

FACTORS IMPACTING THE SELECTION AND POSITIONING OF HUMAN RIGHTS CLASS ACTIONS IN UNITED STATES COURTS: A PRACTICAL OVERVIEW

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Lawyers pursuing human rights individual or class action cases on a contingency basis cannot afford to select the wrong cases, or to posture those cases in an unfavorable manner. Defendants, wielding greater resources, are usually capable of purchasing big-firm legal representation, accompanied by the large volume of offensive legal work often intended to delay proceedings, bury plaintiffs' counsel in paper, and scare over-burdened courts into dismissing or limiting victims' claims. Plaintiffs' counsel can expect to invest substantial attorney time on legal issues and substantial hard costs on tools such as experts, factual research, and translation services (for foreign parties). Examples of such defense tactics can be seen in the cases filed for the compensation of victims of Nazi-era persecution. Plaintiffs' counsel in these recently-resolved class actions in United States courts collectively expended tens of millions of dollars in attorney time, or lodestar, and millions in hard costs.¹ The

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1. The author was one of the principal plaintiffs' counsel responsible for prosecuting Nazi-era cases against various European entities, and has firsthand experience and knowledge of the costs associated with the prosecution of that and other human rights cases.

Nazi-era cases settled at a relatively early stage of litigation;² the costs would have been many times greater if plaintiffs had gone all the way to trial, and then had to enforce a litigated judgment.

International human rights law, combined with the rules of civil procedure and statutes and case law, provide technical guidelines for evaluating and framing potential human rights claims for litigation in the United States. United States courts are not able to resolve every dispute. Limits on personal and subject matter jurisdiction demarcate the constitutional limits on the types of matters that may be brought in a United States court. In addition, there are discretionary doctrines, such as *forum non conveniens*, act of state, international comity, and political question, that often prompt United States courts to decline to exercise jurisdiction, even where it exists. Statutes and treaties also limit the ability of courts to provide justice as to particular categories of potential defendants, such as governmental entities or defendants that have negotiated waivers of liability with the United States government. And courts are not willing to treat all claims on a class basis, even where the harms alleged were clearly directed at and perpetrated against large groups of persons.

In addition, practical considerations—including the judge's prior experience and biases, the relevant political interests (such as the social, political and/or economic status of the accusers and accused), and the ability of victim's advocates to generate publicity and public sympathy—impact a potential human rights class action's probability of success. A practitioner must carefully weigh these and other factors before undertaking not only the enormous investment required by this complex field, but also the risk of creating bad law or diverting resources that might be better spent on non-judicial avenues for obtaining redress, or on other worthy causes.

Victims' groups often simultaneously pursue multiple mechanisms to achieve justice for past abuses, including public relations, legislative activity, and old-fashioned grass roots activism or pro-

2. The Swiss banks litigation, *In re Holocaust Victim Assets Litigation*, settled after briefing and argument but before any ruling on motions to dismiss the pleadings. See 105 F. Supp. 2d at 142. Similarly, only one of the fifty-three class actions against German, Austrian or French entities proceeded past motions to dismiss before it was settled. See *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000). The claims against the French banks proceeded to the most advanced stage, in which a court actually ruled upon and denied motions to dismiss, and in which the parties were embarked on merits discovery at the time of settlement. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

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test.³ Litigation is often considered to be one part of an overall strategy for resolving disputes over compensation or the need for changes in policies or practices. Victims' advocates must be wary of being dazzled by the publicity and morale boost afforded by the filing of a legal "complaint," or the headlines describing the rare judgment or large-dollar settlement in a human rights case. The case law is riddled with the legal equivalent of train wrecks, where victims' claims have been dismissed on numerous grounds,⁴ resulting in a loss of resources and loss of momentum for the victims' movement. Conversely, there is also a danger in victims' advocates' being too timid, and failing to creatively use the judicial system to obtain justice, even in tough cases.

No one can predict with certainty the outcome of any case; therefore, the decision to use litigation is often a difficult judgment call. This Article is intended to provide a brief overview of some of the key factors that affect the decision of whether to file a human rights class action case, and to identify some of the legal and extra-judicial tools that affect the prospects for a successful outcome.

I.

HISTORICAL RESEARCH/INFORMAL DISCOVERY

Before filing a human rights class action complaint to address past abuses, counsel must conduct a factual inquiry both to identify with as much specificity as practicable the parties and precise conduct to be addressed and to evaluate the factors discussed below. Practitioners can review public archives, conduct Internet research, and interview percipient or potential witnesses, and can create a detailed picture of the parties and events in question.⁵

3. See, e.g., JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002) (describing the various tools utilized by victims' advocates to achieve resolution of Nazi-era claims).

4. See, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 202, 205 (2d Cir. 1987) (dismissing on grounds of *forum non conveniens*); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1164-65 (N.D. Cal. 2001) (barring action on grounds of expired statute of limitations and sovereign immunity). Several of the grounds for dismissal are discussed in greater depth *infra*.

5. Although the advice to conduct historical research prior to filing seems relatively obvious and mundane, lawyers often file prior to having completed a factual investigation, such that the complaint must be revised and the class must be redefined during the course of the litigation. Although not ideal, this is sometimes unavoidable, either because information is not readily available, or because the plaintiffs are aged or infirm and need quick relief. Any research, especially interviews of potential witnesses, must be conducted within applicable ethical constraints.

In some circumstances involving abuses of human rights, the general outlines of the abuse are well-documented in press reports or through victim testimonials. The more difficult task for the victims' advocate is identifying responsible parties against whom a meaningful judgment can be obtained and over whom a United States court is likely to exercise jurisdiction. For example, in the Nazi-era slave labor litigation, plaintiffs sued only a fraction of the German companies that were involved in the use of slave labor during the Holocaust;⁶ plaintiffs sued those companies that they believed had sufficient contacts with the United States to justify an exercise of personal jurisdiction by the court over those defendants.

II. STATUTES OF LIMITATIONS

Often, it takes many more years than the statutes of limitations typically contemplate for victims of human rights abuses—whose lives are often shattered by the abuse—to develop the wherewithal and resources to actually pursue litigation. This inevitable delay can create obstacles to litigation. For example, plaintiffs who should have known of claims but failed to file them within the ten-year statute of limitations on federal human rights claims under the Torture Victim Protection Act⁷ or the Alien Tort Claims Act (ATCA)⁸ are forced to rely upon other theories.⁹ There are a number of sources that can provide useful theories to overcome a potential statute of limitations barrier: treaties, continuing violations, principles of equitable tolling, and legislation.

In the Nazi-era cases against German entities involving slave labor, plaintiffs relied upon treaties that, they argued, did not permit claims against German entities to be pursued for nearly fifty years, and therefore the claims filed against German entities in the mid-1990s were timely.¹⁰ Plaintiffs argued that, through the London Debt Agreement of 1953,¹¹ the international community

6. *See, e.g.*, In re Nazi Era Cases Against German Defendants Litig., 198 F.R.D. at 448–49 (Appendix A, listing cases filed).

7. 28 U.S.C. § 1350 (1948), *amended by* Torture Victim Protection Act of 1991, Pub. L. No. 102-256 (1992).

8. 28 U.S.C. § 1350.

9. *See, e.g.*, *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002) (holding that ATCA claims have a ten-year statute of limitations).

10. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 466 (D.N.J. 1999).

11. *See* Agreement on German External Debts, February 27, 1953, 4 U.S.T. 445, 449. The London Debt Agreement was signed on February 27, 1953 by the Federal Republic of Germany (FRG) on the one hand and, on the other hand, many of the victorious Allies. The main purpose of the Treaty was to enable the

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adopted a plan that structured Germany's World War II legal obligations to enable the economy to recover its strength, provided an opportunity for the complete resolution of wartime claims pursuant to bilateral state-to-state negotiations, and expressly preserved but deferred the claims of *private* liabilities until the close of the reparations negotiations.¹² Plaintiffs argued that those deferral provisions were lifted by the ratification of the "Two-Plus-Four Treaty" in 1991,¹³ which was subsequently recognized by German courts.¹⁴ In 1997, the first of several German courts ruled that the Treaty on the Final Settlement with Germany had lifted the moratorium on individual claims against German companies for compensation arising out of World War II.¹⁵

However, most victims of persecution do not benefit from treaties that expressly defer the date by which claims can or should be filed.¹⁶ Instead, plaintiffs must typically rely on other theories to demonstrate the timeliness of the filing of their claims. In *Bodner v. Banque Paribas*, a Nazi-era case pursued against French banks, the court found that plaintiffs' claims—arising out of alleged efforts, starting in the 1940s, by the banks to convert the assets of victims of Nazi persecution—were timely-filed based on two different tolling theories.¹⁷ First, the court found that plaintiffs had properly pled a continuing violation of international law that postponed accrual of the claim until the last offense was committed.¹⁸ Plaintiffs successfully argued that the time had not yet begun to accrue on plaintiffs' claims because of "defendants' alleged continued denial and failure to return the looted assets to plaintiffs" ¹⁹

FRG to establish normal economic relations with other nations and to settle its external debt. *Iwanowa*, 67 F. Supp. 2d at 452–53.

12. *Iwanowa*, 67 F. Supp. 2d at 453.

13. "On September 12, 1990, the F.R.G. and the [German Democratic Republic] on one side and the U.S., U.K., France and the U.S.S.R. on the other, entered into the Two-Plus-Four Treaty, effective March 15, 1991." *See id.* at 454. This treaty "reunified West and East Germany and terminated the occupying Allied Powers' rights and responsibilities over Germany." *Id.*

14. *Id.* at 455.

15. *See id.* at 454–55 (citing Krakauer I, LG Bonn (1997), at 24–27).

16. Indeed, the trial court in *Iwanowa* held that because Ford Motor Co., unlike its co-defendant and German subsidiary Ford Werke, was not covered by the various treaties deferring the filing of claims against German entities, that plaintiffs' claims against Ford Motor Co., the United States corporation, could therefore not be deemed to have been deferred by those treaties. *See id.*

17. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134–36 (E.D.N.Y. 2000).

18. *Id.* at 134.

19. *Id.*

Second, the trial court in *Bodner* found that the claims were timely based on equitable tolling principles, implicated by plaintiffs' allegations that the defendants had engaged in conduct that concealed from the plaintiffs the existence of their claims.²⁰

In this case, plaintiffs allege a policy of systematic and historical denial and misrepresentation concerning the custody of the looted assets to plaintiffs and the public at large. Plaintiffs assert that defendants continue to deny their possession of the assets, the full scope of their role in the plunder of the assets of the French Jews, and even the existence of some of the accounts in question. Plaintiffs were misled as to whether defendant banks retained their assets or transferred them to third parties. Plaintiffs argue it would have been impossible for them to learn critical facts underlying their claim, including which of the banks was in possession of their assets, absent cooperation from the defendants. Finally, plaintiffs argue that the Holocaust, World War II, and the subsequent diaspora of the French Jewish community constitute extraordinary circumstances in and of themselves sufficient to invoke the doctrine of equitable tolling.²¹

The court grounded its holding in the well-established principle that the statute of limitations may be tolled "in cases alleging causes of action other than fraud where the facts show that the defendant engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of the cause of action."²²

Victims' advocates have also turned to legislation to extend statutes of limitations for the filing of certain categories of claims. The California legislature has been particularly generous about extending statutes of limitations to allow particular persecuted groups, on equitable grounds, to file suit for claims that would otherwise likely be deemed untimely. For example, legislation was passed extending the statute of limitations for persons who were forced to perform slave labor during World War II, as well as for victims of the Armenian genocide.²³ If the court finds that the stat-

20. *Id.* at 135.

21. *Id.*

22. *Id.* But see *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 467-68 (D.N.J. 1999) (rejecting equitable tolling arguments on the ground that the alleged misrepresentations regarding Ford Motor Company's involvement in the German slave labor campaign were insufficient to be deemed a basis for tolling claims that became untimely many years before the misstatements were made).

23. CAL. CIV. PROC. CODE § 354.6 (West 2002), held unconstitutional by *In Re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001); CAL. CIV. PROC. CODE § 354.4 (2002).

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ute of limitations is procedural, and applies to all plaintiffs who are properly brought before a California court, then this legislation can be a powerful tool for avoiding possible statute of limitation pitfalls.²⁴

III.

IDENTIFIABLE DEFENDANTS AND ASSETS

Prospective litigants must, as a threshold matter, identify a responsible party and frame relief that can be effectively obtained from that party in a United States court. Often, the parties most directly responsible for torture, genocide, mass conversion of assets, and other international law violations are not susceptible to suit in a United States court. Among other things, the massive social upheaval that often accompanies periods of intense and widespread human rights violations makes it difficult to identify a specific wrongdoer with assets. Additionally, the United States court often cannot exercise personal jurisdiction over the defendant.²⁵ Nevertheless, private corporations, many of which are multinational, often either facilitate or illicitly profit from abuses.²⁶ As a result, corporations doing business in the United States—especially those that converted abuse victims' assets, or to which specific bad acts can be attributed—are the easiest entities to bring to justice in United States courts.

IV.

PERSONAL AND SUBJECT MATTER JURISDICTION

A. *Personal Jurisdiction*

A plaintiff bears the ultimate burden of establishing jurisdiction over a defendant by a preponderance of the evidence.²⁷ However, when a motion is made to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2) before substantial discovery

24. See, e.g., *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 46 Cal. Rptr. 2d 33, 39 (Cal. Ct. App. 1995). Of course, such legislation is not helpful to plaintiffs suing a defendant with no jurisdictional contacts with California, such that the court is unable to extend personal jurisdiction over the defendant.

25. See, e.g., Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 496–501 (2002).

26. See, e.g., Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 49 (2002).

27. *Hoffritz For Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 57 (2d Cir. 1985); *Schenker v. Assicurazioni Generali S.p.A., Consol.*, 2002 U.S. Dist. LEXIS 12845 at *4–5 (S.D.N.Y. July 15, 2002).

and prior to an evidentiary hearing, plaintiffs need make only a *prima facie* showing that personal jurisdiction exists.²⁸ Prior to substantial discovery, plaintiffs may rely on their allegations, which are taken as true.²⁹

Many defendants, especially sophisticated multinational corporations, have structured themselves (often through separate regional subsidiaries or affiliates) to create jurisdictional quagmires for potential plaintiffs seeking to address abuses that occur outside of the United States. Unless illicitly converted assets can be specifically traced to a United States entity, or unless the United States entity was actually an active participant in the misconduct, victims' advocates must be careful to anticipate the jurisdictional problems that come from the corporate shell game. Victims' advocates often make the mistake of filing suits against the wrong foreign defendant or the holding company of a multinational conglomerate without undertaking the analysis necessary to identify the truly responsible entity. Plaintiffs' counsel have also sometimes mistakenly named an American subsidiary as a defendant on the incorrect assumption that the parent is automatically liable for the misconduct of a subsidiary, and without properly pleading a basis for liability of the United States defendants.³⁰

Plaintiffs in the Nazi-era slave labor cases against German entities argued certain theories regarding unjust enrichment and conversion. Plaintiffs based arguments regarding personal jurisdiction on the theory that the illicitly-obtained gains from human rights violations in Europe were transferred to North American entities created after the war;³¹ this was not tested in the course of the litigation. None of the Holocaust-era decisions reached after 1996 addressed the asset-tracing jurisdictional claims. In addition, as to certain United States companies operating German subsidiaries during the war, Nazi-era litigation plaintiffs alleged that the parent companies were liable for having cooperated with the Nazis. For example, plaintiffs alleged that "[a]lthough the Nazi party nationalized or confiscated many American companies in Germany, the Nazis did not confiscate Ford Werke as enemy property; instead, the

28. See, e.g., *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1108 (2d Cir. 1997).

29. See *id.*

30. See, e.g., *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (affirming dismissal of claims against foreign company on personal jurisdiction grounds, where the only alleged basis for jurisdiction was the presence in United States of a subsidiary that was not the agent or alter ego of the parent company).

31. See, e.g., *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 253-54 (D.N.J. 1999) (noting that plaintiffs sought to trace illicit profits from slave labor).

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Nazis allowed Ford to continue its controlling ownership of Ford Werke” throughout the war, including during the period of time that Ford Werke participated in the Nazi slave labor scheme of which plaintiff Iwanowa was a victim.³² In this way, the plaintiffs attempted to expand the jurisdictional reach of the court to the parent company.³³

In a diversity action, which many human rights claims are, personal jurisdiction over a defendant in federal court is determined by reference to the jurisdictional laws of the state in which the court sits.³⁴ If the exercise of jurisdiction would be valid under the forum state’s law, the court must then determine whether such exercise is consistent with the Due Process Clauses of the United States Constitution’s Fifth and Fourteenth Amendments.³⁵ In *Schenker*, for example, the court dismissed claims against two Swiss entities because plaintiffs were unable to establish their allegations under New York’s procedural rules.³⁶ According to the court, plaintiffs pleaded neither the factual grounds for an exercise of general personal jurisdiction over a non-domiciliary corporation that is “doing business” in the State of New York,³⁷ nor that there was a basis for specific jurisdiction arising out of the defendants’ business or conduct within the state giving rise to plaintiffs’ claims.³⁸

It is not sufficient to allege merely that a foreign bad actor has United States subsidiaries or affiliates. Instead, to provide the court a meaningful basis for the exercise of personal jurisdiction, plaintiffs must allege either a “mere department” or agency relationship between the American subsidiary and foreign affiliates.³⁹ For instance, to make a *prima facie* case that a New York company doing business in New York is the agent of a foreign company, plaintiffs

32. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 433 (D.N.J. 1999).

33. *Id.* The plaintiffs’ claim was dismissed on other grounds.

34. *Beacon Enters. v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983).

35. *See Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997).

36. *Schenker v. Assicurazioni Generali S.p.A., Consol.*, 2002 U.S. Dist. LEXIS 12845 at *36 (S.D.N.Y. July 15, 2002).

37. The judicial indicia under New York law of a corporation doing business include (1) the existence of an office in New York, (2) the solicitation of business in New York, (3) the existence of bank accounts or other property in New York, and (4) the presence of employees in New York. *See, e.g., Hoffritz For Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55, 58 (2d Cir. 1985). No single factor is dispositive. *See Palmieri v. Estefan*, 793 F. Supp. 1182, 1187 (S.D.N.Y. 1992).

38. CPLR § 302(a)(1) provides the standard for determining whether personal jurisdiction exists. *See Hoffritz*, 763 F.2d at 58. *See generally* *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 787 (2d Cir. 1999) (discussing jurisdictional standards).

39. *See Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998).

must allege that the New York company does the business in New York that the foreign company would do through its own officials if it did not have a representative in New York to perform the functions.⁴⁰

B. Subject Matter Jurisdiction

For misconduct that falls within the rubric of a violation of international law, such as the facilitation of torture or genocide, the United States federal courts have subject matter jurisdiction in cases involving both private and state actors.⁴¹ The Alien Tort Claims Act⁴² was originally adopted in 1789 as part of the original Judiciary Act. It provides that “the 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.”⁴³ However, the statute was rarely used until recently: “[f]or almost two centuries, the statute lay relatively dormant, supporting jurisdiction in only a handful of cases.”⁴⁴

*Wiwa v. Royal Dutch Petroleum Co.*⁴⁵ lists a number of decisions that, over the past twenty years, have demonstrated the increased willingness of courts to use the previously dormant ATCA to provide a basis for the prosecution of human rights claims in United States courts.⁴⁶ These decisions have breathed real life and force

40. See *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967). To show a subsidiary is a “mere department” of its parent, the party must show, “first, ‘common ownership’—which is ‘essential’—; second, ‘financial dependency of the subsidiary on the parent corporation;’ third, ‘the degree to which the parent corporation interferes in the selection and assignment of the subsidiary’s executive personnel and fails to observe corporate formalities;’ and fourth, ‘the degree of control over marketing and operational policies of the subsidiary exercised by the parent.’” *Jazini*, 148 F.3d at 184–85 (citing *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*, 751 F.2d 117 (2d Cir. 1984)).

41. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999).

42. See generally, Russell G. Donaldson, *Construction and Application of Alien Tort Statute (28 USCS § 1350)*, *Providing for Federal Jurisdiction over Alien’s Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (1993).

43. 28 U.S.C. § 1350 (1948), amended by Torture Victim Protection Act of 1991, Pub. L. No. 102-256 (1992).

44. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000).

45. *Id.*

46. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); *Kadic*, 70 F.3d at 236–37 (alleging torture, rape, and other abuses orchestrated by the Bosnian-Serbian military leader); *In re Estate of Ferdinand Marcos, Human Rts. Litig.*, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former president of Philippines); *Tel-Oren v. Libyan*

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into the 1789 act.⁴⁷ For example, in *Filartiga v. Pena-Irala*, the court held that torture perpetrated under the color of official authority violates universally accepted norms of international human rights law, which in turn constitutes a violation of the domestic law of the United States, giving rise to a claim under the ATCA whenever the perpetrator is properly served within the borders of the United States.⁴⁸ In *Kadic v. Karadzic*, the Second Circuit held that the ATCA reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.⁴⁹

The Torture Victim Prevention Act, passed in 1991, not only codified the Second Circuit's holding in *Filartiga* that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, but extended it:⁵⁰

While the 1789 Act expressed itself in terms of a grant of jurisdiction to the district courts, the 1991 Act creates new rights in that it (a) makes clear that it creates *liability under U.S. law* where under "color of law, of any foreign nation," an individual is subject to torture or "extra judicial killing," and (b) extends its remedy not only to aliens but to any "individual," thus covering citizens of the United States as well.⁵¹

Plaintiffs can assert the federal law human rights claims as well as state law claims over which the federal court has pendant jurisdiction.⁵² The overwhelming weight of authority recognizes that customary international laws are an integral part of the federal common law.⁵³

In the Nazi-era litigation, plaintiffs in the various cases against German entities argued that the federal court had jurisdiction by

Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (alleging torture by Paraguayan officials); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (alleging abuses by Guatemalan military forces).

47. See *Wiwa*, 226 F.3d at 104.

48. 630 F.2d at 880, 884-86.

49. See *Kadic*, 70 F.3d at 239-40, 245.

50. 28 U.S.C. § 1350 (1948), amended by Torture Victim Protection Act of 1991, Pub. L. No. 102-256 (1992).

51. *Wiwa*, 226 F.3d at 104-05; see also 28 U.S.C. § 1350.

52. The assertion of state law claims raises complex choice of law issues not addressed in this article.

53. See, e.g., *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); *Filartiga*, 630 F.2d at 877-78.

alleging that the court possessed subject matter jurisdiction under both federal question and diversity.⁵⁴ Diversity jurisdiction was supported by allegations that each named plaintiff was diverse from each named defendant (United States citizens suing foreign entities), along with allegations clearly exceeding the minimum amount in controversy of \$75,000 per plaintiff, exclusive of interest and costs. For federal question jurisdiction, plaintiffs alleged violations of international treaties, human rights law, and customary international law enforceable as federal common law.⁵⁵

Victims' advocates need not base their international law claims on a particular treaty that addresses the specific perpetrators. In Nazi-era cases, plaintiffs did not rely on any one particular treaty to provide a basis for their human rights claims. Rather, plaintiffs alleged that defendants violated international law as evidenced by various treaties.⁵⁶ International law arises not only from treaties or agreements between nations, but also from customary international law, which, unlike treaties, is found not in the text of written agreements but rather derived "from a general and consistent practice of states followed by them from a sense of legal obligation."⁵⁷

V.

ANTICIPATING THE ASSERTION OF DISCRETIONARY DOCTRINES SUPPORTING DISMISSAL

In human rights claims involving activities outside the United States, or historical wrongs, defendants inevitably assert various doctrines that have prompted many courts to stay or dismiss litigation in United States courts or to decline to hear matters. Four of these doctrines are particularly relevant to human rights litigation. *Forum*

54. See, e.g., *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 272–73 (D.N.J. 1999) (finding jurisdiction under 28 U.S.C. § 1332).

55. For the authority to find subject matter jurisdiction under §1331 on human rights claims, plaintiffs cited, *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), and *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957). Plaintiffs also asserted supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

56. *Burger-Fischer*, 65 F. Supp.2d at 272–73.

57. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1986); see also, *Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that the courts ascertained customary international law by looking to "the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators"); *Filartiga*, 630 F.2d at 882 (relying extensively on declarations and treaties as evidence of customary international laws' recognition of the prohibition of torture); cf. U.N. GAOR, 2d Part, 1st Sess., at 188, U.N. Doc. A/64/Add.1 (1947).

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non conveniens, a judge-created doctrine, allows a court to find that a United States court is not a convenient or reasonable forum for the resolution of the claim, even where it otherwise has proper jurisdiction. Defendants use the act of state doctrine to show that challenging their behavior would be akin to challenging the practice of a sovereign government. And both the doctrines of international comity and political question can be used to prompt courts to defer to the prior decisions of foreign courts or entities, or to the executive or legislative branches of the United States government.

A. *Forum Non Conveniens*

In 1947, the Supreme Court issued two decisions laying out the groundwork for *forum non conveniens* analysis: *Gulf Oil Corp. v. Gilbert*⁵⁸ and *Koster v. American Lumbermens Mutual Casualty Co.*⁵⁹ *Forum non conveniens* is a doctrine which grants the court discretion in rare instances to “dismiss a claim even if the court is a *permissible* venue with proper jurisdiction over the claim.”⁶⁰ Courts engage in a two-step analysis under the doctrine developed by *Gilbert* and *Koster*. The first step is to determine if an adequate alternative forum exists.⁶¹ If so, courts must then balance a series of factors involving the private interests of the parties in maintaining the litigation in the competing fora and any public interests at stake.⁶²

Defendants rarely win dismissal on *forum non conveniens* grounds. The party seeking dismissal under the doctrine has the burden to establish that an adequate alternative forum exists, and then to show that the pertinent factors tilt “strongly” in favor of trial in the foreign forum;⁶³ if not, then “the plaintiff’s choice of forum should rarely be disturbed.”⁶⁴

58. 330 U.S. 501 (1947).

59. 330 U.S. 518 (1947).

60. P.T. United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998); *see also Gilbert*, 330 U.S. at 507.

61. *See Gilbert*, 330 U.S. at 506–07.

62. *Id.* at 508–09; Piper Aircraft Co. v. Reyno, 454 U.S. 235, 265 (1981).

63. *Gilbert*, 330 U.S. at 508.

64. *Id.* Parties defending against the assertion of the *forum non conveniens* doctrine should be cognizant of their right to conduct discovery in connection with the *forum non conveniens* factors described above. *See, e.g., Panama Processes, S.A. v. Cities Serv. Co.*, 650 F.2d 408, 416 n.1 (2d Cir. 1981). Because *forum non conveniens* is a factual determination, appellate courts have in certain circumstances remanded actions back to the trial court for development of a proper record on which to base a determination. *See, e.g., El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996).

B. Act of State

“Act of state issues only arise when a court *must decide*—that is, when the outcome of a case turns upon—the effect of official action by a foreign sovereign.”⁶⁵ Defendants in human rights cases typically assert that their conduct was consistent with policies of a foreign sovereign, and that to challenge the practices would be to challenge the sovereign government.⁶⁶ The party asserting the act of state doctrine has the burden of establishing that an alleged abuse meets the two criteria necessary to be considered an “act of state.”⁶⁷ First, the party asserting the doctrine must “offer some evidence that the government acted in its sovereign capacity and some indication of the depth and nature of the government’s interest.”⁶⁸ Second, the party must show that the questions presented were committed by constitutional authority to another branch.⁶⁹

Once a defendant in a human rights suit establishes that an act of state has occurred and is in question, and that the validity of the state action must be judged to resolve the dispute between the parties, the court engages in a balancing approach to determine whether the doctrine should apply to bar prosecution of the action.⁷⁰ Among other factors, the party asserting the doctrine must establish that relations between the United States and another government would be adversely impacted if the court were to decide the matter, and that the issues involved are best left to the executive or legislative branches to avoid embarrassment.⁷¹ In fact, the act of state doctrine can be deemed inapplicable where there is a treaty or other unambiguous agreement setting forth controlling legal principles violated by the conduct at issue.⁷² On the other hand, some

65. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 406 (1990).

66. *Id.* at 405.

67. *See, e.g., Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992).

68. *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

69. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427–28 (1964) (explaining that the “continuing vitality [of the Act of State doctrine] depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of Government on matters bearing upon foreign affairs”).

70. *See, e.g., Kirkpatrick*, 493 U.S. at 409; *Sabbatino*, 376 U.S. at 428.

71. *See, e.g., Allied Bank Int’l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520–21 (2d Cir. 1985).

72. *See, e.g., Sabbatino*, 376 U.S. at 428.

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commentators have asserted that a general human rights exception to the act state doctrine exists.⁷³

C. International Comity

Litigants must be aware of the doctrine of international comity, which, in the judicial context, refers to the spirit of cooperation in which a tribunal of one country approaches the resolution of cases affecting the law and interest of another country.⁷⁴ The doctrine applies where the courts of another country have already ruled upon the issues presented by litigants contemplating filing a human rights claim in a United States court.⁷⁵ In *Jota v. Texaco, Inc.*, the Second Circuit noted it is critical to address, in connection with a comity analysis, whether an adequate alternative forum exists in which the objecting party has consented to jurisdiction.⁷⁶ Furthermore, in *Hartford Fire Insurance Co. v. California*, the Supreme Court considered with respect to this issue whether a true conflict existed between the laws of the United States and a foreign jurisdiction.⁷⁷ Although United States courts sometimes defer to the decisions of other courts, again, a balancing approach is involved which often militates against deference. For example, in *Hartford Fire Insurance Co.*, the United States Supreme Court permitted an antitrust action to proceed against insurance companies based in the United Kingdom, even though the United States and British laws and policies regarding antitrust differed in significant ways, and the companies were being prosecuted for activities that were legal in Britain.⁷⁸

It is important to note that this doctrine “neither impels nor obliges the United States . . . court[s] to decline jurisdiction in a particular case.”⁷⁹ Plaintiffs should be particularly wary of efforts by defendants to assert the appropriateness of dismissal on international comity grounds, based merely on the fact that a foreign government has established a commission to study or investigate alleged abuses of human rights. The *Bodner* court specifically noted

73. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 57, § 443 cmt. c.

74. See, e.g., *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543–44 n.27 (1987).

75. *Id.*

76. 157 F.3d 153, 160 (2d Cir. 1998).

77. 509 U.S. 764, 798 (1993).

78. *Id.* at 798–99. There is no one set of factors that courts consider, but in *Hartford Fire Ins. Co.*, the Court found that conduct by foreign entities that was directed at the United States outweighed concerns regarding supposed conflicts. See *id.*

79. See *Bodner v. Banque-Paribas*, 114 F. Supp. 2d 117, 129 (E.D.N.Y. 2000).

that it found no support for the dismissal of litigation in deference to an informal historical commission or other similar type of investigative body.⁸⁰

D. Political Question

The political question doctrine allows a court to decline to adjudicate a dispute because it raises questions best addressed by the political branches of government.⁸¹ In determining whether a matter raises political questions that the court must or should decline to address, courts typically examine factors including:

(1) a demonstrable constitutional commitment of the issue to a coordinate political department; or (2) the lack of judicially discoverable and manageable standards for resolving [the dispute]; or (3) the impossibility of making a decision without first making a policy determination of the type clearly outside judicial discretion; or (4) the court's inability to resolve the issue without expressing lack of respect to the coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potential for embarrassment from multifarious pronouncements by various departments [of the United States government] on one question.⁸²

VI.

EFFECT OF PRIOR TREATIES

Claims may be either protected or preempted by treaties signed by the United States or the country of the victim's origin, and a victim's advocate must be aware of the precise scope and effect of such Treaties. For example, courts have held that the claims of United States prisoners of war that were forced to perform slave labor for Japanese companies during World War II are preempted

80. *See id.*

81. *See Baker v. Carr*, 369 U.S. 186, 208–37 (1962); *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989, 995 (D.C. Cir. 1966).

82. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999). Though plaintiffs vigorously argued that the disputes involved in the Nazi-era slave labor cases were not covered by a coordinate branch of government such as the Executive Branch, their arguments were rejected by the trial court in New Jersey. *See id.* at 489. In contrast, the New York Federal Court rejected defendants' justiciability arguments regarding the act of state doctrine requiring deference to the Executive Branch in questions of international or foreign political significance in the context of Nazi-era litigation against French banks. *See Bodner*, 114 F. Supp. 2d at 130.

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by treaties between the United States and Japan.⁸³ Conversely, a California court found that persons hailing from other countries, such as Korea, were covered by treaties that do not preclude their claims against Japanese companies for using slave labor during World War II.⁸⁴

The United States government has expressly waived its citizens' private claims arising from the conduct of certain foreign actors.⁸⁵ For example, in *Dames & Moore*, the Court considered agreements between the United States and Iran, embodied in two declarations of the Republic of Algeria.⁸⁶ Pursuant to this convention, the United States agreed to terminate all private claims brought in the United States courts and to bar such future claims against Iran and Iranian corporate entities as the condition for the release of American hostages. Claimants were required to use an alternative forum—the Iran-U.S. Claims Tribunal in The Hague, Netherlands.⁸⁷

In *Dames & Moore*, a specific forum was provided, and a mechanism for the resolution of claims was clearly established.⁸⁸ Despite these narrowing criteria, defendants nevertheless attempt to rely on that case even where there is no establishment of a governmental alternative dispute resolution mechanism, and where the plaintiffs would be without effective remedy absent resolution by a United States court. For example, in *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*,⁸⁹ Judge Michael B. Mukasi denied motions to dismiss on *forum non conveniens* grounds, where the defendants had argued that plaintiffs should be required to defer to the existence of an ad hoc, non-governmental private dispute resolution mechanism for Holocaust-era insurance claims known as

83. See *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 948–49 (N.D. Cal. 2000).

84. See *Jeong v. Onoda Cement Co.*, No. BC 217805, at 3, 18 (Ca. Super. Ct. L.A. Cty. filed Sept. 14, 2001) (denying motions for judgment on the pleadings where defendants averred, among other things, that the Treaty of Peace with Japan (1951) barred private claims against Japanese corporations regarding their use of slave labor during World War II). The author is one of plaintiffs' counsel in the *Jeong* case. The order denying motions for judgment on the pleadings is on appeal.

85. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 656 (1981) (upholding suspension of private law claims against Iran); *United States v. Pink*, 315 U.S. 203, 234 (1942) (upholding the suspension of certain private law claims against the Soviet Union).

86. *Dames & Moore*, 453 U.S. at 664.

87. *Id.* at 665.

88. *Dames & Moore*, 453 U.S. 654.

89. MDL No. 1374, M21-89 (MBM), 2002 U.S. Dist. LEXIS 18127 (S.D.N.Y. Sept. 25, 2002).

the International Commission on Holocaust-Era Insurance Claims (ICHEIC).⁹⁰ As the court noted: “Because of its private status, it is not clear that a nongovernmental forum such as ICHEIC can ever constitute an adequate alternative forum for the purposes of *forum non conveniens*.”⁹¹

Similarly instructive is the experience of claimants against German entities arising out of Nazi-era misconduct; as noted above, treaties between the United States and Germany following the war were interpreted by plaintiffs’ counsel to expressly preserve claims against the running of the statute of limitations following World War II.⁹² The plaintiffs in *Burger-Fischer* alleged that Degussa, then and now a major German corporation, actively cooperated with the Nazi regime from 1933 until 1945.⁹³ Part of this cooperation included receiving “gold taken from jewelry, precious metal, coins, eyeglasses and teeth of those being persecuted.”⁹⁴ Plaintiffs alleged that Degussa was “fully aware of the sources of the gold and nevertheless solicited the business of processing and refining it, an important source of gold needed to finance prosecution of the war.”⁹⁵ They further alleged that “Degussa utilized slave laborers in various of its manufacturing and refining facilities, and that it was a principal source of Zyklon B, the agent used in the gas chambers”⁹⁶ The theories of recovery for the proposed plaintiff class—Holocaust victims and their heirs whose assets or labor were converted by Degussa—included “civil assault and battery, conversion, unjust enrichment, accounting, violation of human rights and customary international law . . . and conspiracy with the Nazi regime” and with other German corporations that had engaged in similar conduct.⁹⁷ These theories were asserted under both United States and German law, with the principal theories based on human rights law incorporated into the federal common law.⁹⁸

In *Burger-Fischer*, defendants contended that settlement with Germany resulting from the Two-Plus-Four Treaty was final, and thus precluded individual reparations claims, despite the explicit

90. *Id.* at *4.

91. *Id.* at *23.

92. See *Agreement on German External Debts*, *supra* note 11, at 449.

93. 65 F. Supp. 2d 248, 252 (D.N.J. 1999).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 272–73. *Burger-Fischer* also dealt with similar claims brought against Siemens AG, another German corporation, which were coordinated in front of the same judge.

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deferral of such claims in the London Debt Agreement, and despite the Two-Plus-Four Treaty's silence on extinguishment of claims.⁹⁹ The trial court rejected the plaintiffs' contention that the plaintiffs' claims were not subsumed under treaties that pre-dated the London Debt Agreement that, the court held, extinguished all reparations claims.¹⁰⁰ The *Burger-Fischer* court noted that plaintiffs had not disputed the principle of international law that nations are able to control the claims of their citizens in the context of negotiation of a peace treaty.¹⁰¹ Reviewing the relevant treaties, the court found that a 1954 "Transition Agreement" provided a mechanism for the payment of all war related claims through German-initiated programs.¹⁰² The court held that what plaintiffs really criticized was Germany's compliance with the Transition Agreement and Germany's failure to provide complete reparations.¹⁰³ The adverse holding for victims' advocates in the *Burger-Fischer* case does not apply outside of a situation in which there had been a war, resolved by treaties; the opinion expressly distinguishes cases arising out of human rights abuses that did not occur in war time and were not resolved by post-war treaties.¹⁰⁴

VII. FORUM SELECTION

When there is a choice of forum, victims' advocates can review the law of the possible alternatives, as well as other factors, to make sure the clients' claims are pursued in the most beneficial jurisdiction. Different appellate jurisdictions in the United States have applied the *forum non conveniens* doctrine with varying degrees of liberality to dismiss claims involving foreign nationals.¹⁰⁵

99. *Id.*

100. *Id.* at 278–79.

101. *Id.* at 276.

102. *Id.* at 279.

103. *Id.*

104. *Id.* at 273. While the *Iwanowa* trial court in New Jersey reached a similar result to the *Burger-Fischer* court, it had a different view of the nature and meaning of the relevant treaties, and found that the London Debt Agreement did in fact defer and preserve whatever individual reparations claims existed arising out of the misconduct of German actors during World War II. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 459–60.

105. *See, e.g.*, William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1688 (1992) (noting variation in law of circuits).

VIII.
FRAMING AN IDENTIFIABLE AND MANAGEABLE
CLASS UNDER FEDERAL RULE OF CIVIL
PROCEDURE 23

Rule 23 of the Federal Rules of Civil Procedure, regarding class actions, sets forth the prerequisites for class certification. It permits representative parties to sue on behalf of a class of similarly-situated persons where:

- (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.¹⁰⁶

In addition to satisfying the four prerequisites of Rule 23(a), listed above, a class must also satisfy one of the three provisions of Rule 23(b) in order for certification to be granted. As a general rule, classes seeking principally injunctive or equitable relief are typically certified under Rule 23(b)(1) or 23(b)(2), while classes seeking principally monetary relief or damages are normally certified under Rule 23(b)(3).¹⁰⁷

Most countries do not have a rule of civil procedure analogous to Federal Rule of Civil Procedure 23, and thus do not permit the aggregation and joint prosecution of multiple plaintiffs' claims.¹⁰⁸ These countries often have their own devices for adjudicating mass claims, but nothing as efficient from the plaintiffs' perspective as Rule 23.¹⁰⁹ Some claims are more naturally susceptible to adjudication under Rule 23, such as violations perpetuated in discrete geographic regions, against clearly-defined groups of people, over a

106. FED. R. CIV. P. 23(a).

107. See FED. R. CIV. P. 23(b); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613–20 (1997) (discussing the prerequisites for class certification under 23(b)(3) in both litigation and settlement contexts); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 162 n.7 (2d. Cir. 2001).

108. See, e.g., *Ansari v. N.Y. Univ.*, 179 F.R.D. 112, 116 (S.D.N.Y. 1998) (noting that there may be difficulty enforcing a class judgment abroad since many countries do not recognize Rule 23 judgments).

109. See, e.g., *In re Lernout & Hauspie Sec. Litig.*, 208 F. Supp. 2d 74, 91–92 (D. Mass. 2002) (noting that foreign jurisdictions' lack of class action statutes have played a role in denial of motions to dismiss on *forum non conveniens* ground); *Derensis v. Coopers & Lybrand Chartered Accountants*, 930 F. Supp. 1003, 1007 (D.N.J. 1996) (deeming Canada an inadequate forum because Canadian courts fail to recognize fraud-on-the-market theory and had just enacted a limited class action procedure statute which was at that time undeveloped).

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limited period of time, by a single entity, and employing the same mechanisms. These tend to be ideal cases for class treatment, as they allow victims' advocates to ask a federal court for discretionary certification of a class under Rule 23 (or the analogous state law rule if the claims are pursued in state court), as they meet the criteria enumerated there.¹¹⁰

More often, however, human rights violations occur in the context of tremendous social upheaval, involving practices that cut across large geographic regions involving multiple players employing different strategies to directly violate the rights, aid in the commission of violations, or convert the resources and assets of the victims in a way that violates international norms or creates other private causes of action. In these circumstances, it is incumbent upon plaintiffs' counsel, who intend to seek certification of a class of victims under Rule 23, to identify the victim classes and the types of misconduct that are best suited to Rule 23. Often this involves filing separate cases against different private entities for distinct types of misconduct on behalf of classes that constitute only a *subset* of the victim population. While this tends to create piecemeal litigation and pose additional costs upon plaintiffs' counsel and the court initially, it increases the chance that a contested class certification motion will be granted, and that the order granting certification will be upheld on appeal.

In the Swiss Banks litigation, plaintiffs' complaints initially pleaded for certification of relatively amorphous plaintiff classes in order to address distinct types of alleged Nazi-era misconduct by the Swiss Banks. Such behavior included facilitating slave labor, converting victim assets, and facilitating the laundering of assets looted from victim populations.¹¹¹ In connection with the settlement of that litigation, the parties stipulated to the certification of five distinct settlement classes, with each class covering specifically delineated types of claims and categories of victims.¹¹² Four of the five classes, for example, defined "Victims or Targets of Nazi persecution" as Jews, Jehovah's Witnesses, Romani, the physically and mentally disabled, and homosexuals—a definition that carved out other potential plaintiffs.¹¹³ Various groups excluded from these

110. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming the judgment in class trial of torture claims on behalf of the thousands of victims of the Marcos regime).

111. *See In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).

112. *See id.* at 143–44.

113. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 194 (2d Cir. 2000).

settlement classes, such as persons representing ethnic Poles who did not otherwise fit into the definition, filed appeals from the trial court's settlement orders. The Second Circuit affirmed the trial court's decisions regarding allocation of the settlement and the class definitions in that case.¹¹⁴ The Swiss class certification issues, of course, were addressed in a settlement context, which, even after *Amchem Products v. Windsor*,¹¹⁵ allows for more permissive certification of classes than might be acceptable for a litigation class.

IX. COMMUNITY CONNECTIONS

Class members in human rights abuse cases deserve and require a level of attention from counsel that is not always accorded in a typical class action case. Class actions are economically viable usually only if there is a streamlined process for communicating with class members other than through time-consuming individual contacts between counsel and the general victim population. Law firms pursuing mass litigation must have a structure in place for dealing with claimant inquiries at every stage of the litigation. Especially in cases involving large numbers of victims, the following things will help counsel satisfy the needs of a victim class for information:

- Establish a web site.
- Reach out to community groups, many of which are better able to communicate with victims than a law firm will ever be.
- Train paid staff or volunteers to handle telephone calls, using scripts or informational Question-and-Answer sheets that are regularly updated as new issues are presented.
- Keep all contacts on a database.
- Prepare and send regular newsletters or case status updates to persons who have contacted the advocate and/or to community groups.

Upon certification of a plaintiffs' class, the procedures for communicating with members of a class become dramatically more expensive; concurrently, the need to reach class members becomes more intense. If certification occurs on a contested motion prior to a settlement, plaintiffs' counsel typically pays for the cost of providing notice to the class. If certification occurs pursuant to a settle-

114. *Id.* at 203.

115. 521 U.S. 591 (1997) (finding constraints on class certification in the settlement context).

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ment, then the defendant typically pays for notice.¹¹⁶ There are rarely lists of class members that can be used to provide direct mail notice, which is often cheapest, thus requiring that notice be provided through some combination of publication in newspapers, community outreach, public relations, and internet postings. The methods by which notice is provided to class members in a human rights case, as in any other case, will depend on such factors as the size of the class, the size of a settlement fund (notice expenses should be proportionate to the size of the settlement, as long as they allow the parties and court to meet minimum due process requirements), and other unique characteristics that may impact decisions regarding how best to inform class members of the certification and, if there is a settlement, of the settlement terms and of their rights with respect to any class certification or settlement.¹¹⁷ So, for example, in the relatively small Rule 23 settlements of Nazi-era cases against Barclay's and J.P. Morgan for conduct in France, where the settlement fund was less than \$5 million and the class members were arguably dispersed worldwide, notice had to be structured so as not to overwhelm the settlement fund. Notice was provided principally through publication in newspapers in the countries in which class members were most likely to reside, and through a substantial community outreach effort by Jewish community organizations. This permitted the best notice practicable under the circumstances of that case.¹¹⁸

In contrast, the Swiss banks litigation involved a much larger fund, and the Court approved the plaintiffs' much more expansive notice program. Notice here involved a staggering publication budget, printing and publication of notice in twenty-eight languages, a coordinated public relations campaign by professional public relations firms, and unprecedented community outreach in previously neglected victims' groups, such as the Romani and the Jewish community of the former Soviet Union.¹¹⁹ In addition, 1.4 million notice packages were sent directly to potential class members, combined with tens of thousands mailed to community groups worldwide who were enlisted as part of a centrally coordi-

116. See, e.g., FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) §30.211 (1995).

117. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–77 (1974) (requiring only the best notice practicable in 23(b)(3) classes).

118. The author is one of settlement class counsel in the class settlements with Barclay's and J.P. Morgan. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

119. See *In re Holocaust Victim Asset Litigation*, 105 F.Supp. 2d 139, 144–45 (E.D.N.Y. 2000).

nated effort to provide information and assistance with completing claims forms to elderly survivors throughout the world.¹²⁰ This was essential in that case because there were so many competing claims programs, the victims were elderly and often did not understand the nature of the deadlines or the claim forms, and there was widespread emotional unease in the victim community resulting from the need to dredge up old memories of the Nazi era in order to complete claims forms.

X.

GOVERNMENTAL CONTACTS AND SUPPORT

Where plaintiffs' counsel are able to effectively cooperate with government institutions, as exemplified by the successful results in connection with Nazi-era slave labor litigation against Swiss banks and German banking institutions and industrial concerns, the defendants in human rights cases face the maximum pressure, and the victims are thereby best served. For example, Senator D'Amato, as head of the Senate's banking committee, held Congressional

120. *Id.*; see also Report of Notice Administrator Jerry Benjamin on Organizational Outreach, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 354); Report of Notice Administrator Todd B. Hilsee on Analysis of Overall Effectiveness of Notice Plan, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 355); Report of Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 356); Report of Notice Administrator Katherine Kinsella on Roma Outreach Program, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 359); Report of Notice Administrator Todd B. Hilsee on Paid Media Implementation, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 360); Report of Notice Administrator Katherine Kinsella on Earned Media Program, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 5, 1999) (No. 361); Update to the Report of the Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 24, 1999) (No. 406); Supplemental Report of Notice Administrator of Todd B. Hilsee, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 24, 1999) (No. 407); Declaration of Notice Administrator Jerry Benjamin Regarding Outreach to Disabled Holocaust Survivors, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Nov. 24, 1999) (No. 408); Update to the Report of Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Dec. 14, 1999) (No. 492); Amended Report of Notice Administrator Todd B. Hilsee on Analysis of Overall Effectiveness of Notice Plan, *In re* Holocaust Victim Assets Litigation, Case No. 96 Civ. 4849 (E.D.N.Y. Dec. 15, 1999) (No. 501).

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hearings regarding the Nazi-era Swiss bank litigation which catapulted that issue into the national spotlight.¹²¹ Victims' advocates' relationships with the United States State Department, banking committees in New York, insurance commissioners, and other public figures also played prominently in the dynamics that ultimately prompted the settlement of the Nazi-era litigation.¹²²

On the other hand, government entities sometimes feel competitive with the plaintiffs' bar, and compete with plaintiffs' counsel; such was the case in connection with efforts to address Nazi-era claims against insurance companies. In the Nazi-era insurance context, plaintiffs' counsel filed omnibus complaints against German, Italian, Swiss and other insurers who were alleged to have failed to pay policy benefits to the heirs of victims of Nazi persecution after World War II.¹²³ At the same time, the various state insurance commissioners, principally through the National Association of Insurance Commissioners (NAIC), were attempting to address the same problem with respect to the limited number of companies that did business in the United States and over which the Commissioners felt they could exercise some leverage.¹²⁴ Rather than coordinate with litigants and plaintiffs' counsel to pressure the companies to agree to voluntarily conduct a thorough review of their files and disgorge all amounts that should not have been retained by the insurers either to traceable victim heirs or to a fund for the benefit of the victim class generally, the NAIC and World Jewish Restitution Organization (WJRO) representatives who selected the NAIC as the body with which they would exclusively coordinate on insurance issues competed with plaintiffs' counsel.¹²⁵ The red herring issue of attorneys' fees, which in any of the Holocaust cases was a tiny fraction of the relief provided to the victims, was used as a justification for this competition, and the NAIC, WJRO, and selected insurers

121. See, e.g., *D'Amato Lambastes Switzerland*, UNITED PRESS INTERNATIONAL, May 7, 1997.

122. See, e.g., AUTHERS & WOLFFE, *supra* note 3, at 62-73, 215-29.

123. See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, MDL No. 1374, M21-89 (MBM), 2002 U.S. Dist. LEXIS 18127, at *15-16 (S.D.N.Y. Sept. 25, 2002).

124. The author is one of the lead plaintiffs counsel in Nazi-era cases against European insurers, including *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 2002 U.S. Dist. LEXIS 18127 (S.D.N.Y., September 25, 2002), relating to *Schenker v. Assicurazioni General S.p.A., Consol.*, 2002 U.S. Dist. LEXIS 12845 (S.D.N.Y., July 15, 2002), and participated in negotiations with various insurer representatives of the National Association of Insurance Commissioners and the World Jewish Restitution Organization to attempt to coordinate regarding the resolution of Nazi-era claims.

125. See *id.*

entered into an agreement to establish ICHEIC, headed by Lawrence Eagleburger, which excluded plaintiffs' counsel.¹²⁶

To seduce the insurers to participate in the NAIC, rather than resolving claims through the federal courts which were considering Nazi-era insurance cases, the NAIC and WJRO had to convince the insurers that they would be better off settling exclusively with them rather than in some sort of global arrangement involving plaintiffs' counsel. As a result, the entity created had a number of problems that stemmed from the need to hold out carrots to the insurers, such as participation in the body that would establish rules for evaluating claims.¹²⁷ In the end, the problems with the ICHEIC process have been well documented, and could possibly have been avoided had the victims' advocates cooperated instead of competed against each other.¹²⁸

XI. MEDIA COVERAGE

Attorneys coordinating with victims' advocates, as noted in the Introductory section, often utilize litigation as part of an overall strategy that includes media coverage to complement the political activities and grass roots activism. The lawyers' rule in connection with generating media coverage regarding a particular human rights case is fraught with difficulty. First, there are often rules which constrain counsel's ability to make representations to the press regarding a pending litigation matter.¹²⁹ Second, counsel should be wary of becoming the target of media attention, which risks the inevitable anti-lawyer, anti-legal fees type of coverage that plagued the Holocaust cases. For example, in the Holocaust cases, at least one of the more media-oriented counsel, Edward Fagen, became the subject of extremely unflattering press coverage when the press decided that he was part of the story, rather than simply an advocate for the victims' positions in the media.¹³⁰ In the Nazi-

126. *See id.*

127. *See In re Assicurazioni Generali*, 2002 U.S. Dist. LEXIS 18127, at *15-22.

128. *See, e.g.*, Greg Garland, *Holocaust-Claims Group Accused of Poor Management Operational Expenses Exceed Money Given to the Survivors*, MIAMI HERALD, July 14, 2002, 2002 WL 24339245; John Authers & Richard Wolffe, *A Web of Distrust*, FIN. TIMES (London) June 15, 2002, at 1.

129. *See, e.g.*, 7 AM. JUR. 2d *Attorneys at Law* § 46 (1997) (noting the limitations on counsel's ability to make media statement); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109 (2000) (limitations on lawyers' ability to comment on pending litigation).

130. *See, e.g.*, Barry Meier, *Lawyer in Holocaust Case Faces Litany of Complaints*, N.Y. TIMES, Sept. 8, 2000, at A1.

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era cases, the most effective coverage, in the opinion of the author,¹³¹ resulted from direct contact between media outlets and victims themselves or traditional victims' groups, or from paid advertisements placed by victims' groups in order to focus attention on the issues raised by the litigation.

* * *

The foregoing is just a partial description of some of the factors practitioners must consider when evaluating potential human rights claims.

131. The author helped coordinate that litigation and advocacy effort on behalf of victims.

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