

98. *Cf.*, e.g., *Spring v. Schweizerische Eidgenossenschaft*, Schweizerisches Bundesgericht [Swiss Federal Supreme Court], Jan. 21, 2000, BGE 126 II 145 (2000) (holding that claim by Jewish refugee who was handed over to German authorities after attempting to cross the Swiss border was time-barred and that the action of the Swiss border patrol represented no violation of international law at the time); *Landergericht Stuttgart* [district court], decision of November 24, 1999, reproduced in 21 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRax] 240 (2001) (holding a forced-labor claim against German companies unfounded because the German statute of limitations had run). *But see* Paul Oberhammer & August Reinisch, *Zwangsarbeiter vor deutschen Gerichten*, 21 IPRAX 211 (2001) (criticizing the latter decision both for applying the German two-year statute of limitations applicable to labor contracts rather than the thirty-year statute applicable to claims for unjust enrichment in the context of forced labor and for the court's view that that short statute of limitations began to run after the Two-Plus-Four Treaty of 1991 went into force, thus reversing the time bar imposed by the London Debt Agreement of 1953 even though no such reversal was clearly stated in the former treaty and even though it took German authorities at least until 1996 to realize that the Two-Plus-Four Treaty might have addressed this issue).

99. Compare, e.g., *supra* note 28 and text accompanying notes 28-31 with *supra* note 98.

litigation boom.” From this perspective, a procedural system lacking some of the features of equity is necessarily biased in favor of corporations and the status quo. A less cynical point of view, however, would permit a better assessment of the reform alternatives.¹⁰⁰ More importantly for present purposes, it would allow for a more critical evaluation of the prospect of litigating a particular claim in a forum other than a U.S. court, especially one that takes the enforcement of existing law (including international law) more seriously, but whose judges are not perhaps as good at, or (for good reason) even allowed to,¹⁰¹ create entirely novel solutions to emerging legal problems.¹⁰² A more informed and less cynical perspective would also provide a better basis from which to assess the costs that the current U.S. litigation system is apt to impose on the enforcement of human rights both in the United States and elsewhere and on transnational litigants in general.

III. CONCLUSION

The Holocaust-era litigation undoubtedly has done considerable good. It has created a vast pool of assets for distribution among victims of the Holocaust whose claims had been submerged by the politics of the Cold War,¹⁰³ and it has prompted at least the Swiss to engage in a painful reconsideration of their role in World War II.¹⁰⁴ On a theoretical level, Professor Neuborne’s account of that litigation appears to add further support both to Professor Koh’s notion of transnational legal process and to the empirical finding of Liberal international relations scholars that the enforcement of international (human rights) law works best when private individuals and groups are provided with standing to sue before international and domestic tribunals.¹⁰⁵

100. See, e.g., Burbank, *supra* note 40, at 1468.

101. See, e.g., TRANS-ATLANTIC LAWMAKING, *supra* note 26, at § 9.III.C.

102. Cf. Professor Subrin’s observation that “[we in the United States] are good at using equity process and thought to create new legal rights. We have, however, largely failed at defining rights and providing methods for their efficient vindication.” Subrin, *supra* note 33, at 1001. Whether, however, federal civil procedure with its mostly negotiated solutions and thus its inevitable move towards “dispute resolution *simpliciter*,” see Burbank, *supra* note 40, at 1486, really remains “good at . . . creat[ing] new legal rights,” see Subrin, *supra* note 33, at 1001, and thus at protecting the individual against the status quo that much better than German and Swiss procedure, as Professor Neuborne claims, see Neuborne, *supra* note 2, at 832, is one of the questions that merit serious consideration within the comparative assessment here suggested.

103. See, e.g., Neuborne *supra* note 2, at 813 n.63.

104. See *supra* text accompanying note 68.

105. See *supra* text accompanying notes 15-25.

Upon closer examination, however, the Holocaust cases also give rise to difficult questions, of which Professor Neuborne mentions quite a few.¹⁰⁶ I am particularly concerned with the effects on the development of international human rights law and on the law of transnational litigation of a procedural system in which outcomes appear to be only loosely, if at all, related to the law applicable to the case¹⁰⁷ and whose courts have largely declared themselves incompetent to deal with issues of international law.¹⁰⁸ There were difficult problems of substantive law, including international law, at issue here. Apart from the issue of repose (in the case of the German litigation complicated by the uncertain terms of two international treaties),¹⁰⁹ for example, there was the question of how far, if at all, a corporation should be liable for human rights violations by a state if it derived profit from such violations; how close the connection between those violations and the action (or inaction) of the corporation must be; and whether such liability, of very recent vintage, should be imposed retrospectively regarding actions that occurred over one-half a century ago. These are momentous questions. Yet, I am not sure that the Holocaust litigation has resolved them, given that uncertainty about those questions, together with “informal” judicial action and pressure by the U.S. government, is what controlled the settlement negotiations.¹¹⁰

As a result, I doubt that the Holocaust litigation fully supports either Liberal or Constructivist insights about the making and application of international human rights law. I suggest that lawyers and international relations scholars pay closer attention to these uncertainties when conceiving and empirically testing theories about the role of law in the behavior of nation states, groups, and individuals in international relations. I also suggest that policy makers engage the costs of the use of the current U.S. litigation system for purposes of enforcing human rights abroad. Among those costs is the perception abroad that the government and the courts of the United States are really engaging in power politics.¹¹¹ Over time, such a perception breeds resentment, which, in turn, may affect outcomes in cases and issue areas in which the United States and its litigants do not have the upper hand.¹¹² It may

106. See, e.g., Neuborne *supra* note 2, at 827-34.

107. See *supra* text accompanying notes 34-64.

108. See *supra* note 64.

109. See *supra* text accompanying notes 57 and 98. In the case of Switzerland and the looted assets claims, there was also the issue of whether the Washington Accord of 1948 barred recovery. See, e.g., Vagts, *supra* note 65, at 474.

110. See *supra* text accompanying notes 50-61.

111. See *supra* text accompanying notes 62-80.

112. See *supra* text accompanying notes 82-87, 92-93.

also lead to protective action that renders pursuing human rights claims more difficult, both in the United States and abroad.¹¹³ Addressing those costs will by no means be easy, and finding appropriate solutions will require a considerable comparative enterprise.¹¹⁴

113. *See supra* text accompanying notes 78-87, 94-95.

114. *See supra* text accompanying notes 96-100.